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26-ORD-303

July 13, 2026

In re: Xavier Prow/City of Owensboro

Summary: The City of Owensboro (“the City”) violated the Open Records Act (“the Act”) by failing to provide a detailed explanation of the cause for its delay in providing the requester with copies of all existing, responsive, and nonexempt records and the specific date on which it would make those records available, in accordance with KRS 61.872(5). However, the City did not violate the Act by providing copies of all existing, responsive records it possesses.

Open Records Decision

On April 27, 2026, Xavier Prow (“the Appellant”) submitted a request to the City for copies of records “related to PSU [(Professional Standards Unit)] 25.43 and the January 2024 incident,” including (1) “[a]ll internal communications (including emails, texts, and messages) between or involving Owensboro Police Department [“(OPD”)”] personnel, supervisors, and city officials regarding this incident or PSU 25.43”; (2) “[a]ny reports, notes, memoranda, or supplemental documents created during or after the Internal Affairs investigation that were not previously provided”; (3) “[a]ny legal analysis, memoranda, or correspondence between the [OPD] and the City Attorney’s Office regarding this incident”; (4) “[a]ny policies, procedures, or training materials referenced, reviewed, or assigned as part of the remedial ‘search and seizure training related to this case’”; and (5) “[a]ny documentation explaining or supporting the disciplinary findings and decisions issued in PSU 25.43.”

The City acknowledged receipt of the request on April 27, 2026, and stated it would “begin the process of locating any responsive records” without further comment or explanation. By letter dated May 4, 2026, the City Attorney responded on behalf of the City, first acknowledging the “legal department” received the Appellant’s request “on or about April 27, 2026.” The City attorney further advised that he was including a single email responsive to the first part of the request and the City was “still in the process of obtaining the training records and will forward those as soon as possible. Regarding your request for legal memoranda, please be advised that any

legal memoranda would be protected by the attorney/client privilege and exempt from disclosure under KRS 61.878 (1)(k).” Without waiving the attorney-client privilege, the City Attorney stated affirmatively “that he never prepared any legal memorandum related to the video.”

By email on May 5, 2026, the Appellant questioned whether the City was in the process of “still trying to obtain internal communication records.” The City replied that “there are no other internal communications. OPD is working on training records.” Upon receipt of the City’s reply, the Appellant asked whether the City had completed its search “for all internal communications related to this incident or PSU 25.” On May 20, 2026, the Appellant notified the City that he did not receive any response to his May 5 inquiry, and further inquired regarding the status of his April 27 request. Later that day, the City replied that it had “sent everything we have. As far as training, OPD did not have records.” The City further advised that OPD received its training from a firm named “Blue to Gold,” which maintains the PowerPoint presentations it uses for such training, and provided the Appellant with a hyperlink to its website. *See* KRS 61.872(4).

On June 10, 2026, the Appellant initiated this appeal. “Given the nature of the incident, the number of individuals involved in the review process, and the limited production provided,” the Appellant questions the adequacy of the City’s search for internal communications and whether the City withheld any responsive records. In sum, the Appellant disputes “whether all responsive communications and records were identified and produced.”

Upon receipt of this appeal from the Office, the City Attorney responded on behalf of the City, reaffirming its original response concerning the internal communications and stating the City “never indicated that there were other responsive communications in its possession. The City possesses no other responsive communications, and it is not withholding any such communications under a claim that they are exempt. The City cannot produce something it does not have.”

Under KRS 61.880(1), a public agency must respond “within five (5) days, excepting Saturdays, Sundays, and legal holidays,” following receipt of a request made under the Act “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.” A public agency is permitted to extend the period for production of the records under KRS 61.872(5), but only if the records are “in active use, in storage or not otherwise available,” *and* the agency provides “a detailed explanation of the cause . . . for further delay and the place, time, and earliest date on which the public record[s] will be available for inspection.” When determining whether a delay is reasonable, the Office has consistently deemed the number of records implicated, the location of the records, and the content of the records, to be relevant factors to consider. *See, e.g.*, 26-

ORD-143; 25-ORD-245; 22-ORD-176; 21-ORD-045; 01-ORD 140; OAG 92-117. “Weighing these factors is a fact-intensive inquiry.” 26-ORD-213; 26-ORD-062; 24-ORD-063; 21-ORD-045.

The Office has consistently recognized that persons requesting large volumes of records may “expect reasonable delays in records production.” 12-ORD-228. Here, the City did not initially estimate the volume of records implicated, nor did it advise on appeal that volume was a factor in delaying access to any existing records; likewise, the City failed to provide any information regarding the location or content of such records and failed to provide the specific date by which it would provide the Appellant with the records. “Whether any delay beyond the statutory deadline was warranted turn[s] on the adequacy of the [agency’s] explanation.” 18-ORD-179; *see also* 26-ORD-213; 16-ORD-153; 14-ORD-226. Further, the redaction process required by KRS 61.878(4) is an “ordinary part of fulfilling an open records request” and, standing alone, is not generally a sufficient reason to delay production of responsive and nonexempt records. *See* 26-ORD-213.

Here, the City offered no explanation for its delay in providing the Appellant with copies of all existing, responsive records. By failing either to provide the Appellant with copies of all existing, responsive, and nonexempt records within five business days or, in the alternative, to properly invoke KRS 61.872(5) by explaining in sufficient detail the legally permissible reasons for delaying access to any such records and the specific date by which the City would make the records available, the City violated the Act.

Moreover, the City did not deny that it possessed any training records until the Appellant sent a follow-up inquiry on May 5. If a public agency denies a request, in whole or in part, its response 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.,* 24-ORD-182; 21-ORD-090. If the records exist but a statutory exception applies that permits the agency to withhold the records (or justifies redacting the records), the agency must cite the statutory exception and explain how it applies under KRS 61.880(1). *See also* KRS 61.880(2)(c). Conversely, if certain records do not exist, then the agency must affirmatively state that the agency does not possess the records. *See Bowling v. Lexington–Fayette Urb. Cty. Gov’t*, 172 S.W.3d 333, 341 (Ky. 2005); 24-ORD-182. The City did not discharge its duty in this regard.

Rather, in the agency’s May 4, 2026, written response, it advised the Appellant it was enclosing a single email that was responsive to the first part of his request and stated the City was “in the process of obtaining the training records,” which it agreed to forward “as soon as possible.” The City did not address the remaining categories of records beyond stating that the City Attorney did not create any legal memorandum

“related to the video,” and noting that such a memorandum would be exempt from disclosure under KRS 61.878(1)(k), which incorporates the attorney-client privilege, codified at KRE 503, into the Act. Ultimately, the City determined it does not possess any responsive training records and notified the Appellant of that fact.

Once a public agency states affirmatively that certain records do not exist, as the City did here initially (regarding legal memoranda) and in response to subsequent inquiries from the Appellant (regarding internal communications and training records), in addition to reiterating as much on appeal, the burden shifts to the requester to make a *prima facie* case that the requested records do or should exist. See *Bowling*, 172 S.W.3d at 341. 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). A requester’s bare assertion that a public agency “possesses a requested record is insufficient to establish a *prima facie* case that the agency, in fact, possesses it.” 25-ORD-063; see, e.g., 26-ORD-087; 22-ORD-040. Rather, to make a *prima facie* case that the agency possesses or should possess the requested records, “the requester must point to some statute, regulation, or factual support for this contention.” *Id.*; see, e.g., 26-ORD-087; 21-ORD-177; 11-ORD-074.

The Appellant emphasizes the nature of the incident and the number of individuals “involved in the review process,” which arguably *suggest* additional records, and “communications” in particular, were or should have been created and still exist in the City’s possession. However, this assumption does not make a *prima facie* case that the City has any additional records in its possession, custody, or control, and the City has consistently denied possessing additional, responsive records. The record on appeal does not include any objective proof to refute that assertion. See *Eplion v. Burchett*, 354 S.W.3d 598, 603 (Ky. App. 2011). Accordingly, the Office has no basis upon which to find the City violated the Act when it did not provide 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
Attorney General

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

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Distributed to:

Xavier Prow, Appellant
Tom Watson, City of Owensboro, Mayor
Beth Davis, City of Owensboro, City Clerk
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