



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

RUSSELL COLEMAN
ATTORNEY GENERAL

1024 CAPITAL CENTER DRIVE
SUITE 200
FRANKFORT, KY 40601
(502) 696-5300

24-ORD-027

February 6, 2024

In re: Reginald Grider Jr./ Kentucky State Penitentiary

Summary: The Office cannot find that the Kentucky State Penitentiary (“the Penitentiary”) violated the Open Records Act (“the Act”) when it denied a request for records that do not exist. However, the Penitentiary violated the Act when it denied a request for audio recordings without citing an applicable exception.

Open Records Decision

Inmate Reginald Grider Jr. (“Appellant”) submitted a request to the Penitentiary for copies of disciplinary reports and “appeals to the warden” for “all disciplinary violations that are STG related that [sic] status has been finalized” and copies of “each audio adjustment proceeding.” In a timely response, the Penitentiary denied his request for disciplinary reports from November 30, 2022, to the present because it had already provided him with those records in response to an earlier request. The Penitentiary also denied the Appellant’s request for the audio recording of disciplinary report “KSP-2023-0001330” because it “still has not been retrieved from the recorder it is on as it is still being worked on by the IT” Department. Finally, the Penitentiary denied the Appellant’s request for appeals “to the warden” because no responsive records exist. This appeal followed.

On appeal, the Appellant admits he has received the disciplinary reports from November 30, 2022, to the present, but claims he did not limit his request to that period. He states he asked for all such reports related to “STG,”¹ but not all of the reports have been provided. He also challenges the Penitentiary’s denial of the audio recordings and his “appeals.” However, he admits he submitted his appeals to “the Central Office,” not the warden. In response, the Penitentiary claims to have provided all responsive disciplinary reports and notes the Appellant now admits he did not submit any “appeals” to the warden. The Penitentiary further states the audio “recordings” will be made available to the Appellant “within two weeks” because it is

¹ It is not clear from this record what the acronym “STG” means.

currently “transferring [the] data.” The Penitentiary originally denied the request for audio recordings because the audio had been “compromised” and the Penitentiary’s IT staff were working to resolve the issue.

Once a public agency states affirmatively that it does not possess responsive records, the burden shifts to the requester to present a *prima facie* case that the requested records do or should exist. See *Bowling v. Lexington–Fayette Urb. Cnty. Gov’t*, 172 S.W.3d 333, 341 (Ky. 2005). If the requester establishes a *prima facie* case that records do or should exist, “then the agency may also be called upon to prove that its search was adequate.” *City of Ft. Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 848 n.3 (Ky. 2013) (citing *Bowling*, 172 S.W.3d at 341). Similarly, once a public agency claims to have provided all responsive records, the burden shifts to the requester to make a *prima facie* case that additional records exist because, in essence, the agency has stated no additional records exist. The Office, however, is unable to resolve factual disputes between the parties about whether all responsive records have been provided. See, e.g., 23-ORD-317; 19-ORD-083; 94-ORD-121. In other words, in appeals involving claims that responsive records exist but have not been provided, the Office can only decide whether an agency’s search was adequate. However, the Office will only make such a determination after the requester has made a *prima facie* case that the agency’s search was inadequate because a statute, regulation, or other factual evidence supports the potential existence of responsive records that have not been provided.

Here, the Appellant admits he did not submit an “appeal” to the warden. Although he now claims that he seeks appeals he submitted to “the Central Office,” he did not request those records originally. Moreover, the Appellant merely asserts that additional disciplinary reports related to “STG” exist and have not been provided. A requester’s mere assertion that records should exist does not establish a *prima facie* case that they do. Accordingly, the Office cannot find that the Penitentiary violated the Act when it provided all responsive disciplinary reports and denied a request for “appeals to the warden” that do not exist.

However, the Penitentiary’s response denying access to the audio recordings violated the Act. Under KRS 61.880(1), if a public agency denies a request for records that *do* exist then it must cite an exemption in support of its denial and explain how the exemption applies to the record withheld. Here, the Penitentiary denied the Appellant’s request without citing an exemption or explaining how it applied. Rather, by the Penitentiary’s own admission, the audio recordings were not available at the time of the request because its audio equipment was malfunctioning. Thus, the Penitentiary could have invoked KRS 61.872(5) because the records were “not otherwise available.” Under KRS 61.872(5), if requested records cannot be provided within the five-day period because they are “not otherwise available,” the agency must notify the requester of the earliest date on which the records will be available

and provide a detailed explanation for the cause of delay. But here, the Penitentiary did not notify the Appellant of the earliest date on which the audio recordings would be available, denying his request outright without citing any exemption to the Act.

Further, on appeal, the Penitentiary refers to audio “recordings,” *i.e.*, plural, and the Appellant asked for *all* audio recordings of all his proceedings. However, the Penitentiary’s response to the request addressed only a single audio recording—referred to as “KSP-2023-0001330.” Thus, it appears the Penitentiary’s denial did not fully address the Appellant’s request for all audio recordings of all his proceedings or explain that multiple audio recordings were malfunctioning. An agency’s response cannot ignore portions of request. *See, e.g.*, 21-ORD-090. Accordingly, the Penitentiary’s response violated the Act when it failed to address the Appellant’s request for all audio recordings and denied his access to one such recording without citing an exemption.

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

Russell Coleman
Attorney General

/s/ Marc Manley
Marc Manley
Assistant Attorney General

#15

Distributed to:

Reginald Grider, Jr. #253921
Ed Baylous
Amy Barker
Ann Smith
Stephanie DeFrancesco