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26-ORD-127

March 26, 2026

In re: Ashley Elgin/Kentucky Department of Corrections

Summary: The Kentucky Department of Corrections ("the Department") violated the Open Records Act ("the Act") when it did not advise the Appellant that it did not possess certain requested records. The Department did not violate the Act when it redacted personal information under KRS 61.878(1)(a), when it withheld records the disclosure of which would pose a security threat under KRS 197.025(1), when it did not disclose protected health information, or when it did not provide records it does not possess.

Open Records Decision

On December 15, 2025, Ashley Elgin ("the Appellant") submitted a request to the Department asking for multiple categories of records related to the August 8, 2025, in-custody death of her husband, Robert Broyles, at Eastern Kentucky Correctional Complex ("EKCC").[1] In a timely response, the Department advised the

[1] In the Appellant's request, she sought copies of the following general categories of records: (1) "Incident, Investigation, and Staff Accountability Records," including the complete Internal Affairs ("IA") Investigation Report and Extraordinary Occurrence Report ("EOR") concerning the August 31, 2025, incident, all incident reports, shift logs, control logs, the chain-of-custody log, "Official Inmate Count Sheets, the disciplinary file regarding correctional officer ("CO") Brandy May, and "Training Logs" for all staff involved; (2) "Video, Audio, and Welfare Check Logs (Security Records)," including all surveillance video recordings, audio recordings, and "floor officer logbooks" for the 72 hours preceding the incident; (3) "Medical and Administrative Records," including the full autopsy report, Mr. Broyles' complete medical record from his entire period of incarceration, "Medication Administration Records (MAR)" for the 90 days preceding his death, all "medical and healthcare records," including EMS records from the day of the incident beginning at 6:30 a.m., and the "Medical Emergency Response Protocol and CPR/Resuscitation Procedures" in effect on August 31, 2025; and (4) "Classification, Policy, and Complete Inmate Files," including the complete inmate record for both Mr. Broyles and inmate Daleon Rice, the "Disciplinary Violation/Documentation" file and Kentucky Risk Assessment System ("KyRAS") file regarding both inmates, and the relevant Department of Corrections Policies and Procedures ("CPP"s) in effect on August 31, 2025, specifically, CPP 8.7, 9.8, and 8.1, as well as the administrative regulations and policies governing the mandatory use of KyRAS from January 1 to September 1, 2025.

Appellant it was complying with her request but needed "additional time in which to identify, locate, review, and redact all existing, responsive, and nonexempt records per KRS 61.878(1) and (4). *See* KRS 61.872(5) (authorizing public agencies, in relevant part, to delay production if the records are 'not otherwise available'); 197.025(7)." The Department explained that its "initial search yielded approximately 800 pages of records that will require careful review to determine responsiveness and then require the redaction of any sensitive information, such as personal information, including medical information, that is exempt under KRS 61.878(1)(a), and information, the disclosure of which would pose a security threat under KRS 197.025(1), incorporated into the Open Records Act by KRS 61.878(1)(k)." The Department agreed to provide the Appellant with a final response, including the responsive and nonexempt records, no later than January 16, 2026.

On January 16, 2026, the Department supplemented its response and provided the Appellant with 614 pages of responsive and nonexempt records. In addition, the Department included six internet hyperlinks to access the publicly accessible records responsive to items 3 and 4 of the request. The Department noted it had redacted personal information from the records being provided under KRS 61.878(1)(a) (mistakenly cited as KRS 61.878(1)(k)), consisting of dates of birth, social security numbers, personal telephone numbers, personnel ID numbers, a driver's license number, and medical information. Additionally, the Department explained it had redacted information related to substance abuse treatment under KRS 61.878(1)(a) and KRS 61.878(1)(k), which incorporates 42 U.S.C. § 290dd-2 and its implementing regulations into the Act. The Department further stated that federal confidentiality law and regulations, specifically 42 U.S.C. § 290dd-2 and 42 C.F.R. Part 2 "prohibit the Department and its personnel from acknowledging whether or not an individual is or ever was a patient in the substance abuse program unless he/she executes a proper consent form authorizing disclosure in accordance with Subpart E of the applicable federal confidentiality regulations. 42 C.F.R. § 2.13." Likewise, the Department cited KRS 197.025(1), incorporated into the Act by KRS 61.878(1)(l), to justify redactions of information regarding security threat group status, the disclosure of which "could provide opportunities for inmates to engage in activities which threaten the safety of staff, inmates, and the public by revealing vulnerabilities in the current system."

Regarding its withholding of medical information, the Department cites the federal Health Insurance Portability and Accountability Act ("HIPAA"), which is incorporated into the Act by KRS 61.878(1)(k). The Department explains that HIPAA only allows covered entities to release protected health information ("PHI") under limited circumstances. The Department says it "is a covered entity because it is a

health care provider under 45 CFR 160.103. The HIPAA general disclosure rule applies for up to 50 years after the death of the individual whose medical information has been requested. (45 CFR 160.103)." Accordingly, in compliance with 45 C.F.R. § 164.502, which requires the Department to release PHI only in particular circumstances, none of which apply here, the Department redacted PHI. *See* 21-ORD-139.

The Department also withheld KyRAS records, which "contain information collected by probation and parole officers in the course of their duties and are exempt pursuant to KRS 439.510," which is incorporated into the Act by KRS 61.878(1)(l). The Department also explained that KyRAS records "are copyrighted material and are exempt pursuant to KRS 61.878(1)(k) and 17 U.S.C. § 106. The Department is prohibited from disclosing any reports that Probation and Parole officers prepare in discharging their official duties under KRS 439.510."[2] Citing *Commonwealth v. Bush*, 740 S.W.2d 943, 944 (Ky. 1987), and prior decisions by the Office, the Department stated that KRS 439.510 "requires the Department to maintain the confidentiality of these records."

Finally, the Department explained that its diligent search did not yield any responsive autopsy report or the related toxicology results and medical examiner findings. The Department stated that a public agency "cannot provide a requester with access to nonexistent records or those which it does not have. 99-ORD-98. Therefore, the agency discharges its duty under the Open Records Act by affirmatively so stating. 99-ORD-150; 04-ORD-043." The Department stated that the right to inspect records, and the corollary right to receive copies "only attaches if the records requested are 'prepared, owned, used, in the possession of or retained by a public agency.' KRS 61.870(2); 02-ORD-120, p. 10; 04-ORD-205."

On appeal, the Appellant challenges the Department's response "as incomplete and insufficiently supported" in the following respects: (A) the "[u]nexplained discrepancy" between the initial statement estimating that approximately 800 pages of responsive records were located and the 614 pages that were disclosed; (B) the "[d]uplicate pages" that were provided, "reducing meaningful disclosure and obscuring what" the Department actually withheld; (C) the "categorical denial" of surveillance video and related still images or photographs under KRS 197.025(1) and 61.878(1)(l); (D) the failure to produce the "Dorm 8 count/recount sheets" for the critical period of 7:20 a.m. to 9:00 a.m. on August 31, 2025, and the production of

[2] Under KRS 439.510:

> All information obtained in the discharge of official duty by any probation or parole officer shall be privileged and shall not be received as evidence in any court. Such information shall not be disclosed directly or indirectly to any person other than the court, board, cabinet, or others entitled under KRS 439.250 to 439.560 to receive such information, unless otherwise ordered by such court, board or cabinet.

nonresponsive count sheets dated September 30, 2025; (E) the production of "missing/incomplete welfare check logs and floor officer logbooks" for the 72 hours preceding Mr. Broyles's death; (F) the withholding of "incident-related medical records and documentation of CPR/resuscitation/emergency response efforts"; (G) the "missing/incomplete evidence disposition records, including crime-scene log and chain-of-custody documentation"; and (H) the allegedly "incomplete" Internal Affairs Report and "disciplinary file" regarding Correctional Officer May.

Regarding the discrepancy between the number of records located and the number provided, the Department correctly states that its original response "clearly and unambiguously explained" the initial search yielded approximately 800 pages of records that would require "careful review to determine responsiveness" and it would provide a final response, "including the responsive and nonexempt records," no later than January 16, 2026. Citing 16-ORD-138, the Department further argued the Office has recognized that when the "'material is non-responsive, the public agency is not required to cite a statutory exception to justify its denial." Next, the Department clarified it did not provide the Appellant with duplicative copies of records; instead, the Department provided the Appellant with responsive records that were stored in multiple locations and on multiple devices and the Act "does not prohibit a public agency from providing identical records that exist in multiple locations." Based upon the foregoing, the Department has now sufficiently addressed the first two issues the Appellant raises on appeal, and the Office finds no violation of the Act related to those.

Regarding its denial of the Appellant's request for surveillance videos and still images under KRS 197.025(1), the Department further explains that "producing that video would show the location and angles of surveillance cameras, showing vulnerabilities and gaps in surveillance coverage, which poses a security threat. Still images pose the same security threat." The Department correctly states 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)." Citing a line of prior decisions by the Office, the Department further notes the Office has consistently affirmed the denials of requests for security camera video footage that captures the inside of a detention center. The primary risk associated with disclosure of surveillance video footage is that disclosure would reveal the "'methods or practices used to obtain the video," and the "areas of observations and blind sports for the cameras." Because the still images are derived from the security cameras within the correctional facility, their disclosure would pose the identical security risk. Thus, the Office finds no violation of the Act on this ground.

The Department acknowledges inadvertently providing the Appellant with bed count sheets for *September 30*, 2025, rather than *August 31*, 2025. However, the Department sent a supplemental response on February 5, 2026, a copy of which it

attached to its appeal response, including a copy of the requested August 31, 2025, bed count with legally permissible redactions of personal information under KRS 61.878(1)(a). Because the Department has now provided the Appellant with a copy of the correct record, any related issues have been rendered moot under 40 KAR 1:030 § 6. ("If the requested documents are made available to the complaining party after a complaint is made, the Attorney General shall decline to issue a decision in the matter.") Further, the Department affirmatively states its diligent search did not yield any "welfare check logs" because the Department does not create or maintain such records. However, the Department provided "bed count sheets" with its original response, which "serve the purpose of welfare check logs." Citing KRS 61.870(2), prior decisions by the Office, and governing case law, the Department correctly argues that a public agency cannot provide a requester with access to nonexistent records or those records it does not have, and the agency discharges its duty under the Act by affirmatively stating, following a diligent search, that the record does not exist. As such, the Office finds no violation of the Act on this basis.

Regarding the nondisclosure of the requested medical records and records documenting "resuscitation efforts," the Department explains the Appellant is required to submit a completed HIPAA release form to Roederer Correctional Complex and provides the mailing address for that facility.[3] The Department also clarifies that it provided the Appellant with copies of all existing, responsive records it possesses in response to her request for "[d]ocumentation regarding the Disposition of all Physical Evidence collected from Cell 11," explaining the Kentucky State Police ("KSP") investigated the incident and processed the crime scene. Thus, KSP would possess any records pertaining to its processing of the crime scene. Consistent with KRS 61.872(4), the Department provides the Appellant with contact information for KSP, the custodial agency. As such, the Office finds no violation in this portion of the Department's response.

Upon receipt of the Department's appeal response, the Appellant supplemented her appeal on February 23, 2026, alleging the Department failed to address three items and requesting the Office to determine the Department must either produce these outstanding items or "provide a written explanation of their nonexistence or lawful exemption per KRS 61.880(1)." First, the Appellant contends the Department failed to address the initial request for "all audio recordings (phone calls, radio transmissions, or intercom recordings)" regarding the August 31, 2025,

[3] On appeal, the Appellant states that if the Department is disputing her personal representative status, it must "specify what documentation is required so the requested incident medical records can be released lawfully," and further asks the Department to "identify what documentation [it] requires to treat the requester as a personal representative under 45 C.F.R. § 164.502(g)." Insofar as the Department has now done so, providing her with the necessary form and the correct mailing address for the agency with custody of the records, the Appellant has been afforded the relief she requested, and the related issues have been rendered moot under 40 KAR 1:030 § 6.

incident. Second, the Appellant alleges her request for the "full [KyRAS] files" of both Mr. Broyles and Mr. Rice "remains unanswered." Third, the Appellant claims the Department provided the correct official count sheets from August 31, 2025, "but failed to include the 8:00 A.M. recount sheets referenced in institutional investigative materials." More specifically, the Appellant notes that Lieutenant Julian's incident summary "confirms that a recount was conducted at 8:00 A.M., yet no documentation of that" was produced.

In response, the Department confirms that phone calls, radio transmissions, and intercom recordings "are not routinely recorded." For this reason, the Department does not possess any records responsive to that portion of the Appellant's request. The Department also successfully refutes the Appellant's contention that it failed to address the request for KyRAS files, noting its January 16, 2026, final response denied that portion of the request, citing KRS 439.510; KRS 61.878(1)(l); and *Commonwealth v. Bush,* 740 S.W.2d 944 (Ky. 1987). A review of the agency's January 16 response confirms the Department's assertion.[4] Finally, the Department clarifies that it provided the Appellant with a copy of the "only Inmate Count sheet that exists for the morning of August 31, 2025, which reflects that a count was taken at 7:30 a.m." To substantiate its position, the Department encloses a copy of Correctional Major Jason Lotter's March 9, 2026, affidavit confirming the "bed count sheet dated August 31, 2026, at 7:30 a.m. is the only bed count sheet for the morning of August 31, 2025."[5]

When a public agency receives a request for public records, that agency must decide within five business days "whether to comply with the request" and notify the requester, in writing, "of its decision." KRS 61.880(1). A public agency cannot simply ignore portions of a request. *See*, *e.g.*, 24-ORD-086; 21-ORD-090. If the requested records exist but a statutory exception applies to justify withholding the records, the agency must cite the statutory exception and explain how it applies to records or portions thereof being withheld. KRS 61.880(1). Conversely, if the records do not

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[4] Regarding the substantive bases for denying access to KyRAS records, the analysis contained in 25-ORD-392 is controlling and validates the Department's invocation of KRS 439.510, which is incorporated into the Act by KRS 61.878(1)(l), to justify its withholding of information that was collected by probation and parole officers while performing their duties. 25-ORD-392 also confirms that assessment tools, questions, responses, and scoring used in the KyRAS are copyrighted and, therefore, protected from disclosure under 17 U.S.C. § 10, which is incorporated into the Act by KRS 61.878(1)(k).

[5] Major Lotter explains that if, during a bed count, "a dorm calls a 'bad count,' a recount takes place. A 'bad count' is declared when a housing unit's physical tally fails to reconcile with the Captain's Office's record after accounting for all inmates with authorized external movements." The 7:30 a.m. bed count remained "until the count and the [C]aptain's record are reconciled." Here, the 7:30 a.m. bed count was finalized at 8:30 a.m., "as noted on the bed count sheet. At the bottom of the count sheet is the date and time with the designation 'THIS COUNT IS CORRECT' for correctional personnel signature."

exist, then the agency must affirmatively state that such records do not exist following its diligent search. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov't*, 172 S.W.3d 333, 341 (Ky. 2005). Here, the Department violated KRS 61.880(1) by failing to affirmatively indicate whether it possesses the requested "welfare check logs," audio recordings (phone calls, radio transmissions, or intercom recordings), documentation reflecting the disposition of any physical evidence collected from the cell where the incident occurred, and the specific bed count sheet, prior to receiving this appeal. However, the Department did not violate the Act by denying the request for records the agency does not possess.

Rather, the Department "cannot afford a requester access to a record that it does not have or that does not exist, 99-ORD-98, and the agency discharges its duty under the Open Records Act by affirmatively so stating." 16-ORD-246 (citing 99-ORD-150). Further, a public agency is not statutorily required to "prove a negative" to refute an unsubstantiated claim that certain records exist. *See Bowling,* 172 S.W.3d at 341; 11-ORD-037. Once a public agency states affirmatively that it does not possess any responsive records, the burden shifts to the requester to make a *prima facie* case that the records do exist. *See Bowling*, 172 S.W.3d at 341. A requester must provide facts or evidence to support a *prima facie* case that requested records exist, such as the existence of a statute or regulation requiring the creation of the requested records, or other factual support for the existence of the records. *See*, *e.g.*, 24-ORD-101; 21-ORD-177; 11-ORD-074. 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).

Even if the Appellant made a *prima facie* case that a different bed count sheet must exist, on appeal the Department has rebutted the presumption that any such record exists beyond the one it ultimately provided. *See Eplion v. Burchett*, 354 S.W.3d 598, 603 (Ky. App. 2011) (holding that "when it is determined that an agency's records do not exist, the person requesting those records is entitled to a written explanation for their nonexistence"). Accordingly, the Department did not violate the Act by denying the Appellant's request for nonexistent records or records it does not possess. The Department complied with KRS 61.872(4) by referring the Appellant to KSP for additional records documenting the disposition of any physical evidence and has now adequately explained the reason for the seeming discrepancy between the bed count sheet requested and the one it provided.

The Appellant's final claim is that the Department violated the Act by providing her with incomplete and heavily redacted records in response to her request for the Internal Affairs Report and disciplinary file regarding Corrections Officer May. However, the Department correctly states on appeal that its January 16, 2026, response cited KRS 61.878(1)(a) as the basis for the redaction of personal information

such as dates of birth, social security numbers, personal telephone numbers, personnel ID numbers, a driver's license number, and medical information. Public agencies may categorically redact those types of information. *See Kentucky New Era v. City of Hopkinsville*, 415 S.W.3d 76, 89 (Ky. 2013) (affirming the "categorical redaction" of personal information regarding private individuals found in law enforcement records). The Department also notes that disclosure of such personal information does not serve the purpose of the Act but may leave people at risk for identity theft. *See Zink v. Commonwealth*, 901 S.W.2d 825 (Ky. App. 1994). The Office agrees that KRS 61.878(1)(a) allows for these types of redactions. Accordingly, the Department did not violate the Act when it redacted responsive records under KRS 61.878(1)(a).

In summary, the Office finds that the Department did not violate the Act when the number of records it produced was different than its original estimate, when some records produced were duplicate copies located in different locations, when it withheld surveillance videos and still images under KRS 197.025(1), when it did not disclose private health information without the Appellant providing a completed HIPAA release form, when it advised that certain records are in the possession of KSP, when it did not provide certain records it does not possess, and when it redacted personal information under KRS 61.878(1)(a). The Department did violate the Act when its initial response failed to advise whether it possessed "welfare check logs," audio recordings, documentation reflecting the disposition of any physical evidence collected from the cell where the incident occurred, and the specific bed count sheet.

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.

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/s/ Zachary M. Zimmerer
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