

19-ORD-234

December 27, 2019

In re: Leonel Martinez/Western Kentucky Correctional Complex

Summary: Western Kentucky Correctional Complex (“WKCC”) cannot produce nonexistent records, namely, specified medical records, nor does WKCC have to “prove a negative” to refute an unsubstantiated claim that such records exist. Disputes relating to discrepancies between the records provided and those sought are not justiciable in this forum. WKCC discharged its duty under the Open Records Act (“the Act”) in conducting a reasonable search for the records in dispute, providing the requester with all existing responsive documents, and explaining the lack of additional documents.

Open Records Decision

The question presented in this appeal is whether WKCC violated the Act in denying Leonel Martinez’s (“Appellant”) November 14, 2019, request for “a copy from the following prisons['] bottom bunk assignment, LSCC [Little Sandy Correctional Complex] 2019/GRCC [Green River Correctional Complex] 2019/WKCC 2019/Northpoint Training Center 2009, includ[ing], notes[,] prescriptions, orders.” In a timely written response per KRS 197.025(7), Medical Records Custodian Rebecca Smith notified Appellant that she had mailed five pages of responsive documents via institutional mail to him. On appeal, the Appellant alleged that WKCC violated the Act by failing to conduct an adequate search for the records that he requested. He further alleged that WKCC improperly charged him for 23 blank pages and made various other claims that

fall beyond the purview of this Office under KRS 61.880(2)(a). Based upon the following, this Office finds that WKCC did not violate the Act.

Upon receiving notification of Appellant's appeal from this Office, the Justice and Public Safety Cabinet reiterated that the WKCC Records Custodian attached the five pages of responsive documents to her November 18, 2019, written response following a "thorough search" of Appellant's medical records.¹ Accordingly, WKCC maintained there is no basis for this appeal. Citing prior decisions by this Office, WKCC argued that insofar as the Appellant alleged that additional responsive documents existed in the possession or control of WKCC, a public agency cannot produce that which it does not have in order to refute an unsubstantiated claim that additional records exist. In the absence of any facts or evidence that a public agency created additional records or that additional records currently exist, a public agency discharges its duty under the Act in affirmatively stating it does not possess the requested records in a timely written response. WKCC also maintained that any remaining issues Appellant raised could not be resolved in this forum.

The right to inspect and receive copies of public records only attaches if the records sought 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. A public agency cannot produce that which it does not have nor is a public agency required to "prove a negative" in order to refute an unsubstantiated claim that certain records exist. *Bowling v. Lexington-Fayette Urban Cty. Gov't*, 172 S.W.3d 333, 341 (Ky. 2005). To obtain relief, the requester must first establish a *prima facie* case that the requested records exist. *Id.* Under the circumstances presented, this Office's duty is not "to conduct an investigation in order to locate records whose existence or custody is in dispute," 01-ORD-36, p. 2, nor is the

¹ In further support of its position, WKCC included a copy of an internal e-mail from the records custodian sent on December 3, 2019. The records custodian refuted Appellant's position that he requested any records "on bottom bunk" dated March 8, 2010. Appellant did not request records for the bottom bunk dated March 8, 2010. Rather, Appellant's request was for "bottom bunk assignments . . . WKCC, 2019 . . ." The records custodian reiterated that she "completed a thorough review of patients [sic] chart" and that she "provided all information corresponding to his request. I have not denied any records to this patient." She provided records from the 2018 and 2019 dates that Appellant requested "with printout of log." Once a "special need order is written by the provider," she advised, "the previous [order] is no longer available to print. I provided previous dates with log."

Attorney General “empowered to substitute its judgment for that of a public agency in deciding which records are necessary to ensure full accountability.” 08-ORD-206, p. 1; 12-ORD-231.

A public agency violates KRS 61.880(1) “if it fails to advise the requesting party whether the” records exist, but discharges its duty under the Act in advising that records being sought do not exist following a reasonable search, and explaining why, if appropriate. 98-ORD-154, p. 2 (citation omitted); 14-ORD-204. Moreover, when some of the documents requested have been disclosed, this Office has generally declined to “adjudicate a dispute regarding a disparity, if any, between records for which inspection has already been permitted, and those sought but not provided.” OAG 89-81, p. 4; 12-ORD-087; 14-ORD-204; 17-ORD-276. “[O]bjections to alleged inaccuracies and omissions in the records disclosed” cannot be resolved in the context of an open records appeal. 10-ORD-178, p. 2; 12-ORD-162; 18-ORD-207. As in this case, when a public agency denies that additional responsive documents exist, submits proof it conducted a reasonable search, and the record on appeal contains no contrary evidence, further inquiry is unwarranted. 05-ORD-065, pp. 8-9; 11-ORD-037 (denial of request for nonexistent records upheld in the “absence of any facts or law importing the records’ existence”).

Further, “questions relating to the verifiability, authenticity, or validity of records disclosed under the Act are not generally capable of resolution under the Act.” 04-ORD-216, p. 3; 18-ORD-207. The record is devoid of any evidence to refute WKCC’s position that no additional responsive documents exist, notwithstanding any discrepancies that Appellant perceives between the records provided and those he believes may or should exist. *See* 18-ORD-207. In the absence of the requisite *prima facie* showing, or any irrefutable facts or evidence to support Appellant’s claim, this office must affirm WKCC’s denial of his request. 12-ORD-030 (affirming denial of request for nonexistent records where appellant did not offer any “irrefutable proof that such [records] were created or still exist”). Appellant’s broader issues are not justiciable in this forum as the Attorney General “is not empowered to resolve . . . non-open records related issues in an appeal initiated under KRS 61.880(1).” 99-ORD-121, p. 17; 14-ORD-023.

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

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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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