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26-ORD-484

October 29, 2026

In re: Darrell Messer/Louisville Metro Government

Summary: The Louisville Metro Government ("Metro") did not violate the Open Records Act ("the Act") by denying a request for copies of records not within the agency's possession or control. Metro violated KRS 61.880(1) by failing to respond timely upon receipt of the request.

Open Records Decision

On August 5, 2026, Darrell Messer ("the Appellant") submitted a request to Metro asking to "inspect and obtain copies" of public records concerning "the evidential breath-testing instrument identified as Intoxilyzer 8000, series number 80-005510 (KSP property no. 772337), located at the [Metro] Department of Corrections ['DOC'], Department 2, for the period January 1, 2025, to the present[.]" More specifically, the Appellant requested: (1) "[t]he Maintenance Log Book for that instrument, maintained pursuant to [Metro DOC] Policy 03-7.04 (Breath Test Equipment Maintenance), which provides that 'a Maintenance Log Book shall be utilized' and that, on a maintenance problem, 'the operator records it in the Maintenance Log Book'"[1]; (2) "[a]ll service tags completed or affixed for that instrument pursuant to Policy 03-7.04, and all records reflecting the affixing or removal of any such tag, including the date of each"; (3) "[a]ll reports, notifications, or communications by a breath test operator or other [DOC] personnel to the [KSP] Lab Technician regarding a maintenance problem, malfunction, or service need for that instrument, including the notification described in Policy 03-7.4 by which the first-shift operator notifies the KSP Lab Technician"; (4) "[a]ny repair forms, work orders, or service documentation in the [DOC's] possession for that instrument"; and (5) the [DOC's] records of any period during which that instrument was out of service, tagged out, or otherwise unavailable for evidential testing, and the reason for each."

[1] The Appellant further stated that "Kentucky State Police ['KSP'] Breath Alcohol Instrument Service Records for this instrument identify the relevant entries as appearing at 'Page 30' and 'Page 31' of that Log Book[,]" which he requested specifically in addition to "all other pages covering the period above."

On August 14, 2026, Metro responded, advising that DOC "has no responsive records for this request." Metro further explained:

> Metro Corrections does not keep logs pertaining to the maintenance and upkeep of the [I]ntoxilyzer 8000s that are in our lab. Those are the property of the [KSP]. Furthermore, the policy stated that we keep in[-]house logs is outdated and new policies have since been updated to reflect that we do not maintain a log of faulty equipment. The equipment is serviced monthly by the KSP technician. [DOC] has no records pertaining to any instrument being taken out of service for any length of time.

On September 15, 2026, the Appellant initiated this appeal, noting that Metro's response "describes no search. . . . Nothing in the response indicates that the Department 2 facility, its breath-testing area, or any custodian of the instrument was consulted at all." In further support of his position that Metro must possess existing, responsive records, the Appellant relies on "documentary evidence," specifically, service reports for this instrument from KSP that confirm "the log existed and was in use throughout the request period." In addition, Metro's "own policy required the log[,]" specifically, "LMDC Policy 03-7.04 Breath Test Equipment Maintenance Procedures (effective April 17, 2014; Exhibit A)[.]"[2] The Appellant further argues that Metro's response concerning the "outdated policy" "concedes the point and does not reach the request period. . . . If the log requirement was in effect during any part of that period, responsive records existed, and the question becomes what happened to them." Conversely, the Appellant contends that if the records existed "and no longer do, the Act requires an accounting. . . . If the log book was destroyed, the applicable retention schedule and the documentation of disposal" are public records that should be produced. The referral between Metro and KSP "is circular," in the Appellant's view, and constitutes a subversion of the intent of the Act under KRS 61.880(4). Finally, the Appellant notes that Metro's response was issued on August 14, 2026, rather than August 13, 2026, the date on which its response was due under KRS 61.880(1).

Upon receiving notice of this appeal from the Office, the Jefferson County Attorney's Office responded on behalf of Metro, disputing the Appellant's contention

[2] The Appellant includes a copy of Policy 03-7.04, which states, "In order to communicate maintenance problems concerning the Breath Test instruments to the [KSP] and maintain accurate service records of the instruments, a Maintenance Log Book shall be utilized." Policy 03-7.04 further states that it "shall be applicable to all [Metro DOC] Breath Test Operators" and that a "Breath Test Operator" shall, upon experiencing a maintenance problem, "record the problem in the Maintenance Log Book describing in detail what he/she believes is the problem."

that Metro violated the Act by failing to conduct an adequate search for the logbook.[3] Metro explains that it "does not keep logs pertaining to the maintenance of [I]ntoxilyzers in its lab. Therefore, during its initial search of its records," Metro did not locate any responsive records and notified the Appellant of this fact. However, upon receiving this appeal, Metro contacted "the KSP technician who services the machines to inquire as to whether he had any knowledge of the 'logbook' the [A]ppellant" requested. In response, the KSP technician "informed Metro that he did keep a physical handwritten logbook at [Metro DOC] and provided the book to Metro for scanning." Metro has now provided the Appellant with copies of the responsive pages of the logbook. Metro emphasizes that the KSP technician is not an employee of Metro DOC, but "is an agent of KSP who services the [I]ntoxilyzers in the Metro Corrections Lab. This logbook was created and solely used by the KSP technician and belongs solely to KSP." Metro further explains that it "does not create or use logbooks related to the [I]ntoxilyzers and thus did not locate any in a search of its records." Until Metro spoke with the KSP technician, it "had no knowledge of the location of any records responsive to [the Appellant's] request and is only able to provide the records on appeal because the technician shared them" with Metro. Thus, although Metro's original search did not yield any responsive records, Metro maintains that it complied with the Act.

If the requester makes a *prima facie* case that the records are or should be in the agency's possession, custody, or control, however, 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). Even so, a public agency "is responsible only for those records within its own custody or control." *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d at 856 (citing *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136 (1980)); *see also Dep't of Revenue v. Eifler*, 436 S.W.3d 530, 534 (Ky. App. 2013) ("The [Act] does not dictate that [a] public agenc[y] must gather and supply information not regularly kept as part of its records."). A requester's bare assertion that a public agency must possess the requested records is not adequate to make a *prima facie* case that the agency does, in fact, possess the records. *See, e.g.*, 25-ORD-209; 22-ORD-040. Rather, to make a *prima facie* case that the agency possesses or should possess the requested records, the requester must provide a statute, regulation, or other factual support for that contention. *See, e.g.*, 21-ORD-177; 11-ORD-074. In other words, "[m]erely asserting that additional records exist does not establish a *prima facie* case that they do or that an agency has failed to conduct an adequate search." 24-ORD-023; *see, e.g.*, 23-ORD-042.

[3] KRS 61.880(2)(a) does not authorize the Office "to conduct an investigation in order to locate records whose existence or custody is in dispute," 01-ORD-36, nor is the Office "empowered to substitute its judgment for that of a public agency in deciding which records are necessary to ensure full accountability." 18-ORD-207; 12-ORD-231; 08-ORD-206.

Here, Metro concedes that the Appellant "has made a *prima facie* case that the requested records could exist." However, Metro maintains that its "search for the requested records was adequate." Thus, Metro was required to rebut the presumption that such records were in the agency's possession and "prove that its search was adequate." *See* 26-ORD-421; 26-ORD-421; 22-ORD-056; KRS 61.880(2)(c).

"An adequate search for records is one using methods reasonably designed to find responsive records." 26-ORD-096; *see*, *e.g.*, 95-ORD-096. Reasonable search methods include reviewing the files regarding the general subject matter of the request, and the files of employees either specifically mentioned in the request or whose job duties are related to the subject matter of the request. *See*, *e.g.*, 26-ORD-096; 19-ORD-198. On appeal, however, Metro has adequately explained the reason that its original search did not yield the requested logbook, namely, that a *KSP employee* creates and maintains the logbook and Metro was therefore unaware at first of its existence or location because it searched the files of its own agency. *See Eplion v. Burchett*, 354 S.W.3d 598, 603 (Ky. App. 2011) (holding that "when it is determined that an agency's records do not exist, the person requesting those records is entitled to a written explanation for their nonexistence"). In any event, Metro has now provided the Appellant with copies of the requested pages from the KSP employee's logbook. *See* 22-ORD-235. Metro did not violate or subvert the intent of the Act by initially failing to locate the requested logbook when it was in the possession of a KSP employee.

However, upon receipt of a request, a public agency "shall determine within five (5) days, excepting Saturdays, Sundays, and legal holidays," 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." KRS 61.880(1). Metro acknowledges on appeal that it responded on the sixth business day following receipt of the Appellant's request instead of the fifth business day. Accordingly, Metro violated KRS 61.880(1).

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/ Michelle D. Harrison
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Assistant Attorney General

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Distributed to:

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