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-088

May 10, 2022

In re: Dawn Crawford/Department of Corrections

Summary: The Department of Corrections ("the Department") violated the Open Records Act ("the Act") when it failed to respond timely to a request for records. The Department also violated the Act when it entirely withheld a record under KRS 197.025(1) and KRS 197.025(6) instead of separating exempt information from nonexempt information and providing the latter as required under KRS 61.878(4).

Open Records Decision

Dawn Crawford ("Appellant") submitted a 31-part request dated February 5, 2022, for various records and information. The Department received the request on February 15, 2022.[1] Having received no response to her request, the Appellant initiated this appeal on February 23, 2022.

Under the Act, a public agency has five business days to fulfill a request for public records or deny such a request and explain why. KRS 61.880(1); KRS 197.025(7). Accordingly, the Department's response was due on February 22, 2022.[2] On appeal, the Department admits that it did not issue its response to

---

[1] The Appellant claims to have evidence that the request was received on February 9, 2022, but has not provided that evidence to this Office.

[2] In response to the public health emergency caused by the coronavirus, the General Assembly enacted 2020 SB 150 during the 2020 Regular Session. 2020 SB 150 became law on March 30, 2020, and provided that, notwithstanding the provisions of the Act, "a public agency shall respond to the request to inspect or receive copies of public records within 10 days of its receipt." 2020 SB 150 expired on June 29, 2021. *See* 2021 House Joint Resolution 77. During the 2022 Regular Session, however, the General Assembly enacted SB 25, which became law on January 14, 2022. Among other things, SB 25 revived 2020 SB 150 until April 14, 2022, "to

the Appellant's request until February 25, 2022.[3] Thus, the Department violated the Act when it failed to issue a timely response.

In its response on February 25, 2002, the Department stated that it needed additional time to complete the request due to the amount of records requested, and indicated that it would issue a final response by March 11, 2022. KRS 61.872(5) allows an agency to provide records after the five-day deadline if the records are "in active use, in storage or not otherwise available." However, the agency must provide "a detailed explanation of the cause . . . for further delay and the place, time, and earliest date on which the public record[s] will be available for inspection." Although the Department provided the date when records would be available, it did not indicate whether the records were "in active use, in storage or not otherwise available" or provide a detailed explanation of the cause for delay. Thus, the Department did not properly invoke KRS 61.872(5).

On March 11, 2022, the Department issued its final response, granting the request in part and denying it in part. The Department provided 617 pages of records to the Appellant, from which it redacted personal telephone numbers, home addresses, and private e-mail addresses under KRS 61.878(1)(a). These specific categories of personal information may be routinely redacted from public records under ordinary circumstances. *See Kentucky New Era, Inc. v. City of Hopkinsville,* 415 S.W.3d 76 (Ky. 2013).

Pursuant to KRS 197.025(1), the Department also redacted "[i]nformation relating to specific security operations and staffing information at the facility contained within the audit records" requested by the Appellant. Under KRS 197.025(1), which is incorporated into the Act under KRS 61.878(1)(l), "no person shall have access to any records if the disclosure is deemed by the commissioner of the department or his designee to constitute a threat to the security of the inmate, any other inmate, correctional staff, the

---

the extent the provisions are not superseded by statute or administrative regulation." SB 25 §2(1)(c). The ten-day deadline provided by 2020 SB 150 was superseded by the passage of 2021 HB 312, which changed the three-day period under KRS 61.880(1) to five days. *See, e.g.,* 22-ORD-009; 21-ORD-251.

[3] The Department argues that this appeal is unperfected because the Appellant did not include the response to the request as required under KRS 61.880(2)(a). However, "[i]f the public agency refuses to provide a written response, a complaining party shall provide a copy of the written request." KRS 61.880(2)(a). Because the Department did not issue its response by February 22, 2022, the Appellant perfected her appeal by providing a copy of the written request.

institution, or any other person." Here, the Department has stated that information relating to facility staffing and security operations "could provide opportunities for inmates to escape, smuggle dangerous contraband into the compound, or engage in other activities which threaten the safety of staff, inmates, and the public." This Office has historically deferred to the judgment of correctional facilities in determining whether the release of certain records would constitute a security threat under KRS 197.025(1). In particular, this Office has upheld the denial of inmates' requests for records containing information about correctional facility staffing and security operations. *See, e.g.,* 08-ORD-148; 06-ORD-160; 04-ORD-180. Accordingly, the Department did not violate the Act when it redacted this information.

The Department denied several parts of the Appellant's request because they consisted of questions instead of requests for records.[4] 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."). Therefore, the Department did not violate the Act when it denied the Appellant's requests for information.

The Department denied the Appellant's request for "clinical guidelines for an inmate, in Kentucky State Reformatory specifically, who is put on oxygen therapy in 2017," because the Department claimed that no responsive records existed. The Department also explains on appeal that it does not possess any additional policies relating to abuse inspections, health assessments, anticoagulant therapy, and "special health needs," other than those records it provided to the Appellant. Once a public agency states affirmatively that a record does not exist, the burden shifts to the requester to present a *prima facie* case that the requested record does exist. *See Bowling v.*

---

[4] In a follow-up reply to the Department's response, the Appellant claims that the Department failed, without explanation, to provide records relating to inspections conducted at the Kentucky State Reformatory in 2016 and 2017 and jail inspection results for the Madison County Detention Center in 2017. However, the Appellant did not originally request to inspect these records and instead asked various questions such as "[w]hat audits and inspections were conducted between 2014 through 2017" and "[w]here are the findings and results[?]" Similarly, as to the Madison County Detention Center, the Appellant asked "when" an inspection, audit, or review was conducted and "[w]hat were the results[?]" A written application to inspect public records must describe records to be inspected, KRS 61.872(2)(a), not questions to be answered by public agencies. Although the Appellant is free to make a request for copies of inspection and audit records, she did not do so in this case. *See, e.g.,* 21-ORD-166.

Lexington-Fayette Urb. Cnty. Gov., 172 S.W.3d 333, 341 (Ky. 2005). Here, the Appellant merely asserts that the requested clinical guidelines must exist, but has not established a *prima facie* case that they exist. A requester must provide some evidence to support a *prima facie* case that requested records exist, such as the existence of a statute or regulation requiring the creation of the requested record, or other factual support that the requested record exists. *See, e.g.*, 21-ORD-177; 11-ORD-074. A requester's bare assertion that requested records must exist is insufficient to establish a *prima facie* case that the records actually do exist. *See, e.g.*, 22-ORD-040. Thus, the Department did not violate the Act when it did not provide records that do not exist in its possession.

Similarly, the Department denied 21 parts of the Appellant's request insofar as they sought policies, procedures, or other records of the Madison County Detention Center. The Department advised that it did not possess records of the Madison County Detention Center and provided an address where the Appellant could request the records of that agency. Under KRS 61.872(4), "[i]f 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." By providing the address of the Madison County Detention Center, the Department complied with KRS 61.872(4). Thus, the Department did not violate the Act with regard to the requested records of the Madison County Detention Center.

The Department denied the Appellant's request for the policy and procedure governing investigation of inmate deaths at the Kentucky State Reformatory in 2017, because the Department claims that there is no specific policy and procedure for investigating inmate deaths. However, inmate deaths are mentioned in a policy that the Department withheld because it claimed the policy is a "secured policy" posing a security threat under KRS 197.025(1) and 197.025(6). Under KRS 197.025(6), "[t]he policies and procedures or administrative regulations of the department which address the security and control of inmates and penitentiaries shall not be accessible to the public or inmates." This Office has recognized that policies and procedures of the Department that fall within the scope of KRS 197.025(6) are exempt from the Act as records "made confidential by enactment of the General Assembly" under KRS 61.878(1)(l). *See, e.g.,* 19-ORD-207; 09-ORD-057; 05-ORD-055. Here, however, the Department did not initially explain how a policy concerning the conduct of an investigation "address[es] the security and control of inmates and penitentiaries" within the meaning of KRS 197.025(6), or how the disclosure of this policy poses a security threat under KRS 197.025(1).

Therefore, this Office requested the Department to provide a copy of the withheld policy for this Office's internal and confidential review. *See* KRS 61.880(2)(c).

Although this Office may not directly reveal the contents of the policy, CPP 8.3, the Office agrees that some portions of the policy contain information that addresses "the security and control of inmates and penitentiaries" within the meaning of KRS 197.025(6). These portions contain the Department's procedures for responding to disturbances or disasters within the correctional facility, and such portions could be deemed a security risk by the Department under KRS 197.025(1) if revealed. However, this Office also finds those portions of the policy to be unresponsive to the Appellant's request for "policy and procedure for investigation of inmate death." The only provision of the policy that is responsive to the Appellant's request, and in this Office's opinion does not "address the security and control of inmates and penitentiaries" and would not constitute a security threat to the Department, is CCP 8.3 § II(M).[5] The Department has not substantiated that this subsection addresses the security and control of inmates and penitentiaries, or constitutes a security threat, because this section of the policy merely addresses the procedure for reviewing critical incidents after they have occurred. Under KRS 61.878(4), the Department is required to separate this nonexempt section from the remaining unresponsive and exempt sections of the policy.[6] It may do so by redacting the entire policy other than Subsection II, Subsection M. Because the Department withheld the entire policy, instead of separating exempt information from nonexempt information and providing the latter, it violated the Act.

In sum, the Department violated the Act when it failed to issue a timely response to the Appellant's request and when it withheld CPP 8.3 in its entirety instead of separating exempt information and providing nonexempt information. But the Department did not otherwise violate the Act as alleged by the Appellant.

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

---

[5] This Office has reviewed two versions of CPP 8.3, which were those in effect before and after the revision date of November 3, 2017. This analysis applies equally to both versions.

[6] Although the Department asserts that there is no policy and procedure "specifically for investigation of an inmate death," CPP 8.3(II)(M) pertains to review of critical incidents, which the policy defines as including inmate deaths.

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/ James M. Herrick

James M. Herrick
Assistant Attorney General

#65

Distributed to:

Ms. Dawn Crawford
Amy V. Barker, Esq.
Ms. Katherine Williams