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**22-ORD-066**

April 14, 2022

In re: Chris Hawkins/Kentucky State Penitentiary

**Summary:** This Office cannot find that the Kentucky State Penitentiary (the “Penitentiary”) violated the Open Records Act (“the Act”) when it could not provide a copy of an email that does not exist within its possession.

***Open Records Decision***

Chris Hawkins (“Appellant”) submitted a request to the Penitentiary for “all emails” between a licensed psychological associate and another employee regarding the employees allegedly “putting quotes” about the Appellant in the Appellant’s disciplinary report investigations, which the Appellant believes are inaccurate. In a timely response, the Penitentiary granted the request and provided one page of responsive records. The Appellant alleges that there should be additional responsive records in the possession of the Penitentiary that it did not provide.<sup>1</sup> This appeal followed.

On appeal, the Penitentiary again affirmatively states it does not possess any additional responsive records. Once a public agency states affirmatively that a record does not exist, the burden shifts to the requester to

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<sup>1</sup> The Appellant claims the email that was submitted as part of this appeal is related to 22-ORD-020, a decision involving the same parties. In that decision, the Penitentiary denied the request because it claimed the record did not exist within its possession. To the extent that 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.”); see also 22-ORD-016.

present a *prima facie* case that the requested record does exist. *Bowling v. Lexington-Fayette Urban Cnty. Gov't*, 172 S.W.3d 333, 341 (Ky. 2005).

In an attempt to establish a *prima facie* case that the Penitentiary possesses additional responsive records, the Appellant provides a copy of an email from a licensed psychological associate to another employee. The email concerns four “write-ups” that occurred on September 3, 2021, August 27, 2021, August 14, 2021, and July 15, 2021. The email indicated that the Appellant had requested the write-ups be updated because the Appellant claimed they were not accurate.

The Appellant asserts that “since a question was asked via email” then the recipient must have responded via email. However, the Appellant’s assumption fails to account for other methods of communication, such as telephones. In fact, the Penitentiary explains on appeal that it believes the employees spoke about the issue raised in the email over the telephone. The Penitentiary confirmed that it has searched the email accounts of both the sender and recipient employees and that the Penitentiary could not locate any additional emails. Thus, even if the Appellant had established a *prima facie* case that the Penitentiary possesses additional records responsive to the request, the Penitentiary has rebutted that presumption. Accordingly, this Office cannot find that the Penitentiary violated the Act when it could not provide a record that does not exist within its possession.

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court under KRS 61.880(5) and KRS 61.882 within 30 days from the date of this decision. Under 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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