



COMMONWEALTH OF KENTUCKY
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23-ORD-069

March 27, 2023

In re: Deon'tae Williams/Kentucky State Penitentiary

Summary: The Kentucky State Penitentiary (“the Penitentiary”) did not violate the Open Records Act (“the Act”) when it did not provide records that do not exist in its possession.

Open Records Decision

Inmate Deon'tae Williams (“Appellant”) submitted a request to the Penitentiary to inspect letters he sent to the warden and the warden’s responses related to two specified grievances and associated appeals. The Penitentiary stated that no responsive records exist. This appeal followed.¹

On appeal, the Penitentiary states, “the records 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 a copy of a previous request he submitted to the Penitentiary asking to inspect these letters, and the Penitentiary’s response to the request stating that responsive records existed but the request was denied because the Appellant lacked

¹ The Appellant also requested letters sent to three specified individuals on September 25, 2022. The Penitentiary provided all responsive records to this portion of the request. The Appellant objects only to the denial of his request for his letters and the warden’s responses related to the specified grievances.

sufficient funds to pay the copying fee. However, on appeal, the Penitentiary explains that it “mistakenly thought [the Appellant] was requesting copies of the grievances themselves” rather than the letters the Appellant sent to the warden regarding his appeal of those grievances. Moreover, the Penitentiary explains that it searched the offices of the warden and the grievance coordinators, but could not locate any letters from the Appellant related to the three grievances he identified. Thus, even if the Appellant had established a *prima facie* case that responsive records exist, the Penitentiary has explained the adequacy of its search. Therefore, the Penitentiary 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 emailed to OAGAppeals@ky.gov.

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s/ Zachary M. Zimmerer
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Distributed to:

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