



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-242**

November 7, 2022

In re: Carlos Harris/Eastern Kentucky Correctional Complex

**Summary:** The Office is unable to find that the Eastern Kentucky Correctional Complex (the “Complex”) violated the Open Records Act (“the Act”) when it failed to fully respond to a request and failed to state the specific exception authorizing a denial because the request did not precisely describe the records sought. However, the Complex did not violate the Act when it denied a request for a record that does not exist within its possession. An agency is not required to create a record to satisfy a request under the Act.

***Open Records Decision***

On September 21, 2022, inmate Carlos Harris (“Appellant”) submitted a request to the Complex for “staff members to view video footage from” March 5, 2022 and March 22, 2022 because it is critical to his “medical needs.” On September 26, the Complex responded and denied the request “regarding the camera footage of the incident that occurred on March 5, 2022” because it does “not have the ability to review camera footage of an incident that occurred over 6 months ago.” This appeal followed.

Upon receiving a request to inspect records, a public agency must decide within five business days whether to grant the request, and if it denies the request, to explain why. KRS 61.880(1).<sup>1</sup> If the agency denies all or any portion of the request, it must cite the specific exception authorizing nondisclosure of the requested records,

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<sup>1</sup> Similarly, under KRS 197.025(7), a correctional facility must respond to an inmate’s request to inspect public records within five business days of receipt.

and briefly explain how the exception applies to the record withheld. *Id.* Here, the Complex responded within five business days, but its response did not address the part of the Appellant's request related to video footage from the March 22, 2022 incident. The Complex's response also did not cite the specific exception that authorized it to withhold the records. Thus, it would seem that the Complex violated the Act by not fully responding to the request. However, the Appellant's request was not sufficiently clear that he sought camera footage from March 22.

A request to inspect public records under the Act must describe those records in a manner "adequate for a reasonable person to ascertain the nature and scope of [the] request." *Commonwealth v. Chestnut*, 250 S.W.3d 655, 661 (Ky. 2008). If the request is for copies of public records, it must "precisely describe[ ] the public records which are readily available within the public agency." KRS 61.872(3)(b). Here, the Appellant's request was for the Complex's "staff members to view video footage from" March 5, 2022 and March 22, 2022. Therefore, the request does not describe any public records that the Appellant sought to review himself; instead, the request asked the Complex to have its staff review the footage. *See* 22-ORD-054; 08-ORD-058. The Act does not require the Complex to review video footage at the Appellant's request.

On appeal, the Appellant clarifies that he seeks a report of the video footage, not the video itself. The Complex, on appeal, denies the Appellant's clarified request because the Complex does not possess the requested report. Nor is the Complex required, under the Act, to create such a record to fulfill the Appellant's request.

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'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 Appellant does not attempt to make a *prima facie* case that the record he seeks exists within the Complex's possession. Kentucky Courts and the Office have previously found that an agency is not required to create a record to satisfy a request under the Act. *See Dept. of Revenue v. Eifler*, 436 S.W.3d 530, 534 (Ky.App. 2013); *see also* 18-ORD-184; 18-ORD-021; 17-ORD-089; 12-ORD-026; 11-ORD-091; 10-ORD-187. In a recent opinion involving the same parties, this Office specifically found the

Complex was not required by the Act to create a report related to video footage to satisfy the Appellant's request. *See* 22-ORD-224. So too here, the Complex did not violate the Act when it denied a request for a record that does not exist within its possession, and it is not required to create such a record to satisfy a request.

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](mailto:OAGAppeals@ky.gov).

**Daniel Cameron**  
**Attorney General**

s/ Matthew Ray  
Matthew Ray  
Assistant Attorney General

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Distributed to:

Carlos Harris, #143261  
Amy V. Barker  
Sara M. Pittman  
Ann Smith