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23-ORD-319

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In re: Glenn D. Odom/Kentucky State Penitentiary

Summary: The Office cannot find that the Kentucky State Penitentiary (“the Penitentiary”) violated the Open Records Act (“the Act”) because it cannot resolve the factual dispute between the parties about whether the requester received the agency’s responses to his requests or whether the requested records exist.

Open Records Decision

Over a two-week period, Inmate Glenn D. Odom (“Appellant”) submitted multiple requests to the Penitentiary seeking the same records. He then initiated two appeals to this Office, claiming the Penitentiary failed to respond to some of his requests and improperly denied others. Because the parties involved are identical and the issues presented are similar, the Office has consolidated these appeals.

As an initial matter, it is not clear from this record whether the Appellant has provided all necessary documentation to perfect his appeals because he has submitted so many duplicate requests for the same records to the Penitentiary. He then compounded the complications by submitting multiple appeals to the Office. To invoke the Office’s review of an agency’s alleged violation of the Act, the requester must provide a copy of his request and the agency’s denial of *that* request. *See* KRS 61.880(2)(a). Or, if the requester claims an agency failed to respond to his request, he need only provide a copy of the request and a statement that the agency failed to respond to *that* request. *Id.* But here, it is not clear if the Appellant has provided the Penitentiary’s responses that correspond with the requests he claims to have submitted. Assuming he has provided the necessary documents to invoke the

Office's jurisdiction, the Office is nevertheless unable to conclude that the Penitentiary violated the Act.

The Appellant claims he submitted his first requests on October 20, 2023.¹ However, of the two requests he provides, one is dated October 10 and the other is dated October 20, 2023. In his October 10 request, the Appellant sought all emails, letters, or memoranda the Penitentiary sent to the Kentucky Correctional Psychiatric Center ("KCPC") regarding his "being sent for an evaluation [and] informing" KCPC about "what [the Appellant's] past behaviors have been [sic]." In a timely response, the Penitentiary denied the request because the Appellant had not provided a form required to authorize the deduction of copying fees from his account.²

The Appellant allegedly resubmitted his request on October 20, 2023, again seeking the same types of correspondence "sent to" KCPC before his evaluation, which suggested he "will be dangerous [and] violent." The Appellant also added a second subpart to his renewed request, seeking a copy of his "six-month account statement." He provides on appeal a response from the Penitentiary, dated October 26, 2023, that acknowledges receipt of his request for correspondence sent to KCPC. However, that response refers to a request dated October 23, not October 20. It also stated the Appellant had sought correspondence sent to KCPC "informing them on what [his] behavior may be—past behavior," not correspondence that suggested he "will be dangerous [and] violent." Ultimately, the Penitentiary stated no responsive records existed. The response also makes no mention of the Appellant's request for his six-month statement. He therefore claims the Penitentiary violated the Act because responsive correspondence to KCPC should exist and because the Penitentiary did not respond to his request for his "six-month account statement." Finally, the Appellant claims the Penitentiary did not respond at all to a request he allegedly

¹ This aspect of the Appellant's dispute with the Penitentiary is his second appeal, Log#2023000503. However, because his second appeal involves requests he submitted earlier than the request at issue in his first appeal, the Office will instead address each request in chronological order rather than addressing the Appellant's appeals in the order he submitted them.

² Although the Appellant appears to complain that he did provide the requested form, he has not expressly stated on appeal that he is challenging the Penitentiary's denial of his October 10 request for failure to execute the authorization form. Rather, he claims to have resubmitted the request on October 20 with a copy of the required authorization form. To the extent he complains he should not be required to complete such a form, the Office has held that correctional facilities may deny an inmate's request for failure to execute the authorization form permitting deductions from his account to pay copying fees. *See, e.g.*, 23-ORD-045; 21-ORD-015.

submitted on October 23, 2023, which again asked for both the correspondence to KCPC and his account statement.³

On appeal, the Penitentiary claims it received neither of the Appellant's October 20 or October 23 requests seeking both the correspondence to KCPC and his account statement. Rather, it provides two separate requests it received from the Appellant on October 23, 2023, one seeking the correspondence to KCPC and the other seeking the account statement. It further provides proof that it responded to each of those requests separately. With respect to the correspondence to KCPC, the Penitentiary issued a response on October 26 stating no responsive records existed.⁴ Responding to the separate request for the account statement, the Penitentiary provided the responsive record.⁵

As the foregoing discussion demonstrates, the factual dispute about whether the Penitentiary received each of the Appellant's requests, or whether the Appellant received each of the Penitentiary's responses, is complicated. And the Office is unable to resolve factual disputes such as these. *See, e.g.*, 23-ORD-220. As such, the Office cannot find that the Penitentiary failed to respond to the Appellant's multiple requests because the Office cannot resolve the factual dispute between the parties as to whether the Penitentiary received all of the Appellant's requests or if the Appellant received all of the Penitentiary's responses to the requests it did receive.

Finally, to the extent the Appellant claims the Penitentiary has violated the Act by not providing him with the requested correspondence to KCPC, the Office finds no violation. The Penitentiary informed the Appellant multiple times that the requested correspondence does not exist. On appeal, the Penitentiary states the only correspondence to KCPC regarding the Appellant's evaluation involved the logistics of transferring him to that institution, not his alleged behavioral issues. As such, the

³ This aspect of the Appellant's dispute with the Penitentiary, that it allegedly did not respond to his October 23 request, was the Appellant's first appeal submitted on October 31, 2023. Log#202300499.

⁴ Indeed, this appears to be the same response the Appellant claimed corresponded to his October 20 request that sought both categories of records, which he faulted the Penitentiary for not responding to the portion of his request seeking his account statement.

⁵ The Office notes, however, that the Penitentiary invoked KRS 61.872(5) to delay access to this record until November 3, or beyond the five-day period established under KRS 61.880(1), because it had "received several time-consuming open records request[s] that were received prior" to the Appellant's. KRS 61.872(5) only permits an agency to delay access to records if the records that have been requested are "in active use, storage, or are not otherwise available." An agency cannot invoke KRS 61.872(5) because it has been inundated with other requests. *See, e.g.*, 22-ORD-167. But here, the Appellant has not claimed on appeal that the Penitentiary improperly invoked KRS 61.872(5).

Penitentiary claims those records are not responsive to the Appellant's request for correspondence regarding his behavioral issues.

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 makes 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, however, the Appellant has not made a *prima facie* case that the Penitentiary should possess correspondence from its staff telling KCPC about the Appellant's behavioral issues. Rather, he merely asserts such records must exist because KCPC staff allegedly told him they had received a communication stating he was dangerous and declined to perform his evaluation. A requester's bare assertion that a record must exist is not sufficient to establish a *prima facie* case that it does. See, e.g., 23-ORD-207; 22-ORD-040; 19-ORD-171. Accordingly, the Office cannot find that the Penitentiary violated the Act when it denied a request for 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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