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-093

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In re: Chris Hawkins/Kentucky State Penitentiary

Summary: The Kentucky State Penitentiary (the "Penitentiary") did not violate the Open Records Act ("the Act") when it did not provide copies of records that do not exist within its possession. To the extent that the Penitentiary has made other requested records available to the requester, issues related to those records are moot under 40 KAR 1:030 § 6.

Open Records Decision

Inmate Chris Hawkins ("Appellant") submitted two requests for records to the Penitentiary. First, the Appellant requested a copy of "rejection sheets only" for four specific grievances.[1] Second, the Appellant provided and quoted from an email between two employees that refers to "four remaining" disciplinary reports about the Appellant from which a mental health statement needed to be removed "like . . . the other" disciplinary reports.[2] The Appellant requested copies of the "other" disciplinary reports to which the email referred, or any other disciplinary report where similar statements made about the Appellant were "removed after" the Appellant's disciplinary proceedings. The Penitentiary granted the first request and provided four pages of responsive

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1 The four specific grievances listed are #21-07-001-P, #20-08-009-P, #20-09-012-P, and #21-04-008-P.

2 For context, the email mentions that these four disciplinary reports contain "the mental health opinion template," but the Appellant did not call a mental health professional as a witness during those proceedings. The erroneous language has apparently been placed in multiple disciplinary reports about the Appellant.

records. However, it denied the second request because the Penitentiary claimed that it could not find any responsive records that specifically mentioned the Appellant. This appeal followed.

The Appellant claimed that one of the rejection sheets that the Penitentiary provided was not one that the Appellant requested, and that the Penitentiary should refund the ten-cent copying fee it charged for that record. On appeal, the Penitentiary admits that it mistakenly provided the wrong rejection sheet, but that it has now provided the Appellant with the correct one. Accordingly, since the Penitentiary has made the requested record available to the Appellant, this issue is now moot. *See* 40 KAR 1:030 § 6 ("If the requested documents are made available to the complaining party after a complaint is made, the Attorney General shall decline to issue a decision in the matter.").

For the Appellant's second request, the Penitentiary continues to assert on appeal that it could not locate responsive 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).

To make a *prima facie* case, the Appellant provides an email in which one employee asks the other to remove information about the Appellant from "four remaining" disciplinary reports "like [the Penitentiary] did for the other" disciplinary reports. The Appellant then requested to inspect disciplinary reports from which statements about the Appellant's mental health were removed "after" the Appellant's disciplinary hearing. In its original response, the Penitentiary stated:

> The *only* [disciplinary report] in [the Appellant's] inmate electronic file that reflect where a mental health statement was ever removed from one of [the Appellant's disciplinary reports]

> after it was seen by the Adj. Committee/appealed KSP-2021-0001789, KSP-2021-000714 & KSP 2021-0001579 reflect statements then Sgt. Anderson placed in the investigation sections of them from LPA Megan Wilke. However, these statements were not removed from these [disciplinary reports]. (Emphasis added).

The Penitentiary restates this quote verbatim on appeal. But from this statement, the Penitentiary appears to have located at least a few of the Appellant's disciplinary reports from which the objectionable statement was removed. Thus, the Penitentiary's response, and the email the Appellant provided, constituted a *prima facie* case that at least a few responsive records exist.

Because the Appellant made a *prima facie* case that potentially responsive records existed, this Office asked the Penitentiary to provide additional information to explain the adequacy of its search. Specifically, this Office asked the Penitentiary to explain why its initial response indicated that at least a few responsive records existed. The Penitentiary admitted that its initial response was somewhat "inartful," but that upon further review the only disciplinary reports from which the objectionable language had been removed were altered *before* the Appellant's disciplinary hearings. Because the Appellant sought the disciplinary reports from which the objectionable language was removed *after* the disciplinary hearing, these three disciplinary reports were not responsive to the Appellant's request. The Penitentiary explains that it has searched for responsive records three times now—initially upon receiving the request, again upon receiving notice of the Appellant's appeal, and a third time in response to this Office's additional questioning. The Penitentiary is adamant that the objectionable language was not removed from any of the Appellant's disciplinary reports after a disciplinary hearing occurred.

At bottom, this Office is not a "finder of documents." 94-ORD-121. Once a *prima facie* case has been made that responsive records may exist, this Office's inquiry is limited to whether the agency has adequately searched for responsive documents. *See Univ. of Ky. v. Hatemi*, 636 S.W.3d 857, 868 n.8 (Ky. App. 2021) (collecting prior Office decisions in which the Office recognized its

inability to make a factual finding that records exist). The Penitentiary has explained the adequacy of its search, and therefore, the Office cannot find that it violated the Act when it denied the Appellant's request for records that do not exist.

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:

Chris Hawkins, #103061
Jesse L. Robbins