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23-ORD-041

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In re: Rusty Weddle/Luther Luckett Correctional Complex

Summary: The Luther Luckett Correctional Complex ("the Complex") violated the Open Records Act ("the Act") when it inadequately searched for records responsive to one part of a request. However, the Complex did not violate the Act when it denied a request for other requested records that do not exist. The Complex also did not violate the Act by withholding newly located records because of the requester's inability to pay for copies.

Open Records Decision

Inmate Rusty Weddle ("Appellant") submitted to the Complex a request for records containing two subparts. The first subpart requested "all emails to and from internal affairs" related to restrictions placed on his access to phone, JPay email, and canteen accounts. The second subpart requested "emails for the same above to and from the Warden" and two other employees. Also in subpart two, the Appellant requested "all emails and documents pertaining to" the same restrictions and his "requests for [an] attorney." In a timely response, the Complex denied subpart one, and the portion of subpart two seeking emails, because no responsive emails exist. However, the Complex neither granted nor denied the remaining portion of subpart two, which sought "documents pertaining to" his restrictions and his requests for an attorney. Instead, the Complex informed the Appellant that "per the memo" from an employee, his access to "the KIOSK app on the tablets" had been "suspended," which prevented money transfers. Because the Appellant's ability to transfer money was suspended, his access to his phone, JPay email, and canteen accounts were temporarily "halted or restricted." The Complex also did not provide records relating

to the Appellant's requests for attorneys, but informed him an employee had scheduled calls with two attorneys, and one call had not been scheduled. This appeal followed.

The Complex stated affirmatively in its response, and also on appeal, that no emails between internal affairs, the Warden, or the two other employees regarding the Appellant's restrictions 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).

In an attempt to make a *prima facie* case, the Appellant provides copies of grievances he has filed related to these restrictions. The Appellant also provides a copy of a notice rejecting his grievance because he was under disciplinary investigation. The Appellant argues that because his rejection notice specifically refers to a disciplinary investigation, the Complex must possess emails regarding his restrictions. However, this bare assertion that employees must have sent emails regarding the Appellant's restrictions does not constitute a *prima facie* case that the Complex possesses any responsive email records. Accordingly, the Complex did not violate the Act by denying the Appellant's request for emails that the Complex claims do not exist.[1]

Although the Appellant has not made a *prima facie* case that responsive emails exist, the documents he provides on appeal do support a *prima facie* case that other disciplinary records exist. Moreover, in its original response to the Appellant, the Complex made specific reference to a memo written by an employee about the Appellant's restrictions and explained its contents, but did not produce the memo or deny its inspection under any exception. On appeal, the Complex admits a disciplinary investigation regarding the Appellant is ongoing, and now claims responsive disciplinary records exist, but they are preliminary and exempt under KRS 61.878(1)(i) and (j). It is not clear whether the memo the Complex originally

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[1] To the extent the Appellant also argues that copies of his grievances should have been provided, any dispute regarding those records is moot because the Appellant now possesses them. *See* 40 KAR 1:030 § 6. Although neither the Appellant nor the Complex expressly states whether the Complex provided him with copies of these grievances, it is not clear how else the Appellant would have received them. He states only that he received them on January 18, the day after his request was denied.

referenced in its response is one of these preliminary disciplinary records. It is clear, however, that the Appellant has made a *prima facie* case disciplinary records existed at the time of his request and the Complex's search for them was inadequate. Moreover, the Complex also admits it has now located several emails with attorneys to schedule phone calls with the Appellant, which it is withholding for the reasons explained below. By failing to perform an adequate search for responsive records in the first instance, the Complex violated the Act.

Nevertheless, the disciplinary records retain their preliminary status until they are adopted as part of any final action the Complex takes. *See, e.g.*, 21-ORD-202. Thus, the Complex did not violate the Act by withholding these records. And the Complex continues to withhold the emails attempting to schedule phone calls between attorneys and the Appellant because he lacks the ability to pay for copies of these records. The Complex explains that the Appellant's monetary account is frozen as part of the disciplinary investigation regarding alleged improper use of that account. A public agency may demand prepayment of applicable copying fees before providing copies to the requester. KRS 61.872(3)(b). The Office has consistently found that a public agency is not required to provide free copies of records to an inmate requester. *See, e.g.,* 19-ORD-129; 18-ORD-119; 18-ORD-111; 15-ORD-006; 09-ORD-071. Accordingly, the Complex did not violate the Act when it denied inspection of records it subsequently located because of the Appellant's inability to pay the copying fee for such records.

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.

Daniel Cameron
Attorney General

s/ Matthew Ray
Matthew Ray
Assistant Attorney General

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Distributed to:

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