



COMMONWEALTH OF KENTUCKY OFFICE OF THE ATTORNEY GENERAL

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25-ORD-380

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In re: Joshua Welch/Kentucky State Penitentiary

Summary: The Kentucky State Penitentiary (“the Penitentiary”) did not violate the Open Records Act (“the Act”) when it did not provide records that do not exist.

Open Records Decision

Inmate Joshua Welch (“the Appellant”) requested copies of his “Resident Record Cards in consecutive order [showing] how they appeared each month from March 2021 [through] August 2024,” and showing “date changes per addition or deduction each month.”¹ In a timely response, the Penitentiary explained that “[t]he resident record card is an ever-changing document,” and as time is added or deducted, “it changes to reflect the changes made.” Therefore, the Penitentiary stated “there are no records of [the Appellant’s] resident record card for the time frame” he requested. This appeal followed.

Once a public agency states affirmatively that no responsive records exist, the burden shifts to the requester to make a *prima facie* case that the records do exist. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov’t*, 172 S.W.3d 333, 341 (Ky. 2005). A requester must provide some evidence to make a *prima facie* case that requested records exist, such as the existence of a statute or regulation requiring the creation of the requested record, or other factual support for the existence of the records. *See, e.g.*, 21-ORD-177; 11-ORD-074. A requester’s bare assertion that certain records should exist is insufficient to make a *prima facie* case that the records actually do exist. *See, e.g.*, 22-ORD-040.

Here, the Appellant claims the record he requested “has previously (and still does) exist in the computer.” However, the Penitentiary states “that if a copy of an inmate’s Resident Record Card is not saved and scanned into his inmate file in the Kentucky Offender Management System (‘KOMS’), the correctional facility is unable

¹ The Appellant stated there should be “a total of 42 Time Sheets”

to provide a copy of any previous version(s) of the record. In other words, the only means by which [the Penitentiary] could provide” copies of the Resident Record Cards “as they appeared” from March 2021 – August 2024 would be to recreate those records because the records do not currently exist in that form.” The Act does not require a public agency to create a record to satisfy a request. *See, e.g.*, 24-ORD-278; 24-ORD-229; 16-ORD-052. Moreover, the fact that a public agency *could* have “preserve[d] previous versions” of a record or created “change logs” is not evidence that such documentation exists. 25-ORD-152. Because the Appellant has not made a *prima facie* case that the requested records currently exist, the Office cannot find that the Penitentiary violated the Act.

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

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/s/ James M. Herrick

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Assistant Attorney General

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