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22-ORD-001

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In re: Chris Hawkins/Kentucky State Penitentiary

Summary: The Kentucky State Penitentiary (the "Penitentiary") did not violate the Open Records Act ("the Act") when it denied a request for records that did not exist at the time it received the request or when it denied a request for records that do not exist within its possession.

Open Records Decision

On November 16, 2021, Chris Hawkins ("Appellant") submitted a request to the Penitentiary to inspect various medical records in his medical file. On November 17, 2021, the Penitentiary denied the Appellant's request because the requested records "do not exist." The Penitentiary affirmatively stated that the records "do not exist" and that a "thorough search of [the Appellant's] DOC medical records was completed, and it was determined that no documents responsive to these requests are contained in [the Appellant's] chart." Moreover, the Penitentiary explained that the "test results [the Appellant specifically requested] have not yet been returned and [the] provider has not yet entered a final diagnosis in [the Appellant's] chart." The Penitentiary suggested that the Appellant re-submit the request in "approximately two to three weeks." This appeal followed.

Once a public agency states affirmatively that it does not possess responsive records, the burden shifts to the requester to present a *prima facie* case that requested records do exist in the possession of the public agency. *See Bowling v. Lexington-Fayette Urb. Cnty. Gov.*, 172 S.W.3d 333, 341 (Ky. 2005). If the requester is able to make 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).

Here, the Penitentiary stated affirmatively that two of the three types of medical records the Appellant requested to inspect do not yet exist. On appeal, the Penitentiary again states affirmatively that the records the Appellant seeks did not exist at the time of the Appellant's request. The Penitentiary explains that "[the specific doctor] did not finalize her assessment notes until November 29, 2021" and the Appellant "was informed of the MMPI results verbally by [a specific person] on December 1, 2021."[1]

To make a *prima facie* case that the records did exist at the time of the Appellant's request and that the Penitentiary should have possessed them, the Appellant states that "all contacts with any 'provider' are entered into my medical/mental health records." The Appellant further claims that a specific doctor "told me personally that the MMPI results were available." However, the Penitentiary states that the Appellant was informed that the results had not yet "been entered into his record." The Penitentiary also explained that the health care service provider did not complete her assessment until November 29, 2021, almost two weeks after the date of the Appellant's request. Thus, there is a factual dispute about what the Appellant had been told, and when his assessment was completed. This Office has repeatedly stated that it cannot resolve competing factual claims such as these. *See, e.g.*, 20-ORD-202; 14-ORD-132; 96-ORD-070. Thus, this Office cannot find that the Penitentiary violated the Act when it could not produce a record that it claims did not exist at the time it was requested.

Finally, the Penitentiary's initial response to the Appellant stated affirmatively that the doctor the Appellant identified did not make any entries into his medical file. Therefore, the Penitentiary claimed that no records responsive to this part of the Appellant's request existed. On appeal, the Penitentiary again states affirmatively that no responsive records exist.

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[1] This date is within the two-to-three-week time period the Penitentiary asked the Appellant to resubmit the Appellant's request in its initial response to the Appellant's request.

To make a *prima facie* case that the Penitentiary should possess medical file entries by this doctor, the Appellant provides a copy of a "Health Service Staff Contact Form" dated November 7, 2021. This document appears to be a complaint the Appellant drafted to be forwarded to the specific doctor. The Appellant asserts that this is proof that the specific doctor was required to make notes in his file. The Appellant also cites to Kentucky Corrections Policy and Procedure ("CPP") 14.7 (II)(H)(1) as proof that the Penitentiary is required to create and possess the requested medical file entries. However, there is no evidence in the record that the complaint was actually delivered to the doctor.

Here, even if the Appellant had made a *prima facie* case that his complaint should have caused an investigation to begin, the Appellant has not made a *prima facie* case that records related to that investigation should be placed in his medical file. Moreover, the Appellant submitted his request less than 90 days after the date of his complaint. Thus, even if the complaint was sufficient to begin an investigation, the Penitentiary is not required to complete that investigation in less than 90 days. Here, there is no evidence that the doctor received the complaint, that the Penitentiary was required to place the Appellant's complaint in his medical file, or that the Penitentiary possessed any other records related to the investigation at the time of the Appellant's request. Therefore, this Office cannot find that the Penitentiary violated the Act when it did not provide for inspection records that do not exist in its possession.

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 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.

Daniel Cameron
Attorney General

/s/Matthew Ray
Matthew Ray
Assistant Attorney General

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Distributed to:

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