**18-ORD-161**

August 21, 2018

In re: Torrey Cross/Northpoint Training Center

***Summary:*** Northpoint Training Center made records available to the complaining party that were located after the filing of the appeal, rendering those issues moot pursuant to 40 KAR 1:030 Section 6. NTC did not violate the Open Records Act when it denied the requests for records that did not exist.

***Open Records Decision***

 The question presented in this appeal is whether the Northpoint Training Center (NTC) violated the Open Records Act in its disposition of an open records request submitted by inmate Torrey D. Cross (“Appellant”). For reasons stated herein, we find that NTC made records located after the filing of the appeal available to Appellant, thereby rendering issues related to those records moot, pursuant to 40 KAR 1:030 Section 6.[[1]](#footnote-1) We also find that NTC did not violate the Act when it denied the requests for those records that did not exist.

 On July 17, 2018, Appellant submitted a Request for Inspection of Records form to NTC seeking records relating to a July 8 disciplinary incident. Appellant stated that he was seeking “[c]opies of detention orders, EOR[[2]](#footnote-2) reports, notes from visit supervisor; [sic] Tracy Nietzel dated July 8, 2018.” NTC responded on July 19, 2018, stating “this investigation is still active, when it is complete the inmate will receive notice.” Appellant submitted an appeal this disposition on the same date.

 On July 30, 2018, NTC responded to the appeal through counsel, Assistant General Counsel Amy V. Barker, Justice and Public Safety Cabinet. Ms. Barker stated “[a]fter receipt of the appeal, a further search was made for responsive records.” The response states that the detention order, disciplinary reports, and the report from the visit supervisor were located. Ms. Barker states that the records “have been offered upon payment for the copies.” A letter from NTC Offender Information Specialist Lisa Douglas to Appellant was included with the response. Ms. Douglas informs Appellant that records were located in his institutional file. She states:

After a thorough review of your institutional file, I was able to locate a disciplinary report Part I & 2 dated 7/8/18, a detention order dated 7/8/18, a disciplinary report Part 1 dated 7/19/18, and two information reports, one of which is completed by the visit supervisor. There is no Part 2 of the disciplinary dated 7/19/18 as the investigation is still pending. The report of the visit supervisor was the only thing prepared by him. There were no notes taken by the visit supervisor other than the information report aforementioned.

 Ms. Douglas informed Appellant that “[n]o EOR report has been created or exists at this time as this matter is still under investigation.” She also informed Appellant that no additional notes were created by the visit supervisor “other than the information report aforementioned.” Ms. Douglas informed Appellant that the records would be made available upon receipt of an authorization to use funds from his inmate account, and a copy of the letter was placed in his institutional file.

This matter is moot regarding Appellant’s request for the detention orders, disciplinary reports, and notes of the visit supervisor. After the filing of the appeal, NTC was able to locate the requested records and make them available to Appellant, upon payment. In accordance with 40 KAR 1:030 Section 6, any issues relating to those records have been rendered moot. Accordingly, we shall decline to issue a decision on matters relating to those records.

 NTC complied with the Act when it denied Appellant’s request for EOR’s and additional notes from the visitation supervisor because those records did not exist. NTC cannot produce nonexistent records for inspection or copying. *See* *Bowling v. Lexington Fayette Urban Cnty. Gov’t*, 172 S.W.3d 333, 340-41 (Ky. 2005); 07-ORD-188; 07-ORD-190. The Attorney General has long recognized that a public agency cannot afford a requester access to a nonexistent record or those records it does not have in its possession. 07-ORD-190, p.6; 06-ORD-040. A public agency cannot afford a requester access to records which it does not have, or which do not exist. 17-ORD-018; 99-ORD-098; 93-ORD-134. “The agency discharges its duty under the Open Records Act by affirmatively so stating.” 99-0RD-150; 09-ORD-088; 04-ORD-043. However, the Attorney General does require that the agency offer some explanation for the nonexistence of records. *See* 11-ORD-041, p.2; 10-ORD-222.

 In order to satisfy the burden of proof imposed by KRS 61.880(2)(c)[[3]](#footnote-3), public agencies must offer some explanation for the nonexistence of the records. *See Eplion v. Burchett*, 354 S.W.3d 598, 604 (Ky. App. 2011); 12-ORD-195. NTC informed Appellant that the disciplinary matter was still under investigation in both the initial response to his request, and in the appeal. Ms. Douglas also informed Appellant that she searched his entire institutional file and could not locate any additional notes. NTC provided a sufficient explanation for the nonexistence of the EOR’s and additional notes. Accordingly, we find that NTC complied with the requirements of the Open Records Act.

 A party aggrieved by this decision shall appeal it by initiating action in the appropriate circuit court pursuant to KRS 61.880(5) and KRS 61.882. 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 proceeding.

 Andy Beshear

 Attorney General

 J. Marcus Jones

 Assistant Attorney General

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1. 40 KAR 1:030, Section 6 states: “Moot complaints. If 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.” [↑](#footnote-ref-1)
2. “EOR” is an abbreviation for Extraordinary Occurrence Report. [↑](#footnote-ref-2)
3. KRS 61.880(2)(c) states: “On the day that the Attorney General renders his decision, he shall mail a copy to the agency and a copy to the person who requested the record in question. The burden of proof in sustaining the action shall rest with the agency, and the Attorney General may request additional documentation from the agency for substantiation. The Attorney General may also request a copy of the records involved but they shall not be disclosed.” [↑](#footnote-ref-3)