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20-ORD-069

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In re: Jeremy Henley/Kentucky State Penitentiary

Summary: Because Kentucky State Penitentiary ("the Penitentiary") cannot provide for inspection of records that do not exist, it did not violate the Open Records Act (the "Act").

Open Records Decision

On January 13, 2020, Jeremy Henley ("Appellant") requested copies of three groups of records from the Penitentiary. The first request was for copies of audio recordings or "exact verbatim of transcript proceeding minutes" of thirteen Control Transition Unit ("CTU") Program hearings. The second request was for copies of transcripts or minutes of eight Administrative Control Status ("ACS") Committee hearings. The third request was for a copy of a handwritten document Appellant allegedly submitted to a Penitentiary Lieutenant almost two weeks earlier.

The Penitentiary denied the requests stating that no responsive records existed. The Penitentiary provided statements from two unit administrators with knowledge of the CTU and ACS hearings process. They claimed that the Penitentiary does not record the hearings "so no audio or mechanical recordings exist." The two unit administrators also stated that no transcripts or minutes exist because CTU and ACS committees do not create such records. The Penitentiary explained that the Lieutenant who allegedly received the requested handwritten document searched for it but was unable to locate it. The Lieutenant was able to locate a different handwritten document Appellant submitted, and the

Penitentiary explained that it would make that record available to Appellant upon request. However, the Penitentiary stated that it could not locate any other record matching the description Appellant provided. On February 21, 2020, Appellant appealed.

The right to inspect records attaches only if the record in dispute is "prepared, owned, used, in the possession of or retained by a public agency." KRS 61.870(2). A public agency cannot produce that which it does not have nor is a public agency required to "prove a negative" in order to refute an unsubstantiated claim that certain records exist. *Bowling v. Lexington-Fayette Urban Cty. Gov't*, 172 S.W.3d 333, 341 (Ky. 2005). To obtain relief, the requester must first establish a *prima facie* case that the requested records exist. *Id.* Only "[i]f the requester makes a *prima facie* showing that responsive records have not been accounted for, then the agency may also be called upon to prove that its search was adequate." *City of Ft. Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 848 n.3 (Ky. 2013).

Here, Appellant has failed to established a *prima facie* case that the Penitentiary was required to create or maintain the requested transcripts, minutes, and audio recordings. Although Appellant provided CPP 10.2 to support his case,[1] the policy only requires the committees to issue a written decision at the conclusion of a hearing. The policy does not require the creation of transcripts, minutes, or audio recordings of proceedings.[2] *See* CPP 10.2(II)(H)(3)(e). Because the Appellant failed to make a *prima facie* showing the requested transcripts, minutes, or audio recordings exist, the Penitentiary had no duty to explain the adequacy of its search. *See City of Ft. Thomas*, 406 S.W.3d at 848 n.3.

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[1] CPP 10.2(II)(M) provides that committee review hearings are periodically required as part of an inmate's assignment to a special management unit, such as disciplinary segregation or protective custody. A committee review hearing is required before an inmate's release or transfer between special management units, per CPP 10.2(II)(M)-(N).

[2] Appellant's additional claim, that due process requires the creation of these records, is not justiciable in this forum. KRS 61.880(2)(a) requires the Attorney General to "review the request and denial and issue . . . a written decision stating whether the agency violated provisions of KRS 61.870 to 61.884." Because Appellant's additional claim alleges a violation of a constitutional right rather than a violation of the Open Records Act, the Attorney General respectfully declines to address Appellant's due process claim.

Regarding the Appellant's request for the handwritten record, the only evidence supplied by Appellant for the existence of the record was his own claim that he submitted it. Even if, for the sake of argument, Appellant's claim could serve as a *prima facie* showing the record existed, the Penitentiary explained the adequacy of its search for the requested record. The person who allegedly received the handwritten record was unable to find the record Appellant described, but was able to find a different handwritten record and offered to make it available to Appellant. Therefore, the Penitentiary met its burden of proof that it performed an adequate search for the record and that the record does not exist. Thus, the Penitentiary "cannot produce that which it does not have." *Bowling*, 172 S.W.3d at 341.

A party aggrieved by this decision shall appeal it by initiating action in the appropriate circuit court pursuant to KRS 61.880(5) and KRS 61.882. 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 proceeding.

Daniel Cameron
Attorney General

/s/ John Marcus Jones

J. Marcus Jones
Assistant Attorney General

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Distributed to:

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