



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

DANIEL CAMERON
ATTORNEY GENERAL

CAPITOL BUILDING, SUITE 118
700 CAPITAL AVENUE
FRANKFORT, KENTUCKY 40601
(502) 696-5300
FAX: (502) 564-2894

23-ORD-090

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In re: Leonel Martinez/Lee Adjustment Center

Summary: The Lee Adjustment Center (the “Center”) did not violate the Open Records Act (“the Act”) when it denied a request for a record that no longer existed within its possession at the time of the request.

Open Records Decision

Inmate Leonel Martinez (“Appellant”) submitted a request to the Center for a copy of its denial of his request to move to a different cell. In a timely response, the Center denied his request because the requested record was discarded after the Appellant was informed his request to move was denied. This appeal followed.

On appeal, the Center again states affirmatively that the requested record no longer exists. Specifically, the Center states that the requested record “was disposed of after his request for a different bed placement was denied.” 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 does not dispute that the requested record no longer exists, but rather, he complains that “legal documents were destroyed.” However, the Appellant does not cite to any authority, such as the Center’s record retention schedule, that would require the Center to retain and possess the record he requested.

Moreover, even if he had made a *prima facie* case the Center should still possess the record, and he has not, the Center adequately explained the record was destroyed and no longer exists. See *Eplion v. Burchett*, 354 S.W.3d 598, 603 (Ky. App. 2011) (“when it is determined that an agency’s records do not exist, the person requesting those records is entitled to a written explanation for their nonexistence”). Thus, the Center did not violate the Act when it denied a request for a record it no longer possesses.

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:

Leonel Martinez #216925
Kristy Hale
Daniel Akers
G. Edward Henry