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OFFICE OF THE ATTORNEY GENERAL

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22-ORD-016

January 27, 2022

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 could not provide a record that does not exist within its possession.

Open Records Decision

On December 15, 2021, Chris Hawkins ("Appellant") submitted a request for records to the Penitentiary. The Appellant's request contained two subparts. First, the Appellant requested a "copy of 'condensed Health Services Encounter' notes from [a specific doctor] relating to her visit with" the Appellant on a specific date. The Appellant specified the scope of the request does not include items such as "medications, mental status exam, health problems, active allergies" and should only include "subjective notes" and notes about a specific medical issue the Appellant is experiencing. Second, the Appellant requested a copy of the "Health Service Staff contact form" that a specific employee mentioned in a "staff response" on a specific date.

In a timely response, the Penitentiary granted the first subpart of the Appellant's request and provided the requested records.[1] The Penitentiary

[1] The Appellant admits the Penitentiary fulfilled the first subpart of the request but alleges that these records prove that the Penitentiary violated the Act when it denied a previous records request because the records did not yet exist. This issue was subject of a prior appeal to this Office involving the same parties. *See* 22-ORD-001 (holding that the Penitentiary did not violate the Act because the records did not yet exist at the time of the request). To the

denied the second subpart of the Appellant's request and affirmatively stated that "[a]fter a thorough search of [the Appellant's] medical records, and emails it was determined that no documents exist responsive to request #2." 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).

In an attempt to make a *prima facie* case, the Appellant attaches a "Memorandum" stating that a "Health Services Contact Form . . . was forwarded to a [specific employee] for review." The Appellant claims the "Memorandum" establishes a *prima facie* case, pursuant to *Bowling,* that the records "must exist" because the Penitentiary had previously claimed to have sent the form to a specific employee. On appeal, the Penitentiary explains that "[t]he contact form requested by [the Appellant] is not the type of document that is considered a medical record and would not have been scanned into [the Appellant's] medical record." Furthermore, the Penitentiary has requested the employee to review her files for the requested record, and the employee was unable to locate the record. Thus, even if the "Memorandum" that the Appellant submitted proved that the record he seeks was forwarded to a specific employee, the Penitentiary adequately explains, on appeal, that those types of records are not retained into the files it keeps. The Penitentiary also states that it searched the records of the specific employee who allegedly forwarded the contact form and she is unable to locate the record. Thus, the Penitentiary has adequately explained its search for the requested record and did not violate the Act.[2]

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extent the Appellant invites this Office to reconsider that decision, this Office declines to do so. *See* 40 KAR 1:030 § 4 ("The Attorney General shall not reconsider a decision rendered under the Open Records Law or the Open Meetings Law. Parties dissatisfied with a decision may appeal the decision to circuit court as provided in KRS 61.880(5) and 61.848.").

[2] The Penitentiary also notes that the Appellant has continuously submitted requests for the same or similar records, and that in 2021 the Appellant filed no less than 26 appeals to this Office. On appeal, the Penitentiary asks this Office to find that the Appellant is

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:

Chris Hawkins, #103061
Peter J. Klear

intentionally disrupting the essential functions of the agency in violation of KRS 61.872(6). However, the Penitentiary did not deny the Appellant's request on this basis, and thus, its claim is not preserved for this Office's review. *See* KRS 61.880(2) (requiring the Attorney General to review the requester's request and the agency's response when determining whether a violation has occurred).