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20-ORD-048

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In re: Chris Patterson/Bell County Forestry Camp

Summary: Bell County Forestry Camp (“BCFC”) initially omitted responsive records, but corrected the error on appeal. BCFC’s initial response violated KRS 61.880(1) by failing to explain the nonexistence of records relating to certifications of assessment and medical inquiries, but it was corrected on appeal. BCFC properly denied requests for information.

Open Records Decision

On February 4, 2020, Chris Patterson (“Appellant”) requested copies of his personnel and medical files, and “the Policy and Procedure on the issuance for Certification of Assessment and Medical Inquiry form in Response to an Accommodation Request.” Appellant also requested information, including: “the number of employees at the [BCFC]...sent a Medical Inquiry form in response to an accommodation request...in the past 5 years[.]” and “the number of employees who have been placed on leave without pay while on paid sick leave[.]”

On February 13, 2020, BCFC provided Appellant the records from his personnel file and electronic medical file, but inadvertently omitted the hard copy records from his medical file. BCFC denied the requests for information related to certifications of assessment and medical inquiries, stating that such information was confidential. BCFC did not respond to the request for policies and procedures.

On February 23, 2020, Appellant initiated this appeal, stating that he did not receive his complete medical file and any policies and procedures. Appellant also appealed the denial of information related to certifications of assessment and medical inquiries. BCFC responded acknowledging the omission of medical records, stating “[i]t appears that there were 17 medical notes that had not yet been scanned into the electronic file.” BCFC’s response described its follow-up search for responsive records and included confirmation that the agency provided Appellant copies of the omitted records. BCFC stated that no policies and procedures relating to certifications of assessment and medical inquiries exist, but “[t]he institution acknowledges that it should have explained this in its response letter.” BCFC changed its response to the requests for information, stating that the Open Records Act (“Act”) does not require a response to such requests. However, BCFC also provided a statement from the Department of Corrections (“DOC”) Director of Personnel Services that DOC and correctional facilities do not track information related to certifications of assessment and medical inquiries, and the agencies do not possess any policies and procedures on the subjects. BCFC acknowledged that it should have initially stated this as the basis for denying the requests for information.

BCFC Omitted Responsive Records but Corrected the Error on Appeal.

BCFC conducted an inadequate search for responsive medical records by failing to include in its search the contents of Appellant’s hard copy medical file. The Act requires that a public agency “make a good faith effort to conduct a search using methods which can reasonably be expected to produce the records requested. Thus, the agency must expend reasonable efforts to identify and locate the requested records.” 95-ORD-96, p. 5, citing *Cerveney v. Central Intelligence Agency*, 445 F.Supp 772, 775 (D. Col. 1978). This Office has found that a public agency meets the “good faith” requirement by directing “its search not only to the first and most obvious place where responsive records could be located but to all places that might yield responsive records.” 12-ORD-153, p. 4. As such, the initial search failed to meet the “good faith” standard. However, BCFC corrected the error on appeal by conducting a follow-up search and providing Appellant the records initially missed. The appeal response also included DOC, which confirmed that all responsive records were located and disclosed. Accordingly, BCFC corrected the initial error.

BCFC Explained the Nonexistence of Responsive Records on Appeal.

BCFC admittedly violated KRS 61.880(1)¹ by failing to address the policies and procedures in its initial response. However, BCFC corrected the error on appeal by explaining the nonexistence of policies related to certifications of assessment and medical inquiries. To satisfy the burden of proof imposed under KRS 61.880(2)(c), a public agency must offer a written explanation for the nonexistence of the records. *See Eplion v. Burchett*, 354 S.W.3d 598, 604 (Ky. App. 2011)(declaring that “when it is determined that an agency’s records do not exist, the person requesting the records is entitled to a written explanation for their nonexistence.”) On appeal, BCFC met its duty by providing statements from knowledgeable staff explaining the nonexistence of the requested policies. Accordingly, the initial violation of KRS 61.880(1) was corrected.

BCFC Properly Denied the Requests for Information.

BCFC admittedly violated KRS 61.880(1) by incorrectly asserting that it was denying the requests for information due to confidentiality, presumably under KRS 61.878(1)(a). However, BCFC justified denying the requests on appeal. “The purpose of the [Act] is not to provide information, but to provide access to public records which are not exempt by law.” OAG 79-547, p. 2. For this reason, requests for information, as opposed to requests for existing public records, need not be honored. 00-ORD-76, p. 3 (citing OAG 76-375).

Ordinarily, public agencies are required to make available for inspection records that might yield the information sought. 97-ORD-6, p. 5; 14-ORD-073. However, “[a] public agency is only able, in lieu of denying a request for information, to make any non-exempt records that may contain the information being sought available for inspection or copying if such records were created and currently exist in the possession or control of the agency.” 10-ORD-156, p. 3. Here, DOC and BCFC affirmatively stated that no records exist in their possession that would yield the information Appellant seeks, and Appellant did not provide any

¹ In pertinent part, KRS 61.880(1) states: “An agency response denying, in whole or in part, inspection of any record shall include a statement of the specific exception authorizing the withholding of the record and a brief explanation of how the exception applies to the record withheld.”

evidence that such records do exist. See *Bowling v. Lexington-Fayette Urban Cty. Gov't*, 172 S.W.3d 333, 340-341 (Ky. 2005) (“before a complaining party is entitled to such a hearing [to refute the agency’s claim that records do not exist], he or she must make a *prima facie* showing that such records do exist”). As such, BCFC properly denied the requests.

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.

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/s/ John Marcus Jones

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Distributed to:

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