

## 19-ORD-226

December 9, 2019

In re: Victor Reyes/Western Kentucky Correctional Complex

*Summary:* Western Kentucky Correctional Complex properly denied inmate request for a copy of specified policies on the basis of KRS 197.025(2), incorporated into the Open Records Act by operation of KRS 61.878(1)(l), as the records being sought do not contain a “specific reference” to him. WKCC did not violate the Open Records Act in denying his request for a specified form because it was never created and the agency cannot provide a nonexistent record for inspection or copying, nor is the agency required to “prove a negative” in order to refute his unsubstantiated claim that such a form exists.

### *Open Records Decision*

The question presented in this appeal is whether the Western Kentucky Correctional Complex (“WKCC”) violated the Open Records Act in denying Victor Reyes’ November 3, 2019, request and his two separate November 4, 2019, requests. Mr. Reyes first requested a copy of the Corrections Policy and Procedure (“CPP”) “Cell Entry Log [sic] which [CPP] require[s] for the cells to be inspect[ed] before an inmate is place[d] in the cell[.]” Next, on November 4, he asked for a copy of the CPP that governs “destruction of state property” and the “bed area inspection form for date of 9-19-2019.” WKCC Offender Records Supervisor Wendy Dupriest denied Mr. Reyes’ November 3 request in a timely response per KRS 197.025(7), on November 6, because the policy that he sought

“is a secured policy. It cannot be released for security reasons pursuant to KRS 61.878(1)(l) [and] 197.025(1) [and] (6).” Likewise, Ms. Dupriest denied his request for the other CPP (relating to destruction of property) on November 4, pursuant to KRS 61.878(1)(l) and KRS 197.025(2)(incorrectly cited as KRS 17.150(2)), because it does not contain a specific reference to him. She further noted that “non-security policies are available for review in inmate library.” She also denied his request for the inspection form because no such record exists. In accordance with existing legal authority, this office affirms the agency’s disposition of each request.<sup>1</sup>

Upon receiving notification of Mr. Reyes’ appeal, Staff Attorney Julie C. Foster, Justice and Public Safety Cabinet, responded on behalf of WKCC and reiterated its position regarding the cited exceptions.<sup>2</sup> She also reiterated that WKCC properly denied his request for the specified “bed area inspection form” because no such record exists. Relying upon prior decisions by this office, she argued that WKCC does not have to “prove a negative” in denying access to a nonexistent record.<sup>3</sup>

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<sup>1</sup> KRS 197.025(1) provides: “KRS 61.884 and 61.878 to the contrary notwithstanding, no person shall have access to any records if the disclosure is deemed by the commissioner of the department [of corrections] or his designee to constitute a threat to the security of the inmate, any other inmate, correctional staff, the institution, or any other person.” Likewise, KRS 197.025(2) provides:

KRS 61.870 to 61.884 to the contrary notwithstanding, the department shall not be required to comply with a request for any record from any inmate confined in a jail or any facility or any individual on active supervision under the jurisdiction of the department, unless the request is for a record which contains a specific reference to that individual.

Both provisions are incorporated into the Open Records Act by operation of KRS 61.878(1)(l), pursuant to which, “[p]ublic records or information the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly” are included among those records removed from application of KRS 61.870 to 61.884.

<sup>2</sup> KRS 197.025(6) is also incorporated into the Open Records Act by operation of KRS 61.878(1)(l). It provides, in part, as follows: “The policies and procedures or administrative regulations of the department which address the security and control of inmates and penitentiaries shall not be accessible to the public or inmates.” Discussion of this alternative basis for denial is unwarranted because KRS 197.025(2) is controlling.

<sup>3</sup> In response to a request for clarification, WKCC confirmed that no such inspection form was ever created so WKCC does not possess a responsive document.

In denying Mr. Reyes' request as to records that lack a specific reference to him, namely, both of the specified CPPs, WKCC correctly relied upon KRS 197.025(2), incorporated into the Act by operation of KRS 61.878(1)(l), in support of its position. As amended in 1998, this provision authorized correctional facilities to withhold a record from an inmate unless the record "pertain[ed] to that individual." 98-ORD-150, p. 3. In 2002, however, the General Assembly further narrowed the scope of public records available to inmates by stipulating that correctional facilities and jails must disclose only those records containing "a specific reference" to the requesting inmate. 04-ORD-015, p. 3; 03-ORD-073, p. 3. "The net effect of [the 2002] amendment has been to further curtail the inmate's right of access to records maintained by the [Department of Corrections] and correctional facilities" under its jurisdiction. 03-ORD-073, p. 3. *See also* 03-ORD-007; 04-ORD-015. To this extent, the identity of the requester is directly relevant and inmates no longer have "the same right to inspect public records as any other person" as a result of the amendments to KRS 197.025(2), at least with regard to records in the custody of facilities such as WKCC. 99-ORD-161, p. 3; 04-ORD-076.

The Attorney General has consistently recognized that KRS 197.025(2) expressly authorizes correctional facilities like WKCC to deny a request by any inmate unless the record(s) contains a *specific reference* to that inmate. *See* 08-ORD-008; 10-ORD-216. Because any responsive policies do not contain a specific reference to Mr. Reyes, as required by the language of KRS 197.025(2), he is not entitled to inspect such records, or to receive copies thereof, notwithstanding any underlying concerns that he may have. *See* 99-ORD-161, p. 2; 17-ORD-054. The instant appeal presents no reason to depart from prior Open Records Decisions recognizing that DOC and facilities under its jurisdiction, including WKCC, are not required to produce records to any inmate unless those records contain a "specific reference" to that individual regardless of the individual's purpose in requesting the records. Accordingly, this office affirms the agency's denial in this regard.<sup>4</sup> 99-ORD-161, p. 2; 17-ORD-054 (upholding application of KRS 197.025(2) specifically in relation to CPPs).

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<sup>4</sup> In construing the expansive language of KRS 197.025(1), the Attorney General has recognized that KRS 197.025(1) "vests the commissioner [or his designee] with broad, although not unfettered, discretion to deny inmates access to records." 96-ORD-179, p. 3; 03-ORD-190. Application of this provision "is not limited to inmate records, but extends to 'any records' the disclosure of which is deemed to constitute a threat to security." 96-ORD-204, p. 2 (emphasis

Likewise, WKCC did not violate the Act in denying Mr. Reyes' request for a nonexistent inspection form. The right of inspection attaches only if the records in dispute are "prepared, owned, used, in the possession of or retained by a public agency." KRS 61.870(2); 02-ORD-120, p. 10. A public agency's response violates KRS 61.880(1), "if it fails to advise the requesting party whether the requested record[s] exist[ ]," but a public agency discharges its duty under the Open Records Act in affirmatively indicating that no such records exist, or advising that it lacks possession and explaining why, as WKCC did here, both initially and on appeal. 13-ORD-052, p. 3. Under the circumstances presented, our duty under KRS 61.880(2)(a) is not "to conduct an investigation in order to locate records whose existence or custody is in dispute." 01-ORD-36, p. 2. Although the intent of the Open Records Act is statutorily linked to KRS Chapter 171, pertaining to management of public records,<sup>5</sup> the Act only regulates public access to records that currently exist and that are in the possession or custody of the public agency to which the request is directed. However, a public agency must explain the nonexistence of the records or its lack of possession if appropriate. See KRS 61.880(1) and 61.880(2)(c); *Eplion v. Burchett*, 354 S.W.3d 598, 604 (Ky. App. 2011); 11-ORD-074.

When, as in this case, a public agency denies that any responsive document exists in the possession or custody of the agency, further inquiry is unwarranted absent objective proof to the contrary. 05-ORD-065, pp. 8-9; 11-ORD-137; 15-ORD-046. WKCC cannot produce that which it does not have nor is WKCC required to "prove a negative" in order to refute an unsubstantiated claim that certain records exist in the possession or custody of the agency in the absence of a *prima facie* showing by the requester. See *Bowling v. Lexington Fayette Urban Cty. Gov't*, 172 S.W.3d 333, 340-341 (Ky. 2005); 11-ORD-037; 19-ORD-068.

Either party may appeal this decision may appeal by initiating action in the appropriate circuit court per KRS 61.880(5) and KRS 61.882. Pursuant to KRS

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added); 03-ORD-190. See 07-ORD-039; 08-ORD-251; 10-ORD-063; 11-ORD-177; 12-ORD-123; 16-ORD-071; 17-ORD-097; 19-ORD-110. As before, the record on appeal contains no justification to substitute our judgment for that of the DOC or facilities under its jurisdiction such as WKCC. Further discussion is unwarranted given that KRS 197.025(2) is controlling on the question of whether the responsive CPPs are subject to disclosure.

<sup>5</sup> See KRS 61.8715.

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.

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