



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-282**

December 29, 2022

In re: James Harrison/Eastern Kentucky Correctional Complex

**Summary:** The Eastern Kentucky Correctional Complex (the “Complex”) violated the Open Records Act (“the Act”) when it invoked KRS 61.872(5) to delay inspection of records without notifying the requester of the earliest date on which the records would be available. However, the Complex did not violate the Act when it denied requests for records that do not exist.

***Open Records Decision***

On November 4, 2022, inmate James Harrison (“Appellant”) submitted to the Complex a request to inspect records containing nine subparts related to various events that have occurred since his incarceration, such as disciplinary events and hearings at specific times, and correspondence exchanged between various individuals.<sup>1</sup> On November 8, 2022, the Complex invoked KRS 61.872(5) and stated it needed “additional time” because some of the records were located in other departments. On November 23, 2022, having received no further response from the Complex, the Appellant initiated this appeal.

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). A public agency may also delay access to responsive records if such records are “in active use, storage, or not otherwise available.” KRS 61.872(5). A

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<sup>1</sup> The Appellant’s request on November 4, 2022, combined three prior requests he made that were denied because he did not have sufficient funds for the copying fees. The Office has previously found that an agency does not violate the Act when it denies a request for copies of records where the inmate requester’s account contains insufficient funds to cover reproduction charges. *See, e.g.*, 08-ORD-096.

public agency invoking KRS 61.872(5) to delay access to responsive records must notify the requester of the earliest date on which the records will be available and provide a detailed explanation for the cause of the delay. *Id.* Here, the Complex's response stated it needed "additional time," which did not notify the Appellant of the "earliest date on which the public record will be available for inspection" as required under KRS 61.872(5). Accordingly, its initial response violated the Act.

After the appeal was initiated, the Complex provided the Appellant with 23 pages of responsive records.<sup>2</sup> The Complex also states it is denying three subparts of the request because no records responsive to those subparts exist.<sup>3</sup> 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 or should 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 states affirmatively that the records do not exist within its possession because it was unable to locate them after a reasonable search.<sup>4</sup> The Appellant did not attempt to make a *prima facie* case that the Complex does or should possess any records responsive to the requests it denied. As a result, the Complex is not "called upon to prove that its search was adequate." *Id.* Thus, the Complex did not violate the Act when it denied a request for records that do not exist within its possession.

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

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<sup>2</sup> Issues related to the records that have been made available to the Appellant are now moot. 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.")

<sup>3</sup> The three requests the Complex denied were: (1) Email sent via JPay on October 27, 2022; (2) Letters sent by the Appellant to a specific complex employee between September 19 and September 29, 2022; and (3) Letters sent by the Appellant to another Complex employee between October 17 and October 20, 2022, pertaining to a detention order.

<sup>4</sup> The Complex suggests the Appellant "may want to ensure the dates for records [he is] requesting are correct." The Complex also suggests that, if the dates are correct, the records possibly were "not created."

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:

James Harrison, #095435  
Jesse L. Robbins