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23-ORD-183

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In re: Hal Cobb/Luther Luckett Correctional Complex

Summary: The Luther Luckett Correctional Complex ("the Complex") violated the Open Records Act ("the Act") when it denied a request for records without stating affirmatively whether the requested records never existed or whether they once existed but were destroyed.

Open Records Decision

Inmate, Hal Cobb ("Appellant") submitted a request to the Complex to inspect "certificates and diplomas for all rehabilitation programs dating back to January 1995."[1] The Complex provided some responsive records, but stated, "Older documents from the mid to late [*sic*] 1990s that were not present in [the Appellant's] hard file when it was converted over to electronic does [*sic*] not exist and cannot be provided." This appeal followed.

The Appellant argues the Complex should have provided responsive records from 1995 to 2005, and that he and other inmates were assured all "program and educational certifications [were] documented with hard copies in" each inmate's respective file. The Complex, however, merely reiterates its original response that, if the records were not in the Appellant's physical file, they would not have been digitized.

[1] In the same request, the Appellant also asked if the Complex still possessed copies of his birth certificate and social security card. He also provides the Office with two additional requests he sent to the Complex and its responses to those requests. However, the Appellant does not refer to any of those other requests in his letter alleging how he believes the Complex violated the Act, and therefore, does not appear to be appealing the Complex's response to those requests.

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). Here, the Complex has not stated affirmatively that the requested records do not exist. Rather, the Complex states only that, if the record had existed, it would have been digitized. The Complex does not explain what happened to the inmates' physical files after they were digitized, whether the physical records were destroyed, were archived, or are still available at the Complex.

The Complex does not dispute the Appellant's assertion that he attended rehabilitation programs between 1995 and 2005, for which he received certificates of completion. The Complex also does not dispute the Appellant's assertion that he was assured by the Complex that his completion of the rehabilitation programs was documented in his physical file. Rather, the Complex states only that the record would have been digitized if it had existed. Either the record never existed, or it existed at one time and has since been destroyed. If the latter, then the Appellant is entitled to a written explanation that the record was destroyed. *Eplion v. Burchett*, 354 S.W.3d 598, 603 (Ky. App. 2011). But here, the Complex's non-answer casts doubt on whether the record *never* existed or whether it *no longer* exists. The Complex's equivocation is not the kind of affirmative statement agencies are required to make when they claim records do not exist. Accordingly, the Complex violated the Act.

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.

Daniel Cameron
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s/ Zachary M. Zimmerer
Zachary M. Zimmerer
Assistant Attorney General

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Distributed to:

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