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23-ORD-030

February 8, 2023

In re: James Hightower/Northpoint Training Center

Summary: The Northpoint Training Center (“the Center”) 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

Inmate James Hightower (“Appellant”) submitted a request to the Center to inspect “authorization of transfer” forms from several dates. The Center provided transport orders from some but not all of the dates requested. This appeal followed.

On appeal, the Appellant alleges the Center failed to provide “both transfer form[s] from between January 1, 2018 to March 31, 2018” and a transfer form from November 1, 2021 to December 15, 2021. In response, the Center states it searched for responsive transport orders and provided all it could locate. The Center claims no transport orders from the remaining dates in question 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 merely asserts he was transferred to other correctional facilities on the dates in question. Whether the Appellant was actually transferred on those dates is a question of fact this Office cannot adjudicate. *See, e.g.*, 22-ORD-159 n.2. A requester’s mere assertion that records *should* exist does not establish a *prima facie* case that requested records *do*, in fact, exist. *See, e.g.*, 21-ORD-250; 21-

ORD-174. Therefore, the Center did not violate the Act when it did not provide records it does not possess.

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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