



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

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20-ORD-046

March 19, 2020

In re: Carlos Thurman/Northpoint Training Center

Summary: Northpoint Training Center (“NTC”) did not violate the Open Records Act (“the Act”) by not providing a nonexistent record. A second request for the same record does not extend the 20-day time for inmate appeals under KRS 197.025(3).

Open Records Decision

The question presented in this appeal is whether NTC violated the Act in the disposition of two requests from inmate Carlos Thurman (“Appellant”) dated November 22, 2019, and November 26, 2019. For the reasons that follow, this Office finds that NTC did not violate the Act.

In his request dated November 22, 2019, Appellant asked for a copy of “the memo from Oct. 16th 2019 with [his] name on it telling [him] to report to the adjustment committee on Oct. 17th 2019” and a copy of “the wavers [sic] from [his] court call hearing date 10-17-19.” In its response, NTC stated that “[a]fter conducting a reasonable search” it was “unable to locate that documentation.”

On appeal, NTC advised that it had located the requested memo and made it available to Appellant upon payment of copying charges. Accordingly, this appeal is moot as to that record. 40 KAR 1:030 § 6.

As to the requested waivers, NTC stated that those records “are retained by the adjustment officer” and after a search of those documents NTC had found no waiver for Appellant. A public agency cannot provide a requester access to a record that does not exist. *See Bowling v. Lexington-Fayette Urban County Government*, 172 S.W.3d 333, 341 (Ky. 2005). Once an agency affirmatively states that no responsive record exists, the burden then shifts to the requester to present a *prima facie* case that the requested record should exist. *Id.* Since Appellant has not made a *prima facie* showing that such a waiver should exist, this Office finds no violation of the Act.

Appellant’s other request, dated November 26, 2019, was for a copy of “the email that [he] sent to D/W C. Hughes and D/W S. Carlson dated 10-20-19, 11-3-19, 11-4-19.” On appeal, NTC pointed out that Appellant had made a prior request for the same three e-mails, which NTC had denied on November 25, 2019. Instead of appealing the first denial, however, Appellant made a duplicate request for the records on November 26, 2019.

Under KRS 197.025(3), “all persons confined in a penal facility shall challenge any denial of an open record with the Attorney General ... within twenty (20) days of the denial.” Thus, Appellant had until December 15, 2019, to appeal the initial denial. Appellant’s letter appealing from the denial of the duplicate request was dated December 18, 2019. A subsequent request for the same records cannot extend the 20-day statutory deadline for appeal. Since this part of the appeal is time-barred, this Office cannot render a decision as to the request dated November 26, 2019.

A party aggrieved by this decision may 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 proceedings.

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/s/ James M. Herrick

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