



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

DANIEL CAMERON
ATTORNEY GENERAL

CAPITOL BUILDING, SUITE 118
700 CAPITAL AVENUE
FRANKFORT, KENTUCKY 40601
(502) 696-5300
FAX: (502) 564-2894

22-ORD-022

February 15, 2022

In re: Winston Wright/Powell County Detention Center

Summary: The Powell County Detention Center (“the Center”) violated the Open Records Act (“the Act”) when a portion of its response failed to indicate whether responsive records were provided or withheld under an applicable exemption. The remaining portions of the Center’s response did not violate the Act. The Office cannot decide factual disputes about whether a public agency has received a request to inspect records.

Open Records Decision

Winston Wright (“the Appellant”) claims to have submitted a request to the Center on December 20, 2021. Having received no response by January 13, 2022, he initiated this appeal.

Under KRS 61.880(1), upon receiving a request for records under the Act, a public agency “shall determine within five (5) [business] days . . . after the receipt of any such request whether to comply with the request and shall notify in writing the person making the request, within the five (5) day period, of its decision.” On appeal, the Center claims to have never received the Appellant’s request. This Office has historically found that it is unable to resolve factual disputes between the parties about whether a public agency has actually received a request. *See, e.g.,* 20-ORD-134; 18-ORD-056; OAG 89-81. Accordingly, the Office cannot find that the Center failed to timely respond to the Appellant’s request.

After the appeal was initiated, the Center responded to the Appellant’s request. The Appellant’s request contained 25 subparts. The Center responded to all but two subparts, specifically, subparts 12 and 13. In subpart 12, the

Appellant sought “any and all grievances” he had filed between June 1, 2021, and October 28, 2021. In subpart 13, the Appellant sought all correspondence between himself and the Department of Corrections between February 1, 2021, and October 2021, “available through COMMS.” The Center did not indicate whether it provided records responsive to these subparts of the request, or whether the Center denied these subparts of the request under an exemption to the Act.¹ Because the Center has not notified the Appellant whether the Center is complying with these portions of the request, or that the Center is denying these subparts under an applicable exemption, the Center violated the Act.

The Center’s response to the remaining 23 subparts of the request did not violate the Act. In most subparts of the request, the Appellant sought information instead of public records. For example, the Appellant sought the names and titles of certain employees, the “number of empty beds” at the Center on specific dates, the number of urine tests failed by other inmates, or the dates on which the Center did certain things. These requests do not describe public records to be inspected, but rather, they seek information. The Act does not require public agencies to fulfill requests for information, but only requests for records. KRS 61.872; *Dept. of Revenue v. Eifler*, 436 S.W.3d 530, 534 (Ky. App. 2013) (“The ORA does not dictate that public agencies must gather and supply information not regularly kept as part of its records.”).²

The Appellant also sought several “policies” about specific types of behavior. For example, one subpart sought any policy “that allows” Center employees “to knowingly give [a] false statement concerning facility policies or procedures.” Another “policy” the Appellant sought was any rule or guideline “that allows facility staff to alter, change, or withhold outgoing inmate mail.” In response to these requests, the Center either refuted the Appellant’s premise, *i.e.*, stating that “legal mail is not altered or changed,” or the Center affirmatively claimed no responsive policies existed.

¹ This Office sought clarification from the Center about why it did not respond to subparts 12 and 13, but the Center did not respond to this Office’s request.

² Nevertheless, the Center answered all of the Appellant’s requests for information by providing requested numbers as well as names and job titles of the requested employees and dates of certain events. As for the Appellant’s requests related to the number of urine tests failed by inmates, the Center denied these requests as ones seeking medical records. The Office declines to consider whether such a response was proper because the request sought information as opposed to ascertainable public 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, the Appellant has not presented a *prima facie* case that the policies he seeks exist. To the contrary, the Appellant has accused the Center of failing to forward his mail to his new address. Thus, the implication of his accusation is that he does not believe the Center possesses policies that authorize it to engage in the behavior in which he accuses the Center of engaging. Thus, the Center did not violate 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 e-mailed to OAGAppeals@ky.gov.

Daniel Cameron
Attorney General

/s/Marc Manley
Marc Manley
Assistant Attorney General

#20

Distributed to:

Winston Wright
Neal Hamilton