



COMMONWEALTH OF KENTUCKY  
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**22-ORD-256**

December 5, 2022

In re: Tami Bauer/Kentucky State Penitentiary

**Summary:** The Kentucky State Penitentiary (“the Penitentiary”) did not violate the Open Records Act (“the Act”) when it did not provide records that do not exist.

***Open Records Decision***

On September 19, 2022, Tami Bauer (“Appellant”) requested the Penitentiary provide the “messages” from an employee’s state-issued cell phone. In a timely response, the Penitentiary advised the Appellant it needed additional time to retrieve the requested records because the phone was “no longer issued to” the employee. The Penitentiary stated it would issue a final response by October 28, 2022. On October 20, 2022, the Penitentiary stated that the requested records did not exist, as it was unable to locate them after a “reasonable search.” This appeal followed.

Once a public agency states affirmatively that requested records do not exist, the burden shifts to the requester to present a *prima facie* case that requested records do or should exist in the agency’s possession. *See Bowling v. Lexington-Fayette Urban Cnty. Gov’t.*, 172 S.W.3d 333, 341 (Ky. 2005). Here, the Appellant has not attempted to present a *prima facie* case that the requested messages exist. Furthermore, on appeal, the Penitentiary asserts the cell phone in question has been assigned to another employee and there were no messages on the phone when the previous employee returned it. Accordingly, the Penitentiary did not violate the Act.

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/ James M. Herrick  
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Assistant Attorney General

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