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In re: Anthony Beard/Roederer Correctional Complex

Summary: The Roederer Correctional Complex ("the Complex") did not violate the Open Records Act ("Act") by denying a request for a record that did not exist at the time of the request. The Act does not require public agencies to comply with requests to preserve public records for purposes of litigation.

Open Records Decision

On March 12, 2020, Anthony L. Beard ("Appellant") submitted a request on the Complex's records request form in which he asked that "the video fotage [*sic*] be reserved [sic] for the date [he] arrived at [the Complex] on 2/19/2020." Appellant did not ask to inspect the recording and he did not submit any payment for copies. The Complex's records custodian responded, stating she "forwarded [Appellant's] request to Internal Affairs . . . .[P]er Internal Affairs, video no longer available." This appeal followed.

On appeal, Appellant argues that the Complex still possessed the surveillance video. But the Complex responds that it searched for the surveillance video and that it no longer exists. The Complex also provides a statement from the Internal Affairs Captain, who explains that the system recorded new video over the video Appellant seeks.

The Complex did not violate the Act when it denied a request for a record that no longer exists. The right of inspection attaches only if the requested records

are "prepared, owned, used, in the possession of or retained by a public agency." KRS 61.870(2). A public agency cannot afford a requester access to a record that that does not exist. *Bowling v. Lexington-Fayette Urban Cty. Gov't*, 172 S.W.3d 333, 341 (Ky. 2005). Once the public agency affirmatively states the requested record does not exist, the burden shifts to the requester to present a *prima facie* case that the requested records do exist. *Id*. Appellant failed to make this *prima facie* case. Even if, for the sake of argument, surveillance footage was recorded on February 19, 2020, this Office notes that the applicable retention schedule provides for the destruction of routine surveillance footage after seven days.

There are certain exceptions to that policy,[1] but there is no evidence in the record that any of those exceptions applied here. Further, the record shows that Appellant requested the surveillance video twenty-two (22) days after the recording. Accordingly, the Complex did not violate the Act.

Appellant's remaining argument is that, by submitting his request, he put the agency on notice to preserve the surveillance recording indefinitely. The Act does not require the indefinite preservation of records upon request. It permits access to records for inspection. *See, e.g.*, KRS 61.872. Although the applicable retention schedule created a limited duty to preserve surveillance video records for purposes of pending litigation or pending open records requests, the Act itself does not independently require a public agency to preserve records beyond the duration of the applicable retention schedule. *See, e.g.,* KRS 61.8715; KRS 171.680(2)(c). Accordingly, the Complex did not violate the Act when it declined Appellant's request to preserve the surveillance video recording.

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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[1] *General Schedule for State Agencies,* Record Series No. M0052, Surveillance Video/Audio Recordings, *available at* https://kdla.ky.gov/records/recretentionschedules/Documents/State%20Records%20Schedules/kystateagency.pdf (last accessed April 22, 2020).

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