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22-ORD-238

November 7, 2022

In re: Ronald Williams/Eastern Kentucky Correctional Complex

Summary: The Eastern Kentucky Correctional Complex ("the Complex") violated the Open Records Act ("the Act") when it denied a request because the record was in storage. The Complex did not violate the Open Records Act when it did not provide a record that does not exist in its possession.

Open Records Decision

Inmate Ronald Williams ("Appellant") submitted a request to the Complex for copies of a specific write-up and a cell search log dated July 6, 2022. The Complex provided the write-up but denied the request for the cell search log because it was in storage. This appeal followed.

Upon receiving a request to inspect records, a public agency must decide within five business days whether to grant the request, or deny the request and explain why. KRS 61.880(1). However, "[i]f the public record is . . . in storage . . . the official custodian *shall* immediately notify the applicant and *shall* designate a place, time, and date for inspection of the public records, not to exceed five (5) days from receipt of the application, unless a detailed explanation of the cause is given for further delay and the place, time, and earliest date on which the public record will be available for inspection." KRS 61.872(5) (emphasis added). Thus, KRS 61.872(5) does not allow an agency to deny a request outright because the record is in storage. Rather, KRS 61.872(5) *requires* the agency to retrieve the record from storage and notify the requester of the date on which it will be available. Therefore, the Complex violated the Act when it denied a request because the record was in storage.

On appeal, the Complex now states that the record no longer exists in its possession. 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. Lexington-Fayette Urb. Cnty. Gov't*, 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).

Here, the Complex implicitly acknowledges the record should exist, thus establishing the Appellant's *prima facie* case. According to the Complex, it has "searched in places that the log was most likely to be stored and [has] not found it . . . and it appears that the log has been inadvertently lost." If a requester makes a *prima facie* case that a record should exist but the agency is unable to locate the missing record, the requester is entitled to an explanation why the record does not exist. *See Eplion v. Burchett*, 354 S.W.3d 598, 603 (Ky. App. 2011). Here, the Complex explained that the record does not exist because it has been "inadvertently lost." Thus, the Complex did not violate the Act by not producing a record it does not possess.[1]

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 e-mailed to OAGAppeals@ky.gov.

Daniel Cameron
Attorney General

s/ Zachary M. Zimmerer
Zachary M. Zimmerer
Assistant Attorney General

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Distributed to:

Ronald Williams #163955
Amy V. Barker
Sara M. Pittman

[1] The loss of a record poses questions about records management, but the loss of a record does not violate the Open Records Act. A courtesy copy of this decision will be sent the Kentucky Department for Libraries and Archives so it may investigate how the Complex "inadvertently lost" a record.

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Ann Smith
Catherine Giles, KDLA