



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-247

November 16, 2022

In re: Carlos Thurman/Eastern Kentucky Correctional Complex

Summary: The Eastern Kentucky Correctional Complex (the “Complex”) did not violate the Open Records Act (“the Act”) when it denied a request for a record that does not exist within its possession.

Open Records Decision

Inmate Carlos Thurman (“Appellant”) submitted a request to the Complex for a copy of a “[backlog sheet] of [l]abs with [his] name on it for blood that was drawn from [him] on” a specific date. In a timely response, the Complex denied his request because it was “not part of [his] medical record” and it is not required to “create a record to satisfy an open records request.”¹ This appeal followed.

On appeal, the Complex again claims the requested record does not exist within its possession. 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 or should 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).

¹ This Office has previously found that an agency is not required to create a record to satisfy a request under the Act. See, e.g., 22-ORD-224.

Historically, this Office has found that a requester's bare assertion is not enough to make a *prima facie* case that a record exists in the possession of the agency. *See, e.g.*, 22-ORD-141; 21-ORD-114; 20-ORD-094. To establish a *prima facie case*, a requester must provide some evidence to support his claim that the requested record exists, such as a statute or regulation requiring the creation of the requested record, or other factual support for the existence of a record. *See, e.g.*, 22-ORD-141; 21-ORD-177; 11-ORD-074.

Here, in an attempt to make a *prima facie* case that the Complex possesses a "backlog sheet," the Appellant claims that a Complex employee "stated in her response to [his] grievance that [his] blood was drawn on 8-4-22 from a backlog from 5-24-22." The Appellant asserts the Complex should possess the May 24 "backlog sheet" that ordered his bloodwork. As proof, the Appellant provided a copy of the grievance form related to his August 4 bloodwork. On the grievance form the Complex employee stated that "the blood work drawn on 8/4/22 was for previous labs ordered on 5/24/22." The Complex employee then "[a]dvised [the Appellant] he could do an open records request to get his *results* or he can be scheduled with the provider to review the *results*" (emphasis added).

The Appellant's documentation only suggests that the Complex may possess a record containing his test results, not that it currently possesses the "backlog sheet" that ordered the bloodwork. Thus, the Appellant failed to make a *prima facie* case that the Complex possesses a record responsive to his request.

Furthermore, even if the Appellant had made a *prima facie* case that the requested record exists or should exist, the Complex sufficiently explains on appeal why it does not possess such a record. First, the Complex explains, the "backlog sheet" the Appellant requested is a temporary document "used as working notes" and is "generated by the medical records system from orders." Second, the Complex explains that the "backlog sheet" the Appellant requested "is not made part of an inmate's medical records and it does not exist with the inmate's name after the specimen is drawn." Once the specimen is drawn, the "backlog sheet" that the Appellant requested "no longer exists since it constantly changes with new orders and specimens being drawn." These are sufficient explanations why the requested record no longer exists. *See, e.g.*, 22-ORD-056 (where the Office found, in a dispute between these same parties about the Appellant's medical records, that the Complex adequately explained why certain medical records did not exist). Accordingly, the Complex did not violate the Act.

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

#403

Distributed to:

Carlos Thurman #112192
Amy V. Barker
Sara M. Pittman
Ann Smith