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23-ORD-108

May 8, 2023

In re: Leslie Haun/Luther Luckett Correctional Complex

Summary: The Luther Luckett Correctional Complex ("the Complex") did not violate the Open Records Act ("the Act") when it provided records it deemed responsive to an open records request but did not provide a record that does not exist. However, the Complex violated the Act when it initially failed to state that the requested record did not exist.

Open Records Decision

On April 4, 2023, inmate Leslie Haun ("Appellant") requested a copy of "[a]ll treatment(s), follow up scheduling(s) and submitted sick call forms for" March 27, 2023, "with notes by provider for this date." In response, the Complex provided seven pages of medical records at the copying fee rate of 10 cents per page. This appeal followed.

The Appellant claims the Complex violated the Act by failing to provide a "submitted sick call form." On appeal, however, the Complex states that no such record exists. 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 a requested record does not exist, the agency must affirmatively state as much. *See,*

e.g., 22-ORD-038. By initially failing to advise the Appellant that the requested sick call form did not exist, the Complex violated the Act.

However, once a public agency states affirmatively that it does not possess a requested record, the burden shifts to the requester to present a *prima facie* case that the requested record does exist. *Bowling v. Lexington–Fayette Urb. Cnty. Gov't,* 172 S.W.3d 333, 341 (Ky. 2005). Here, the Appellant does not allege any facts to indicate a sick call form exists for the date in question. Furthermore, as the Complex explains on appeal, the Appellant "presented for a sick call on March 20, 2023," and at that time "was referred to see a medical provider" on March 27, 2023. According to the Complex, a sick call form "is not generated for provider encounters" in these circumstances. Thus, the Complex has explained why no sick call form exists for the date in question. Therefore, the Complex did not violate the Act by failing to provide such a record.

The Appellant additionally claims the Complex improperly charged him for four pages of "redundant and unrequested" records. However, the Complex asserts all pages provided were "related to the encounter specified in the request" and therefore were "appropriately provided to" the Appellant. Because all of the records relate to the Appellant's medical treatment on the specified date, a reasonable person could conclude they were responsive to the request. *See* 21-ORD-152. Accordingly, the Complex did not violate the Act when it assessed the Appellant a fee of 10 cents per page for those records.

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/ James M. Herrick
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