COMMONWEALTH OF KENTUCKY
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22-ORD-020

February 10, 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 denied a request that was vague and invited the requester to clarify the request. The Penitentiary also did not violate the Act when it could not provide a record that does not exist within its possession.

Open Records Decision

Chris Hawkins ("Appellant") submitted two identical requests for records to two divisions of the Penitentiary. The Appellant submitted the first request to the Penitentiary's open records coordinator to inspect documentation or emails exchanged between a specific licensed psychological associate and another employee about "putting quotes in [the Appellant's] disciplinary report investigations" that the Appellant claims are false. In a timely response, the Penitentiary denied the request under KRS 61.872(2) "at this time" because the request was too vague. The Penitentiary claimed it found records related to two different disciplinary reports that it believed were responsive to the request and asked the Appellant to "[p]lease clarify" the report to which the Appellant was referring.

The Appellant also sent a second request, seeking the same records, to the Penitentiary's medical records coordinator. In a timely response, the Penitentiary's medical records coordinator denied the Appellant's request because it claimed it was "not the proper custodian of the requested records"

and advised the Appellant to direct the request to the open records coordinator. This appeal followed.

"Any resident of the Commonwealth shall have the right to inspect public records." KRS 61.872(2)(a). However, a public agency "may require a written application, signed by the applicant and with his or her name printed legibly on the application, describing the records to be inspected." *Id*. Although the Kentucky Supreme Court has held that "nothing in KRS 61.872(2) contains any sort of particularity requirement," *Commonwealth v. Chestnut*, 250 S.W.3d 655, 661 (Ky. 2008), a request can be considered vague if "a reasonable person [cannot] ascertain [its] nature and scope," *see id.*

Here, the Appellant sought documentation or emails between two employees about putting "false quotes" in the Appellant's disciplinary reports. The Appellant did not specify any particular disciplinary report, or explain what she meant by "false quotes" in such disciplinary reports. After searching its records, the Penitentiary located two disciplinary reports it thought were responsive to the request. Instead of sending both reports to the Appellant, for which the Appellant would have had to pay associated copying fees, the Penitentiary asked the Appellant to clarify the scope of the request.[1]

The Appellant declined the Penitentiary's invitation to clarify the request, but does so now on appeal. The Appellant now clarifies that she is not seeking disciplinary reports, and more fully explains her accusation that a Penitentiary employee attributed "false quotes" to the Appellant while completing disciplinary reports. The Appellant explains conversations she allegedly had with Penitentiary employees regarding the issue. The Penitentiary claims that, with the new information provided by the Appellant on appeal, it was able to "conduct another review of its records." The Penitentiary now states affirmatively that "[b]ased on this additional review, [it] found that the information does not exist."

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[1] This Office notes that the Appellant has recently filed multiple appeals in which she claimed that the Penitentiary was subverting the Act by providing the Appellant with nonresponsive records. *See* 22-ORD-013; 21-ORD-234. Given the history of the parties, this Office understands the record custodian's hesitancy in providing the Appellant with potentially nonresponsive records and instead seeking clarification from the Appellant prior to providing records.

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, to establish a *prima facie* case, the Appellant claims that after her conversations with Penitentiary staff about the "false quotes," such quotes did not appear in the next disciplinary report. The Appellant therefore claims that a conversation must have occurred between Penitentiary staff because the issue was allegedly resolved. In response, the Penitentiary explains that no emails or documentation of the conversation between the two employees exists because the conversation occurred by telephone. Thus, the Penitentiary has explained why no responsive records exists. Accordingly, the Penitentiary did not violate the Act when it could not provide a record that does not exist within its possession.

Finally, the Penitentiary's medical records coordinator denied the identical request the Appellant submitted because the request did not seek medical records. The medical records coordinator directed the Appellant to submit the request to the Penitentiary's general open records coordinator. "If the person to whom the application is directed does not have custody or control of the public record requested, that person shall notify the applicant and shall furnish the name and location of the official custodian of the agency's public records." KRS 61.872(4). Because the Appellant did not seek medical records, and instead sought emails related to the creation of disciplinary reports, it was proper for the Penitentiary's medical records coordinator to direct the Appellant to the proper custodian of records. Therefore, the Penitentiary did not violate the Act.

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