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23-ORD-144

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In re: Carlos Thurman/Green River Correctional Complex

Summary: The Green River Correctional Complex (the “Complex”) did not violate the Open Records Act (“the Act”) when it denied a request to inspect records that do not exist.

Open Records Decision

Inmate Carlos Thurman (“Appellant”) submitted a request to the Complex that contained two subparts. First, he asked to inspect “any and all photographs” that were taken of the Appellant by a Complex employee on a specific date. Second, he requested all documents related to the picture that contained his name. In a timely response, the Complex denied the request under KRS 61.872(2) because the request was “vague as it can’t be determined if the request is in regards to a disciplinary report and/or an incidence report.” The Complex explained that the request is an “any and all” type request, and that those types of requests place “an unreasonable burden on” it “to produce often incalculable numbers of widely dispersed and ill-defined records.” This appeal followed.

On appeal, the Complex located a photograph responsive to subpart 1 of the request and allowed the Appellant to inspect it.¹ The Complex continues to deny the second subpart of the Appellant’s request, only now it claims it does not possess any records responsive to that subpart. Once a public agency states affirmatively that it does not possess any responsive records, the burden shifts to the requester to present

¹ Therefore, the part of this appeal dealing with subpart 1 is now moot. See 40 KAR 1:030 § 6 (“If the requested documents are made available to the complaining party after a complaint is made, the Attorney General shall decline to issue a decision in the matter.”)

a *prima facie* case that the requested records do exist in the agency's custody or control. See *Bowling v. Lexington–Fayette Urb. Cnty. Gov't*, 172 S.W.3d 333, 341 (Ky. 2005). The Appellant has not attempted to make such a *prima facie* case here.

However, even if he had made a *prima facie* case that a photograph containing his name should exist the Complex explains on appeal that the photograph was taken “to provide documentation for the Substance Abuse Program . . . Administrator.” The documentation was needed because inmates in that program were associating with General Population inmates, which is against the rules of the program. The Appellant is a General Population inmate and is not in the program. Thus, the Complex explains, the Appellant “is not the subject or focus of the photograph” and there are no related documents that reference him in any way. Accordingly, the Complex did not violate the Act when it denied a request to inspect records that do not exist.

A party aggrieved by this decision may appeal it by initiating an 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.

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s/ Matthew Ray
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Distributed to:

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