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25-ORD-147

June 4, 2025

In re: Karim Zein/Kentucky State Penitentiary

Summary: The Kentucky State Penitentiary (“the Penitentiary”) violated the Open Records Act (“the Act”) when it failed to carry its burden that an inmate’s duplicative request for a record was unreasonably burdensome or intended to disrupt the Penitentiary’s essential functions. The Penitentiary did not violate the Act when it did not provide records it does not possess or when it denied a request for records that, if released, could pose a security threat to the safety of a correctional facility.

Open Records Decision

On April 15, 2025, inmate Karim Zein (“Appellant”) submitted a three-part request to the Penitentiary seeking (1) records documenting “actions taken by” the Penitentiary on December 31, 2024, involving a particular Penitentiary employee, (2) records containing Penitentiary “banned officers” with the same Penitentiary employee’s name, and (3) video footage or still images taken on December 31, 2024. In response, the Penitentiary denied the first part of the request because it had provided the requested records to the Appellant in response to a previous request. It denied the second part of the request under KRS 197.025(2) because responsive records would not specifically reference the Appellant, and it denied the third part of the request because release of the requested video footage or images would constitute a security risk by revealing “the areas of observation and blind spots for the cameras.” This appeal followed.

On appeal, the Penitentiary cites a line of the Office’s decisions dating to 1995, asserting it properly denied the Appellant’s request because it was identical to a prior request. Before turning to the Office’s prior decisions, however, it is first necessary to review the actual text of the Act, which controls over those decisions. The concept

that an agency may deny duplicative requests is rooted in KRS 61.872(6), which states:

If the application places an unreasonable burden in producing public records or if the custodian has reason to believe that repeated requests are intended to disrupt other essential functions of the public agency, the official custodian may refuse to permit inspection of the public records or mail copies thereof. However, refusal under this section shall be sustained by clear and convincing evidence.

The “clear and convincing” evidentiary standard is a high bar, but not an insurmountable one. It does not require “uncontradicted proof,” but rather, “proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinarily prudent-minded people.” *Commonwealth, Cabinet for Health & Family Servs. v. T.N.H.*, 302 S.W.3d 658, 663 (Ky. 2010).

The theory that an agency may properly deny a second request for records that is identical to a previous one originated in 95-ORD-047. There, the Office held that “[c]ommon sense dictates . . . that repeated requests for the same records may become unreasonably burdensome or disrupt the agency’s essential functions.” In reaching this conclusion, the Office cited OAG 92-91, which had involved multiple requests for several of the same documents over time. Noticeably, the Office concluded in the 1992 case that the requester did not intend to disrupt the essential functions of the agency. *Id.* at 5. Nevertheless, due to the volume of the requested records and the appellant’s repeated requests for them, the Office concluded that the duplicative requests placed an unreasonable burden on the agency. *Id.* at 6. In so holding, the Office concluded, “To produce these records once entails some inconvenience to the agency; to produce them three and four times requires a level of ‘patience and long-suffering’ that the legislature could not have intended.” *Id.* (emphasis added).

Although OAG 92-91 found “three and four” duplicative requests to be unreasonably burdensome, in part due to the volume of records, the Office created a new rule in 95-ORD-047 allowing an agency to deny a second request, solely for the reason that it was the second time the same records were requested. In 23-ORD-180, the Office addressed the “questionable” statutory basis of this rule. There, the Office noted that, while common sense may indeed dictate that three or four requests for the same records may look like the requester intends to disrupt the operations of an agency, without more, it is not “clear and convincing” proof that a second request necessarily reflects the same malicious intent.

Further, in 95-ORD-047, the Office added a qualifier to its new rule—that an agency must nevertheless comply with a second request for the same records if there was some “necessity” for doing so, “such as loss or destruction of the records.” That qualifier is unusual, because the courts and the Office have held in other contexts that the reason for requesting records is irrelevant. *See, e.g., Zink v. Commonwealth, Dep’t of Workers’ Claims*, 902 S.W.2d 825, 828 (Ky. App. 1994); *see also* 10-ORD-229 (holding that “all open records requesters stand in the same shoes”). Regardless, the question is not whether the Penitentiary properly relied on the Office’s decisions. The question is whether the Penitentiary properly denied the Appellant’s second request as duplicative under one of the Act’s exemptions, here, KRS 61.872(6). That requires the Penitentiary to prove by clear and convincing evidence that the Appellant intended to disrupt its essential functions by making repeated requests, or whether the request on its face is unreasonably burdensome.

In 23-ORD-180, the Office declined to overrule its line of decisions on which the Penitentiary now relies because the public agency there violated not only KRS 61.872(6), but also the Office’s extra-textual rule interpreting it.¹ The Office does the same here because the Penitentiary similarly has violated the rule articulated in 95-ORD-047. The Appellant explains he has specifically sought records he has previously obtained because he is currently “housed in isolation” and “always keeps extra copies” of documentation “for litigation purposes.” Although bare, the Appellant has sufficiently articulated the “necessity” of his request. Moreover, it is not clear how producing the responsive record is unreasonably burdensome, even if it must be produced a second time, given that the Appellant may be charged the actual cost for reproducing the record.² *See* KRS 61.874(3). Because there was a “necessity” for the Appellant’s second request, *i.e.*, ensuring he had sufficient copies of litigation records while “housed in isolation,” the Penitentiary failed to carry its burden of showing by clear and convincing evidence that the second request was either unreasonably burdensome or intended to disrupt its essential functions under KRS 61.872(6). Accordingly, it violated the Act.

Regarding the second part of the Appellant’s request, the Penitentiary explains that it does not possess any records containing the requested information. Once a

¹ Specifically, the appellant had explained the “necessity” for his second request.

² Indeed, the Penitentiary, on appeal, provided the Office with the responsive record as proof that it had previously provided the record to the Appellant. The Penitentiary has not explained why mailing that same record to the Appellant, which still had exempt information redacted, would be unreasonably burdensome.

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 is able to make 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 Penitentiary possesses any lists of “banned officers” that include the employee he identified. Thus, the Penitentiary did not violate the Act when it did not provide records it does not possess.

Finally, the Penitentiary maintains that disclosure of the requested video footage and still images presents a security threat to it. Under KRS 197.025(1), which is incorporated into the Act by KRS 61.878(1)(l), “no person shall have access to any records if the disclosure is deemed by the commissioner of the department or his designee to constitute a threat to the security of the inmate, any other inmate, correctional staff, the institution, or any other person.” The Office has historically deferred to the judgment of correctional facilities in determining whether the release of certain records would constitute a security threat under KRS 197.025(1). In particular, the Office has consistently upheld the denial of security camera footage inside a detention center. See, e.g., 24-ORD-154; 21-ORD-197; 18-ORD-074; 13-ORD-022; 10-ORD-055. The main security risk in connection with surveillance footage is that the footage would reveal “methods or practices used to obtain the video, the areas of observation and blind spots for the cameras.” See, e.g., 22-ORD-038; 17-ORD-211; 15-ORD-121; 13-ORD-022. Because the still images in question are taken from the Penitentiary’s security cameras, they pose the same security risk as the surveillance video footage. Accordingly, the Penitentiary did not violate the Act when it denied access to the requested video footage and images.

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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Attorney General

/s/ Zachary M. Zimmerer
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Distributed to:

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