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25-ORD-236

August 28, 2025

In re: Jacob Thompson/University of Louisville

Summary: The University of Louisville (“the University”) did not violate the Open Records Act (“the Act”) when it did not provide a record that does not exist.

Open Records Decision

Jacob Thompson (“the Appellant”) submitted a request to the University for “a copy of the affidavit referenced in 25-ORD-161 and the Gmail response for Open Records Appeal -227, detailing the system failure at the University of Louisville police station on March 12, 2025, which prevented the release of internal security camera footage.” In a timely response, the University stated it had “not identified any records responsive to [the Appellant’s] request.” This appeal followed.

On appeal, the University asserts the requested affidavit does not exist. Once a public agency states affirmatively that a record does not exist, the burden shifts to the requester to make a *prima facie* case that the record does exist. *See Bowling v. Lexington-Fayette Urb. Cnty. Gov’t*, 172 S.W.3d 333, 341 (Ky. 2005). A requester must provide some evidence to make a *prima facie* case that a requested record exists, such as the existence of a statute or regulation requiring the creation of the requested record, or other factual support for the existence of the record. *See, e.g.*, 21-ORD-177; 11-ORD-074. A requester’s bare assertion that a record should exist is insufficient to make a *prima facie* case that the record does, in fact, exist. *See, e.g.*, 22-ORD-040.

Here, the Appellant cites as evidence a response submitted in a previous open records appeal, 25-ORD-161, in which the University explained the security cameras from which the Appellant had requested footage “were not operational” and offered to “provide an affidavit to the fact of the camera malfunction.” The University, however, states no such affidavit was requested because the Office did not request one. Here, the University’s offer to “provide an affidavit” to support factual allegations with a sworn statement was an offer to *create* a document, not to furnish a copy of a document that already existed. As such, the University explains it did not

actually create an affidavit for 25-ORD-161. Thus, the Appellant has not made a *prima facie* case that the requested record exists or should exist. Nor does the Act require a public agency to create a record to satisfy a request. *See, e.g.*, 24-ORD-278; 24-ORD-229; 16-ORD-052. Accordingly, the University did not violate 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.

Russell Coleman
Attorney General

/s/ Zachary M. Zimmerer
Zachary M. Zimmerer
Assistant Attorney General

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Distributed to:

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