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23-ORD-049

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In re: Armstead Baylor/Eastern Kentucky Correctional Complex

Summary: The Eastern Kentucky Correctional Complex ("the Complex") violated the Open Records Act ("the Act") when it failed to inform a requesting inmate that certain records did not exist. However, the Complex did not violate the Act when it denied inspection of records that do not exist, records that do not contain a specific reference to the inmate, or records the disclosure of which would pose a security threat under KRS 197.025(1).

Open Records Decision

On January 23, 2023, inmate Armstead Baylor ("Appellant") requested to inspect "documents, witness's [*sic*] statements, staff currency reports, and phone logs with any security factors redacted[,] in the possession of [the Complex's] Internal Affairs office, that has [the Appellant's] name on it." He further specified his request included emails "from anyone to the [*sic*] Internal Affairs between" August 1, 2022, and January 23, 2023. In a timely response, the Complex denied the request because "the disclosure of documents, witness statements, staff currency reports, phone logs, and e-mails would constitute a threat to the security of inmates, the institution, institutional staff, or others and cannot be provided pursuant to KRS 197.025(1) and KRS 61.878(1)(l)."

Additionally, the Complex stated that "[t]he documents are exempt from disclosure pursuant to KRS 61.878(1)(h), [as] disclosure will constitute the premature release of information to be used in a prospective criminal action. Disclosure of documents would cause harm by revealing sources of information and techniques of investigations and notifying suspects of evidence that is collected. Premature release of information would further interfere with obtaining reliable information, interfere

with witness interviews and potentially taint witnesses, cause an inability to filter false information, and interfere with jury selection." This appeal followed.

On appeal, the Complex asserts its Internal Affairs office possesses no witness statements responsive to the Appellant's request.[1] Additionally, the Complex states the requested "staff currency reports" do not exist because the Complex does not create such documents.

When a public agency receives a request for inspection of public records, it must decide within five business days "whether to comply with the request" and notify the requester "of its decision." KRS 61.880(1). An agency response denying inspection of public records must "include a statement of the specific exception authorizing the withholding of the record and a brief explanation of how the exception applies to the record withheld." *Id.* The agency must "provide particular and detailed information," not merely a "limited and perfunctory response." *Edmondson v. Alig,* 926 S.W.2d 856, 858 (Ky. 1996). "The agency's explanation must be detailed enough to permit [a reviewing] court to assess its claim and the opposing party to challenge it." *Ky. New Era, Inc. v. City of Hopkinsville,* 415 S.W.3d 76, 81 (Ky. 2013). Thus, if the requested records do not exist, then the agency must affirmatively state that such records do not exist. *See, e.g.,* 22-ORD-038. By initially failing to advise the Appellant that the requested witness statements and staff currency reports did not exist, the Department violated the Act.

However, once a public agency states affirmatively that requested records do not exist, the burden shifts to the requester to present a *prima facie* case that requested records do or should exist. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov't.,* 172 S.W.3d 333, 341 (Ky. 2005). Here, the Appellant has not attempted to present a *prima facie* case that the requested witness statements or staff currency reports exist. Accordingly, the Complex did not violate the Act when it denied the Appellant's request for such records.

The Complex also states its Internal Affairs office possesses two photographs responsive to the Appellant's request, but they do not contain a specific reference to the Appellant. Under KRS 197.025(2), the Department of Corrections "shall not be required to comply with a request for any record from any inmate[,] unless the request is for a record which contains a specific reference to that individual." Accordingly, the Complex did not violate the Act when it denied access to those photographs.[2]

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[1] The Complex states on appeal that it will make the requested phone logs available to the Appellant after he pays the associated copying costs. Accordingly, the portion of this appeal relating to phone logs is now moot. *See* 40 KAR 1:030 § 6.

[2] Alternatively, because the Appellant's request is limited to records "that ha[ve his] name on" them, the Complex could have denied inspection of the photographs as nonresponsive to the request.

Finally, the Complex states it possesses an occurrence report and two emails to Internal Affairs that are responsive to the Appellant's request. The Complex asserts these records are exempt from disclosure under KRS 197.025(1), which is incorporated into the Act under KRS 61.878(1)(l). Under KRS 197.025(1), "no person shall have access to any records if the disclosure is deemed by the commissioner of the department or his designee to constitute a threat to the security of the inmate, any other inmate, correctional staff, the institution, or any other person." Here, the Complex explains that disclosure of the records would pose a security threat by potentially causing "discord between inmates," and because the records "contain information concerning other inmates" as well as the Appellant. Furthermore, the Complex states the records would reveal "sources of information and techniques of investigation."

This Office has historically deferred to the judgment of correctional facilities in determining whether the release of certain records would constitute a security threat under KRS 197.025(1), including records in which the requesting inmate is mentioned by name. *See, e.g.,* 22-ORD-195. In particular, this Office has upheld the denial of records that could cause discord between inmates or reveal investigative techniques. *See, e.g.,* 22-ORD-249; 16-ORD-247. Therefore, under the facts of this appeal, this Office defers to the judgment of the Complex to determine that the release of the occurrence report and e-mails would pose a security threat under KRS 197.025(1). Accordingly, the Complex did not violate the Act when it denied inspection of those records.[3]

In sum, the Complex violated the Act when it initially failed to inform the Appellant that certain records did not exist. However, the Complex did not otherwise violate the Act.

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.

[3] Because KRS 197.025(1) is dispositive of this issue, it is not necessary to address the Complex's arguments under KRS 61.878(1)(h) or KRS 17.150(2).

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