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-283

December 29, 2022

In re: Carlos Harris/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 records that do not exist or when it denied a request to preserve video footage.

Open Records Decision

Inmate Carlos Harris ("Appellant") submitted to the Complex a request containing two subparts. Subpart one requested that the Complex "[p]reserve video footage" from November 5, 2022, when he "attended medical [*sic*] from legal library" and purportedly was seen by medical staff to provide a urine sample at a specific time. Subpart two sought "[c]onfirmation that [he] was seen in medical at the above date and times." In a timely response, the Complex denied his request because "there [is] nothing in [the Appellant's] chart on November 5, 2022." This appeal followed.

On appeal, the Complex again states affirmatively that it does not possess any records responsive to subpart two of his request. 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 Appellant does not make a *prima facie* case the requested records exist.[1] However, on appeal, the Complex admits the Appellant was "seen briefly by a security camera in a hallway with what appears to be a urine sample."[2] It is not clear from the record on appeal, however, whether the Appellant was seen providing the sample for medical or disciplinary purposes, and if for the latter, whether the giving of a urine sample must be documented in the Appellant's medical file.

However, even if the Appellant had made a *prima facie* case that records responsive to his request should exist, the Complex has sufficiently explained that its search was adequate. Specifically, the Complex claims that its Medical Records Custodian searched the Appellant's medical records and "no records were found where he visited medical staff on November 5, 2022." Thus, the Complex did not violate the Act when it denied a request for records that do not exist within its possession.

Regarding the Appellant's request that the Complex "preserve" the video depicting him with the sample, the Complex argues its denial was proper because the request sought not to inspect the video but to preserve it. This Office has routinely found the Act does not require public agencies to comply with a request to preserve records indefinitely. *See, e.g.,* 20-ORD-067; 17-ORD-064; 15-ORD-121. Accordingly, the Complex did not violate the Act when it denied a request to preserve a record.[3]

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.

---

1 The Appellant did not attempt to make a *prima facie* case that the records do or should exist but stated the search for records "was performed by the inappropriate staff, because medical records custodian does not have access to the video records that [he] requested" and "[a]ll medical records custodian can perform is a search of files, which [he] did not request any records from his medical files."

2 Regardless of whether a record exists in the Appellant's medical file, the Appellant asked for "confirmation" that he was seen in the medical unit on the specific date with a urine sample. The Complex's admission on appeal that the Appellant appears on video at the requested time should serve as the "confirmation" the Appellant seeks.

3 Because this Office finds subpart one of the Appellant's request was not a request to inspect a public record, it is unnecessary to determine the Complex's alternative claim that the security footage is exempt under KRS 197.025(1). *But see, e.g.*, 19-ORD-040 (upholding a correctional facility's denial of security video under KRS 197.025(1)); 18-ORD-169 (same).

Daniel Cameron
Attorney General

s/ Matthew Ray
Matthew Ray
Assistant Attorney General

#465

Distributed to:

Carlos Harris, #143261
Peter W. Dooley