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23-ORD-063

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In re: Carlos Harris/Eastern Kentucky Correctional Complex

Summary: Because the requester has made a *prima facie* case that public records should exist, the Eastern Kentucky Correctional Complex ("Complex") violated the Open Records Act ("the Act") when it failed to explain the adequacy of its search for the records. The Complex did not violate the Act when it denied a request because of the requester's inability to pay for copies.

Open Records Decision

Inmate Carlos Harris ("Appellant") submitted a request to the Complex to inspect all "letters to and from" five named employees of the Complex and him "concerning treatments/injuries between" January 1, 2022, and February 6, 2023. The Complex denied his request because no responsive "letters exist in [the Appellant's] file." However, the Complex stated it possessed "49 pages of medical records" the Appellant could inspect in person, but he could not obtain copies because he lacked sufficient funds to pay the copying fee. This appeal followed.

On appeal, the Complex states that "some requested documents did not exist," but it does not specify which documents do not 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, to make a *prima facie* case the requested records exist, the Appellant provides copies of letters he either sent to or received from each individual named in his request during the specified time frame. Thus, the Appellant has presented sufficient evidence to suggest the requested letters should exist, because he already possesses copies of at least some of them. As such, the burden shifts to the Complex to explain the adequacy of its search, which it has failed to do.

An adequate search for records is one using methods reasonably designed to find responsive records. *See, e.g.*, 95-ORD-096. Reasonable search methods include reviewing the files pertaining to the general subject matter of the request, and the files of employees either specifically mentioned in the request or whose job duties are related to the subject matter of the request. *See, e.g.*, 19-ORD-198. To carry its burden that its search was adequate, an agency must, at a minimum, specifically describe the types of files or identify the employees' whose files were searched. *See id.* But here, the Complex states only that "some requested records did not exist." The Complex did not describe the files it searched or identify which employees' files it searched. Just as a requester cannot make a *prima facie* case that records do or should exist merely by asserting they do, an agency cannot meet its burden that its search was adequate merely by asserting it searched for the records. Therefore, the Complex violated the Act when it failed to explain the adequacy of its search.

Also on appeal, the Complex explains that it did not provide the "49 pages of medical records" because the Appellant had insufficient funds in his account to pay the copying fees associated with his request. Under KRS 61.874(3), a "public agency may prescribe a reasonable fee for making copies of nonexempt public records . . . which shall not exceed the actual cost of reproduction." *See also* KRS 61.872(3)(b) (if a requester seeks copies of records by mail, "the official custodian shall mail the copies upon receipt of all fees"). This Office has consistently found that a public agency is not required to provide free copies of records requested by an inmate. *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 a request because the Appellant lacked sufficient funds in his account.[1]

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 emailed to OAGAppeals@ky.gov.

[1] In its response to the Appellant's original request, the Complex informed him that he could submit a request to view the "49 pages of medical records" without having to pay the copying fee.

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s/ Zachary M. Zimmerer
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Distributed to:

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