



COMMONWEALTH OF KENTUCKY
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23-ORD-322

December 5, 2023

In re: William Aucott/Northpoint Training Center

Summary: The Northpoint Training Center (“the Center”) did not violate the Open Records Act (“the Act”) when it did not provide records that do not exist.

Open Records Decision

On October 11, 2023, inmate William Aucott (“Appellant”) submitted a request to the Center seeking “all documentation” related to a Prison Rape Elimination Act (“PREA”) investigation he states took place in 2019 “that determines [whether his] abuse was substantiated, unsubstantiated, or unfounded.” Having received no response by October 31, 2023, the Appellant initiated this appeal.

Under KRS 61.880(1), upon receiving a request for records under the Act, a public agency “shall determine within five (5) [business] days . . . after the receipt of any such request whether to comply with the request and shall notify in writing the person making the request, within the five (5) day period, of its decision.” However, this Office has consistently found it is unable to resolve factual disputes between a requester and a public agency, such as whether a requester received an agency’s response to a request. *See* 21-ORD-233 (agency claimed it issued a response but the requester claimed he did not receive it); *see also* 22-ORD-125 (agency claimed it did not receive the request).

Here, the Center states it received the request on October 17, 2023. It further provides a copy of the response it claims to have mailed to the Appellant on October 20, 2023, which was the third business day after the Center received the request. Accordingly, the Office cannot resolve the factual dispute between the parties about

whether the Center issued the response or whether the Appellant received it, and therefore, cannot find that the Center's response was untimely in violation of the Act.¹

In its response, the Center also notified the Appellant that a "PREA investigation was not performed, so no document making a determination of substantiated, unsubstantiated, or unfounded was created." 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, the Appellant has not made a *prima facie* case that the Center possesses these records. Therefore, the Center did not violate the Act when it did not provide them.

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
Attorney General

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

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Distributed to:

¹ On appeal, the Center states the Appellant's appeal is unperfected because he did not include the response the Center claims it sent. "If the public agency refuses to provide a written response, a complaining party shall provide a copy of the written request." KRS 61.880(2)(a). The Appellant claims he did not receive a response from the Center. Thus, for the same reasons the Office cannot find the Center's response was untimely, the Office cannot find that the Appellant's appeal was unperfected.

William Aucott #132419

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