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24-ORD-019

January 25, 2024

In re: Vivian Miles/Kentucky State Police

Summary: The Kentucky State Police (“KSP”) violated the Open Records Act (“the Act”) when it failed to issue a timely response and failed to respond to a portion of a request. However, KSP did not violate the Act when it produced all responsive records it possesses.

Open Records Decision

On December 8, 2023, Vivian Miles (“Appellant”) requested inspection of KSP’s “[r]ecords identifying . . . CJIS Systems and/or NCIC and/or Link User Agreement[s]” for the Division of Protection and Permanency and “R & C (recruitment-foster) in DCBS . . . for Years 2017, 2019 and 2020.” In a response dated December 19, 2023, KSP provided four user agreements, three of which were from 2019 and one from 2020.¹ This appeal followed.

When a public agency receives a request to inspect records, that agency must decide within five business days “whether to comply with the request” and notify the requester “of its decision.” KRS 61.880(1). Here, KSP failed to respond to the Appellant’s request within five business days. Furthermore, an agency response denying inspection of public records must “include a statement of the specific exception authorizing the withholding of the record and a brief explanation of how the exception applies to the record withheld.” *Id.* A public agency cannot simply ignore portions of a request. *See, e.g.,* 21-ORD-090. If the requested records exist and an exception applies to deny inspection, the agency must cite the exception and explain how it applies. Conversely, if the records do not exist, then the agency must affirmatively state that such records do not exist. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov’t*, 172 S.W.3d 333, 341 (Ky. 2005). Here, KSP failed to respond to the

¹ KSP additionally stated that “[t]he Cabinet for Health and Family Services is currently in the middle of an audit that is not complete, therefore the KSP does not have updated records at this time.” However, it is not clear why KSP made this statement because the Appellant did not request any records more recent than the year 2020.

Appellant's request for user agreements from the year 2017. Thus, KSP violated the Act.

On appeal, KSP affirmatively states it has provided all responsive records in its possession. Once a public agency states affirmatively that it does not possess any additional records, the burden shifts to the requester to present a *prima facie* case that additional records do exist. *See Bowling*, 172 S.W.3d at 341. If the requester establishes a *prima facie* case that additional records do or should exist, "then the agency may also be called upon to prove that its search was adequate." *City of Ft. Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 848 n.3 (Ky. 2013) (citing *Bowling*, 172 S.W.3d at 341). To support a claim that the agency possesses responsive records it did not provide, the Appellant must produce some evidence that calls into doubt the adequacy of the agency's search. *See, e.g.*, 95-ORD-96.

Here, the Appellant asserts that all CJIS user agreements must be signed by the current State Control Terminal Officer ("CSO") to be valid. However, the Appellant does not dispute that the 2019 and 2020 agreements KSP provided were signed by the proper CSO at the time. Nor does the Appellant explain how this signature requirement proves KSP possesses any other responsive records for 2017, 2019, or 2020. Thus, the Appellant has not established a *prima facie* case that additional records exist in KSP's custody or control. Accordingly, KSP did not withhold records in violation of the Act.

A party aggrieved by this decision may appeal it by initiating an action in the appropriate circuit court pursuant to KRS 61.880(5) and KRS 61.882 within 30 days from the date of this decision. Pursuant to KRS 61.880(3), the Attorney General shall be notified of any action in circuit court, but shall not be named as a party in that action or in any subsequent proceedings. The Attorney General will accept notice of the complaint emailed to OAGAppeals@ky.gov.

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/s/ James M. Herrick
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