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24-ORD-090

April 3, 2024

In re: Carlos Harris/Eastern Kentucky Correctional Complex

Summary: The Eastern Kentucky Correctional Complex (“Complex”) did not violate the Open Records Act (“the Act”) when it did not provide records that do not exist. The Office cannot resolve the factual dispute between the parties regarding when the Complex responded to the request.

Open Records Decision

On February 26, 2024, inmate Carlos Harris (“Appellant”) submitted a request to the Complex for copies of “communication[s]” between two specified Complex employees and a surgeon regarding the decision to cancel his surgery. In a memorandum dated March 1, 2024, the Complex stated that “no record responsive to your request was found in your KYDOC electronic medical record.” However, the Appellant did not receive the Complex’s denial until March 5, 2024. He then initiated this appeal, claiming the Complex’s response was untimely and that responsive records must exist.

Upon receiving a request to inspect records, a public agency must decide within five business days whether to grant the request or deny the request and explain why. KRS 61.880(1). Here, the Appellant claims he submitted a request to the Department on February 26, 2024, but did not receive the Complex’s response until March 5, 2024. On appeal, the Complex states that it responded to the request on March 1, 2024, the fourth business day after it received the request. However, it is unclear from this record when the Complex actually issued its response. While its memorandum explaining why the request was denied is dated March 1, the Complex’s record custodian signed the Appellant’s request form on March 5, stating, “see enclosed memo.” Thus, it appears the Complex did not send its memorandum of denial until March 5. Ultimately, whether the Complex issued its denial on March 1 or March 5

is a factual dispute the Office cannot resolve. *See, e.g.*, 23-ORD-319 (factual dispute as to whether the requester received the agency’s response). Accordingly, the Office cannot find the Complex violated the Act because the Office cannot resolve the factual dispute between the parties as to the date the Complex responded to the Appellant’s request.

On appeal, the Complex maintains that, if the requested communications existed, they would be located in the Appellant’s medical file. But the Complex has searched the Appellant’s medical file twice, first in response to his request and again in response to this appeal, and confirms that the requested “communications” cannot be found in the Appellant’s medical file. 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 Complex possesses “communications” between the identified surgeon and two Complex employees. Therefore, the Complex 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.

Russell Coleman
Attorney General

/s/ Zachary M. Zimmerer
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Assistant Attorney General

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Distributed to:

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