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20-ORD-023

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In re: Glenn D. Odom/Department of Corrections

**Summary:** The Department of Corrections (“DOC”) violated KRS 197.025(7) in failing to issue a written response within five business days, upon receipt of the request. However, DOC did not violate the Open Records Act (“Act”) in ultimately denying the request based on the nonexistence of the records. DOC cannot provide that which it does not have nor is DOC required to “prove a negative” to refute an unsubstantiated claim that certain records exist.

***Open Records Decision***

The question presented in this appeal is whether DOC violated the Act in failing to issue a timely written response upon receipt of Glenn Odom’s (“Appellant”) December 27, 2019, request for “the grievance and all appeals that I exhausted to Central Office requesting S.O.T.P. class but was denied because I have no sex charge.” By letter dated January 3, 2020, Appellant initiated this appeal challenging the inaction of DOC upon receipt of his request. In its response on appeal, DOC provided a copy of its January 17, 2020, response to Appellant’s request. In that response, DOC advised the Appellant that no responsive documents were located following its search and there “is no public record maintained by [DOC] responsive to your request.”

On appeal, DOC acknowledged that its response was delayed. The only explanation that DOC offered was that staff was processing “several other large document requests.” DOC reiterated that it cannot provide that which it does not

have, nor does it have to “prove a negative” in denying a request based on the nonexistence of the records. Based upon the following, this Office finds DOC’s initial response was untimely and failed to comply with KRS 197.025(7), but affirms the agency’s ultimate disposition of the request.

KRS 197.025(7) requires DOC to respond within five business upon receiving a request for records. DOC did not issue a written response until January 17, 2020, or 13 business days after the date of the request. DOC’s inaction constituted a violation of KRS 197.025(7). A “public agency cannot ignore, delay, or postpone its statutory requirements under the Open Records Act.” 02-ORD-165, p. 3. DOC, like any public agency, is required to have a mechanism in place to ensure the timely receipt and efficient processing of requests. 01-ORD-140, p. 6. However, DOC cannot provide Appellant with access to nonexistent records.

The right to inspect records only attaches if the records in dispute are “prepared, owned, used, in the possession of or retained by a public agency.” KRS 61.870(2). A public agency cannot produce that which it does not have<sup>1</sup> nor is a public agency required to “prove a negative” to refute a claim that certain records exist in the absence of a *prima facie* showing by the complainant. See *Bowling v. Lexington-Fayette Urban Cty. Gov’t*, 172 S.W.3d 333, 341 (Ky. 2005). “[T]he existence of a statute, regulation, or case law directing the creation of the requested record creates a presumption of the record’s existence, but this presumption is rebuttable.” 11-ORD-074. However, the Appellant has not cited a statute or regulation directing the creation of his requested record and therefore has failed to make a *prima facie* showing in this case.

Our 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 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. “Absent proof that [DOC] failed to use methods which could reasonably be expected to produce the records requested, such as anecdotal evidence suggesting the records’ existence or production of responsive records

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<sup>1</sup> However, a public agency is required to make “a good faith effort to conduct a search using methods which [could] reasonably be expected to produce the records requested[.]” 95-ORD-96, p. 4 (citation omitted); 18-ORD-164.

obtained from other sources,” the Attorney General has no basis upon which to question its good faith. 12-ORD-153, p. 4; 17-ORD-082; 19-ORD-054.

Based upon the foregoing, this Office finds that DOC violated KRS 197.025(7) in failing to issue a timely written response upon receipt of Appellant’s December 27, 2019 request. However, DOC did not otherwise violate the Act in the ultimate disposition of Appellant’s request.

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 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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/s/ Michelle D. Harrison

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Distributed to:

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