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26-ORD-091

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In re: Valerie Frost/Kentucky State Police

Summary: The Kentucky State Police (“KSP”) did not violate the Open Records Act (“the Act”) when it redacted records under KRS 61.878(1)(a) and when it did not provide records that do not exist.

Open Records Decision

Valerie Frost (“the Appellant”) submitted a request to KSP seeking records related to a specific KSP case.¹ In response, KSP produced the initial “Kentucky Incident-Based Reporting System Report” related to the identified case but denied the request under KRS 61.878(1)(h), explaining that the underlying incident is still being investigated, a prosecution decision has not been made, and disclosure would harm KSP by “creating bias in the jury pool.” This appeal followed.

On appeal, KSP states that the underling investigation is now complete and it has provided all responsive records in its possession to the Appellant. KSP further states that it has made redactions to the records under KRS 61.878(1)(a) and that it does not possess responsive dash camera video recordings, body-worn camera video recordings, or communications related to a consultation with the “Electronic Crimes Branch.” Thus, this appeal is moot as to KSP’s invocation of KRS 61.878(1)(h). *See* 40 KAR 1:030 § 6 (“If the requested documents are made available to the complaining party after a complaint is made, the Attorney General shall decline to issue a decision in the matter.”). However, the appeal is not moot as to KSP’s redactions or statement that it does not possess certain requested records.

¹ Specifically, the Appellant sought: (1) communications related to the charging decision; (2) any records submitted to or received from the district court; (3) “investigative records; (4) records related to a consultation with the “Electronic Crimes Branch”; (5) any audio or video recordings; (6) records related to probable cause, criminal summons, subpoenas or warrants, or limitations with the county attorney or district court; and (7) records that reference the Appellant.

KRS 61.878(1)(a) exempts “[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.” In reviewing an agency’s denial of an open records request based on the personal privacy exemption, the courts and the Attorney General balance the public’s right to know what is happening in government against the personal privacy interest at stake in the record. *See Zink v. Commonwealth, Dep’t of Workers’ Claims*, 902 S.W.2d 825, 828 (Ky. App. 1994). However, the Supreme Court of Kentucky has held that certain categories of personal information about individuals provide minimal insight into governmental affairs and may be categorically redacted under KRS 61.878(1)(a). *Ky. New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76, 89 (Ky. 2013). These categories include home addresses, personal phone numbers, driver’s license numbers, and Social Security numbers. *Id.* The Court also recognized that law enforcement agencies could redact from public records information related to witnesses, uncharged suspects, and juveniles. *Id.* at 86. Personal email addresses may likewise be redacted under KRS 61.878(1)(a), as they ordinarily shed no light on government conduct. *See, e.g.*, 16-ORD-205.

KSP states that it redacted “dates of birth; personal telephone numbers; personal e-mail addresses; driver’s license numbers, home addresses, and juvenile information.” Each of these categories of information may be redacted pursuant to KRS 61.878(1)(a). Moreover, the Appellant has not identified any countervailing public interest warranting unredacted disclosure. Thus, KSP did not violate the Act when it redacted personal information from the records it provided under KRS 61.878(1)(a).

Regarding KSP’s assertion that it does not possess certain records, 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). If the requester makes a *prima facie* case that the records do or should exist, “then the 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). A requester must provide some evidence to make a *prima facie* case that additional records exist, such as the existence of a statute or regulation requiring the creation of the records or other factual support for the existence of the records. *See, e.g.*, 21-ORD-177; 11-ORD-074. A requester’s bare assertion that certain records exist or should exist is insufficient to make a *prima facie* case that the records actually do exist. *See, e.g.*, 22-ORD-040.

KSP states that it does not possess responsive dash camera video recording, body-worn camera video recordings, or communications related to a consultation with the “Electronic Crimes Branch.” The Appellant has not attempted to make a *prima*

facie case that KSP does, in fact, possess such records. Thus, the Office cannot find that the Cabinet violated the Act by not providing records it does not possess.

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
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/s/ Zachary M. Zimmerer
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