COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

RUSSELL COLEMAN
ATTORNEY GENERAL

1024 CAPITAL CENTER DRIVE
SUITE 200
FRANKFORT, KY 40601
(502) 696-5300

26-ORD-119

March 24, 2026

In re: Leah Kottmyer/Newport Police Department

Summary: The Newport Police Department ("the Department") did not violate the Open Records Act ("the Act") when it could not provide photographs that no longer exist. However, the Department violated the Act when it denied a request for a property and evidence tracking log under KRS 61.878(1)(i) and (j).

Open Records Decision

Leah Kottmyer ("the Appellant") submitted a request to the Department for "the evidence/property documentation and any related records" from its investigation of a death that occurred on April 5, 2025. The Appellant noted that "the police narrative indicates items were 'collected as evidence and stored in property,'" and therefore, she requested "property/evidence inventory sheets, evidence submission forms, evidence receipts, property tags, itemized property logs, and or evidence management system printouts," "[c]hain-of-custody documentation for any items collected," and "[a]ny photographs of the medications/containers/pill(s) collected from the scene."

In response, the Department stated that "[a]fter a review conducted in accordance with [its] records retention policies, [the Department] no longer maintain[s] any photographs related to the property referenced in [the] request." The Department did not state whether it maintained any photographs of the scene of the incident. With regard to the property tracking records requested, the Department responded, "While the agency maintains internal property/evidence tracking log [*sic*], that document is an internal administrative record created solely for internal tracking and control purposes. It is not a public record subject to disclosure under the [Act], including but not limited to KRS 61.878(1)(i) and (j), which protect preliminary and internal records." Therefore, the Department denied the Appellant's request for the tracking log. This appeal followed.

On appeal, the Department asserts it provided "[a]ll of what remained in existence" to the Appellant[1] "along with further explanation as to the remainder." A statement from a public agency that it has disclosed all responsive records is "tantamount to an affirmative statement that the remaining records requested do not exist." 04-ORD-040. More specifically, the Department states the evidence photographs were "disposed of in accordance" with "the Kentucky records retention schedule regarding documents" because the "matter was determined not to be criminal in nature and upon expiration of the 100 days under the schedule the records were no longer maintained."

The Appellant claims the Department "should be required to provide" the "retention schedule entry and record series relied upon," "destruction/disposition logs," and other specific information regarding the disposal of the photographs. However, once a public states affirmatively that records no longer exist, the burden shifts to the requester to make a *prima facie* case that the records do or should exist. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov't,* 172 S.W.3d 333, 341 (Ky. 2005). If the requester is able to make a *prima facie* case that the records should still exist, then the agency must provide "a written explanation for their nonexistence." *Eplion v. Burchett,* 354 S.W.3d 598, 603 (Ky. App. 2011) (quoting 10-ORD-078). And, if the requester has made a *prima facie* case, "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).

Here, however, the Appellant has provided no evidence or authority to make a *prima facie* case that the photographs still exist. *See, e.g.,* 23-ORD-090 (finding no violation of the Act when an agency stated that a record "was disposed of" and the requester did "not cite to any authority, such as the [agency's] record retention schedule, that would require the [agency] to retain and possess the record"). Accordingly, the Department did not violate the Act when it could not provide records that no longer exist.

Regarding the "property/evidence tracking log," a public agency 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." KRS 61.880(1). The agency must "provide particular and detailed information," not merely a "limited and perfunctory response." *Edmondson v. Alig,* 926 S.W.2d 856, 858 (Ky. 1996). "The agency's explanation must be detailed enough to permit [a reviewing] court to assess its claim and the opposing party to challenge it." *Ky. New Era, Inc. v. City of Hopkinsville,* 415 S.W.3d 76, 81 (Ky. 2013). As this Office has recognized, KRS 61.878(1)(i) and (j) are two separate

[1] The record on appeal is unclear as to whether the Department provided any records to the Appellant in response to the request at issue, or whether it is referring to records it provided in response to a previous request.

exemptions, and public agencies must explain how each exemption applies to the withheld records if an agency chooses to rely on both provisions. *See*, *e.g.*, 21-ORD-168; 21-ORD-169. Here, however, the Department's response was "limited and perfunctory" because it did not explain how either of the two claimed exemptions applied to the tracking log. Therefore, the Department violated KRS 61.880(1).

Under KRS 61.878(1)(i), "[p]reliminary drafts, notes, [and] correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency," are exempt from disclosure. KRS 61.878(1)(j) exempts from disclosure "[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended." However, "[a]n agency which would withhold records bears the burden of proving their exempt status." *Ky. Bd. of Exam'rs of Psychologists v. Courier–Journal & Louisville Times Co.,* 826 S.W.2d 324, 327 (Ky. 1992).

Here, the Department has not explained how the tracking log can be characterized as a preliminary draft, a note, correspondence with private individuals, a preliminary recommendation, or a preliminary memorandum "in which opinions are expressed or policies formulated or recommended." The Department merely stated the log "is an internal administrative record created solely for internal tracking and control purposes." That description, without more, is insufficient to establish that it is not a public record subject to disclosure. *See* KRS 61.870(2) ("'Public record' means all books, papers, maps, photographs, cards, tapes, discs, diskettes, recordings, software, or other documentation regardless of physical form or characteristics, which are prepared, owned, used, in the possession of or retained by a public agency."). Therefore, the Department violated the Act when it withheld the "property/evidence tracking log."[2]

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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[2] The Appellant lists other categories of records she claims "remain in dispute," including "[i]ncident/offense report and all supplemental reports," "[o]fficer narrative notes and field documentation," "[w]itness statements," "[b]ody-worn and dash camera recordings," and "documentation reflecting a suspected overdose determination." However, these records are outside the scope of the request at issue in this appeal.

Russell Coleman
Attorney General

/s/ James M. Herrick
James M. Herrick
Assistant Attorney General

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Distributed to:

Leah Kottmyer
Derick Dieters
Dan Braun, Esq.
Christopher Fangman, Chief
Tiffany Meyers, Clerk

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