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20-ORD-113

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In re: Kris Carlson/Department of Corrections

Summary: The Department of Corrections ("DOC") cannot produce nonexistent records for inspection or copying nor does DOC have to "prove a negative" to refute an unsubstantiated claim that certain records were created or currently exist. DOC discharged its duty under the Open Records Act ("the Act") by conducting a reasonable search for the records in dispute and explaining that no responsive records exist.

Open Records Decision

Kris Carlson ("Appellant") requested to inspect or obtain copies of public records from DOC of communications, including text messages and e-mails, relating to an employee's transfer to a new supervisor and any communications regarding the personal or working relationship between that employee and his previous supervisor. On that same day, Open Records Coordinator Katherine Williams requested that Appellant specify a time frame and provide the names of the individuals whose communications Appellant wanted DOC to search. Appellant narrowed the scope of his original request by specifying a "data range" and naming eight individuals whose communications DOC should examine.

By letter dated June 30, 2020, DOC notified Appellant that after a diligent search, no responsive documents were located. DOC further stated that a public agency cannot provide a requester with access to nonexistent records or those which it does not possess. Accordingly, DOC maintained that it had discharged

its duty under the Act by conducting a reasonable search and notifying Appellant that no responsive e-mails or correspondence existed. Appellant initiated this appeal shortly thereafter.

On appeal, DOC explained that the Warden decided to change the identified employee's supervisor on May 12. This personnel change was communicated to the affected employees verbally, through either telephone or in-person communication. As a result, DOC staff did not create any e-mails or text messages when communicating the personnel change. Nevertheless, DOC searched all of the e-mail accounts Appellant identified, as well as text messages on state-issued cellphones, but was unable to locate any responsive records.

The right to inspect and receive copies of public records only attaches if the records sought are "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.* However, Appellant provided no evidence that the requested records exist. Even if Appellant had established a *prima facie* case, DOC explained on appeal that staff communicated the personnel change verbally and therefore DOC did not create any records documenting the employee's transfer. DOC further explained that it searched all potentially relevant locations for the communications requested but was unable to locate any. Thus, DOC did not violate the Act.

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
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/s/ Michelle D. Harrison

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Distributed to:

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