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25-ORD-250

September 5, 2025

In re: Matthew Johnson/City of London

Summary: The City of London ("the Department") did not violate the Open Records Act ("the Act") when it did not provide records that do not exist.

Open Records Decision

On July 23, 2025, Matthew Johnson ("the Appellant") submitted a request seeking "surveillance footage" from the City's police headquarters from May 24 to 26, 2025. In a July 30, 2025, response, the City stated it possessed no records responsive to the request. This appeal followed.

To start, the Appellant alleges that the City did not timely respond to his request. Under KRS 61.880(1), upon receiving a request for records under the Act, a public agency "shall determine within five (5) [business] days . . . after the receipt of any such request whether to comply with the request and shall notify in writing the person making the request, within the five (5) day period, of its decision." Here, the Appellant submitted his request on July 23, 2025, and the City issued its denial on July 30, 2025. The fifth business day following July 23, 2025, was July 30, 2025. Accordingly, the City did not violate the Act when it timely responded to the Appellant's request.

On appeal, the City maintains that it does not possess records responsive to the Appellant's request, explaining that because more than 30 days have passed since the identified date, the footage was deleted pursuant to the City's record retention schedule. Once a public agency states affirmatively that no additional records exist, the burden shifts to the requester to make a *prima facie* case that additional records do 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 requested records exist, 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 records. *See, e.g.*, 21-ORD-177; 11-ORD-074. If the requester makes a *prima facie* case

that the records do or should exist, then the public agency "may also be called upon to prove that its search was adequate." *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 848 n.3 (Ky. 2013) (*citing Bowling*, 172 S.W.3d at 341).

The Appellant has not made a *prima facie* case that the City currently possesses the records requested. Instead, he directs the Office to the history of this request, as described by the City. The City explains that the Appellant had previously requested the footage it had erroneously informed him that the footage was in the possession of a different public agency. The Appellant then requested the footage from the other agency, which stated that the City was the agency in possession of the footage. The Appellant then submitted the request that is the subject of this appeal. This narrative explains why the record no longer exists, and why the Appellant has not made a *prima facie* case that the record currently exists. As such, the City did not violate the Act when it stated it possessed no records responsive to the Appellant's July 23 request.[1]

A party aggrieved by this decision may appeal it by initiating an action in the appropriate circuit court under KRS 61.880(5) and KRS 61.882 within 30 days from the date of this decision. Under 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

[1] The Office notes that, under KRS 61.880(4), a person may petition the Attorney General to review an agency's action if the "person feels the intent of [the Act] is being subverted by an agency short of denial of inspection, including but not limited to . . . the misdirection of the applicant." For the reasons explained above, the City's response to the July 23 request did not violate or subvert the Act. Regarding the City's response to the Appellant's earlier request, the Office lacks jurisdiction to consider whether that response subverted the Act by misdirection of the Applicant because the Appellant did not provide that request or agency denial to the Office. *See* KRS 61.880(2)(a). Accordingly, the Office cannot consider whether the City subverted the Act when it stated it did not possess a record that it did, in fact, possess at the time of the request and later deleted.

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Distributed to:

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Ashley Taylor, London City Clerk
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