



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

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23-ORD-021

January 31, 2023

In re: Jeff Carpenter/Luther Luckett Correctional Complex

Summary: The Luther Luckett Correctional Complex (“the Complex”) did not violate the Open Records Act (“the Act”) when it did not provide records that do not exist within its possession.

Open Records Decision

Jeff Carpenter (“Appellant”) made a request to the Complex to inspect records related to him being moved to a new dormitory, or documenting “accusations made against” him. In a timely response, the Complex denied the request because no responsive records exist. This appeal followed.

On appeal, the Complex reaffirms that no responsive records exist. 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 has not established a *prima facie* case that responsive records exist. Rather, he merely asserts that “[a]ll moves are generated by administration and memos sent [sic] to the dorms to move inmates.” Even if the Appellant’s mere assertion were sufficient to establish a *prima facie* case that the requested record should exist, the Complex explained in its original response that the record “was not created.” Whether the Complex was required to create a record documenting the Appellant’s move is separate from whether the record was in fact created. If a record should exist but does not, an agency may be required to explain

why the record does not exist. *See Eplion v. Burchett*, 354 S.W.3d 598, 603 (Ky. App. 2011). The Complex explained in its original response that the requested record does not exist because it was never created. Therefore, the Office cannot find that the Complex violated the Act when it did not provide records that do not exist.

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.

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s/ Zachary M. Zimmerer
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Distributed to:

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