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**22-ORD-056**

April 6, 2022

In re: Carlos Thurman/Eastern Kentucky Correctional Complex

***Summary:*** The Office cannot find that the Eastern Kentucky Correctional Complex (the "Complex") violated the Open Records Act ("the Act") when it could not provide copies of records that do not exist within its possession.

## *Open Records Decision*

Inmate Carlos Thurman ("Appellant") submitted a request for copies of four "sick call" requests he had submitted to two different nurses at the Complex on February 15 and 16, 2022. The Complex denied the request because "[a]fter a thorough search of [the Appellant's] medical records, [the Complex] determined the documents [the Appellant] requested do not exist in [his] chart." This appeal followed.

On appeal, the Complex again states affirmatively that the records the Appellant seeks do not exist within its possession. 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).

To make a *prima facie* case that the Complex possesses the four sick call request forms he seeks, the Appellant provides a letter he claims to have sent to the Warden shortly after the Appellant allegedly submitted the sick call requests to the nurses. In that letter, the Appellant expressed his concern that the nurses would not appropriately file his sick call sheets. He also asked the Warden to preserve surveillance video of the area in the event the Complex later claimed the sick call requests did not exist. The Appellant also submits what appears to be a response by the Warden, stating that the Appellant had "turned in sick calls on those dates and [he was] seen by a provider." However, the letter does not explain how the Warden arrived at this conclusion. For example, the Appellant claims that surveillance video exists that would prove he submitted the sick call requests, but the Warden did not state that he had reviewed such surveillance video to confirm the dates on which the Appellant submitted the request, or that the Warden had preserved the video. The documentation the Appellant provides is certainly more than a bare assertion that the requested records exist, and the Complex does not dispute the authenticity of the Warden's letter on appeal.[1] However, even if this documentation was sufficient to support a *prima facie* case that the records exist, the Complex sufficiently explains how its search was adequate.

The Complex explains that upon receiving the Appellant's request, the authorized custodian of records and the Deputy Warden "conducted a thorough search of [the Appellant]'s medical records." They could not "find any sick call forms" for the specific dates the Appellant requested—potentially implying that sick call requests do exist in the Appellant's file, but not for the dates the Appellant claims to have submitted them. Furthermore, the Complex explains that "[i]f there were any sick call forms in existence, they would've been scanned into [the Appellant's] chart." After the Complex received notice of this appeal, its Deputy Warden again searched for these records and again found no such records. Thus, the Complex has adequately explained the methods of its search.

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[1] Moreover, inmates are typically unable to inspect or obtain copies of surveillance video, as such requests are routinely denied under KRS 197.025(1). *See, e.g.*, 22-ORD-052 (collecting decisions in which requests for surveillance video were appropriately denied). Other than preserving his correspondence with the Warden and maintaining a written record of events, it is unclear what more the Appellant could have done to make his case.

This Office is unable to serve as fact finder, and has historically declined to decide factual disputes between the parties about whether various events occurred that would lead to the creation of records. *See, e.g.*, 16-ORD-076 (declining to resolve competing claims that documents were submitted to the agency); 01-ORD-036 (in which the Office declined to act as an "investigator" to locate documents a requester claims exists); OAG 86-35 (same). This Office cannot determine whether the Appellant did or did not submit sick call requests on the dates he claims to have submitted them. Accordingly, this Office cannot find that the Complex violated the Act when 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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