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22-ORD-049

March 24, 2022

In re: Glenn Odom/Louisville Metro Department of Corrections

Summary: The Louisville Metro Department of Corrections (the "Department") violated the Open Records Act ("the Act") when it failed to issue a response to a request to inspect records within five business days of receiving the request. However, the Department did not violate the Act when it could not provide copies of records that do not exist within its possession.

Open Records Decision

On January 31, 2022, inmate Glenn Odom ("Appellant") mailed a three-part request to the Department for records related to events that occurred in 2008. First, he requested a visitation log that documents visits by the probation and parole officers that conducted his pre-sentencing investigation around February 2008. Second, he requested "any listed reason for the denial of such pre-sentencing investigation." Third, he requested a copy of the grievance he filed related to the classification supervisor's alleged refusal to conduct a presentencing investigation around March 30, 2008. On February 17, 2022, having received no response from the Department, this appeal followed.

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."[1] On appeal, the Department claims to have not received the Appellant's request until February 19, 2022. Thus, its response was due on or before February 25, 2022. The Department claims that it was "preparing to respond" to the Appellant by mail on February 25, 2022, but the Department received notice of this appeal on that day. The Department does not explain why it did not proceed to issue its planned response to the Appellant on February 25, 2022.

This Office has historically found that it is unable to resolve factual disputes about whether or when a public agency received a request to inspect records. *See, e.g.*, 21-ORD-163; 12-ORD-122; 08-ORD-066; 04-ORD-223. However, the Department "believes" that it received the request on February 19, 2022.[2] Accepting the Department's belief, then its response to the Appellant was due on February 25, 2022, which was the fifth day after the Department received the request. Yet the Department provides no proof that it actually mailed its response on that day. Instead, the Department issued its response to this appeal on March 4, 2022, and for the first time, claims that no responsive records exist. Because the Department did not issue any response to the Appellant's request until more than five business days after the date the Department believes to have received the request, it violated the Act.

On appeal, the Department affirmatively states that it does not possess any records responsive to the three subparts of the Appellant's request. 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

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[1] Likewise, under KRS 197.025(7), a correctional facility must respond to requests submitted by inmates within five business days of receipt. Now that KRS 61.880(1) has been amended to require all public agencies to respond to requests made under the Act within five business days, the distinction between KRS 197.025(7) and KRS 61.880(1) is no longer relevant.

[2] An employee at the Department marked the front of the envelope containing the Appellant's request as received on February 19, 2022, but the Department could not confirm which employee made this mark on the envelope or whether the request was in fact received on this day.

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 did not have the opportunity to make a *prima facie* case that the requested records exist, because the Department did not respond to his request before he brought his appeal. Nevertheless, even if the Appellant had made a *prima facie* case, the Department sufficiently explains why it does not currently possess any responsive records. In the first subpart of his request, the Appellant sought a copy of visitation log that documented visits by the probation and parole officers who conducted the Appellant's presentence investigation in February 2008. The Department explains that "Section L3126 of the retention schedules for [the Department] requires that visitor log books [sic] be retained for three (3) years after last entry, then the records may be destroyed." The Department "has confirmed that visitation logs from 2008 have been destroyed."[3]

In the second subpart of his request, the Appellant sought a copy of "any listed reason for the denial of such pre-sentencing investigation" related to the 2008 incident that the Appellant described in the first subpart of his request. The Department explains that if it "possessed a record regarding the lack of a [pre-sentencing investigation], it would have been located in the inmate record folder. Retention Schedule L3129 [related to] inmate record folders requires that records be retained for two (2) years, then [the records] may be destroyed." The Department "has confirmed that all inmate record folders from 2008 have been destroyed."

In the third subpart of his request, the Appellant sought a copy of a grievance he filed in 2008. The Department explains that "Retention Schedule L5167 [related to] inmate grievance forms sets the retention schedule at three (3) years." The Department "has confirmed that all grievance forms from 2008

[3] The Department also explains that pre-sentencing investigations are conducted by the "Division of Probation and Parole within the Kentucky Department of Corrections, not by" the Department. Therefore, the Department provides the contact information for the records custodian for the Department of Corrections, and invites the Appellant to submit his request to that agency. *See* KRS 61.872(4) ("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.")

have been destroyed." Thus, the Department has sufficiently explained on appeal why records responsive to each subpart of the Appellant's request do not exist within its possession.

In sum, the Department violated the Act when it did not issue a response to a request under the Act within five business days of receiving the request. However, it did not violate the Act when it sufficiently explained on appeal why it could not provide copies of records that do not exist within 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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