



COMMONWEALTH OF KENTUCKY  
OFFICE OF THE ATTORNEY GENERAL

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**21-ORD-070**

April 14, 2021

In re: Jeremy Henley/Kentucky State Penitentiary

**Summary:** The Kentucky State Penitentiary (the “Penitentiary”) violated the Open Records Act (“the Act”) when it did not issue a timely written response to deny a request to inspect records. However, the Penitentiary did not violate the Act when it did not produce for inspection records that do not exist.

***Open Records Decision***

Inmate Jeremy Henley (“Appellant”) asked the Penitentiary to provide copies of any shipping receipts and return notices related to a Gnostic Bible that had been donated to the Penitentiary by a specific person. The Penitentiary denied the request because it claimed that it had searched its records but could find no records responsive to the request. This appeal followed.

As an initial matter, the Penitentiary violated the Act when it failed to issue a timely written response to the Appellant’s request. Under KRS 197.025(7), correctional facilities must respond to a request to inspect records within five business days of receipt. However, in response to the coronavirus pandemic, the General Assembly passed Senate Bill 150 (“SB 150”), which provides that during the state of emergency and “[n]otwithstanding KRS 61.872 and 61.880, a public agency shall respond to the request to inspect or receive copies of public records within 10 days of its receipt.” SB 150 § 1(8). SB 150 took effect on March 30, 2020. Accordingly, the Penitentiary’s response was due on February 19, 2021, which was ten days after it had received the request. A public agency may also seek additional time to respond to a request under KRS 61.872(5). To invoke that provision, however, the public agency must state whether the records are in

“active use, storage, or are otherwise unavailable.” The public agency must also provide the earliest date upon which the records will be available for inspection. KRS 61.872(5).

Here, the Penitentiary did not cite to KRS 61.872(5) or state that the records were in active use, storage, or were otherwise unavailable. The Penitentiary simply claimed that it needed additional time to search for responsive records, and that it would issue its final response on February 22, 2021. Because the Penitentiary did not properly invoke KRS 61.872(5), it violated the Act by issuing a response that was three days late.

When the Penitentiary finally responded, it claimed to possess no records responsive to the Appellant’s request. Once a public agency states affirmatively that requested records do not exist, the burden shifts to the requester to present a *prima facie* case that the requested records do exist. *Bowling v. Lexington-Fayette Urban Cty. Gov’t*, 172 S.W.3d 333, 341 (Ky. 2005). To make his *prima facie* showing, the Appellant claims that he discussed obtaining a copy of the Bible with the Chaplain, and had communications with the person who donated the Bible to the Penitentiary. He also provides evidence of a previous open records request in which he sought to inspect the Bible, but his request was denied because he was lodged in segregated housing at the time of the request.<sup>1</sup>

Even if the Appellant’s evidence is sufficient to make a *prima facie* showing that the Bible was received by the Penitentiary, the Penitentiary has explained the search that it conducted to locate mailroom records relating to the receipt of the Bible. According to the Penitentiary, its search involved consultation with its Property Room Officer, mailroom staff, Chaplain, Deputy Warden, library staff, and the Captain in charge of the mailroom at the time the Bible was received. None of these employees could locate mailroom records reflecting when the Bible was received or shipped. The Penitentiary has explained that it has searched all of the locations where these mailroom records would be located but that it has not found any records responsive to

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<sup>1</sup> Inmates are required to appeal denials of open records requests to this Office within twenty days. KRS 197.025(3). The Penitentiary claims that this Office lacks jurisdiction to review this previous denial because the Appellant did not perfect his appeal within twenty days. It is true that this Office does not have jurisdiction to adjudicate any dispute regarding this earlier request. However, the fact that the Penitentiary did not previously deny the existence of the Bible is evidence that the Penitentiary possessed the Bible at one point. Whether or not the Penitentiary possesses records demonstrating that the Bible has been shipped to or from the Penitentiary is a different question.

the request. This Office finds that the Penitentiary has sufficiently explained the adequacy of its search, and that it did not violate the Act when it denied a request for records that do not exist.

A party aggrieved by this decision may 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 proceedings.

**Daniel Cameron**  
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/s/Marc Manley  
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Assistant Attorney General

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Distributed to:

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