



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

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20-ORD-144

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In re: Richard Turpin/Luther Luckett Correctional Complex

Summary: Luther Luckett Correctional Complex (“Complex”) did not violate the Open Records Act (“the Act”) in denying a request for probation and parole records. The Complex discharged its duty under the Act to inform the requester that it was not the custodian of records for Sex Offender Treatment Program records.

Open Records Decision

On July 14, 2020, Richard Turpin (“Appellant”) requested from the Complex “everything” in his parole and probation file and all of his evaluations from the sex offender treatment program (“SOTP”). Appellant also sought “any and all statements made from anyone including victim impact statements, third party statements and therapy program statements.” On July 27, 2020, the Complex denied the request for Appellant’s probation and parole file as confidential under KRS 439.510 and KRS 61.878(1)(l). The Complex also stated that if any victim impact statements existed then they would be exempt under several statutes. Finally, the Complex stated that Appellant would “need to contact Kentucky State Reformatory in regard to” his request for SOTP records. Thereafter, Appellant initiated this appeal to challenge the Complex’s denial and to assert that the Complex’s response was untimely.

On appeal, the Complex states that it received the request on July 21, 2020. Under KRS 197.025(7), correctional facilities must respond to a request to inspect records within five business days of receipt of the request. Because the Complex

did not receive the request until July 21, 2020, its response on July 27, 2020 was timely issued within five business days of receipt.

The Complex denied Appellant's request for his probation and parole file under KRS 439.510, which provides:

All information obtained in the discharge of official duty by any probation or parole officer shall be privileged and shall not be received as evidence in any court. Such information shall not be disclosed directly or indirectly to any person other than the court, board, cabinet, or others entitled under KRS 439.250 to 439.560 to receive such information, unless otherwise ordered by such court, board or cabinet.

KRS 439.510 is incorporated into the Act under KRS 61.878(1)(l). This Office has consistently found that such requests to inspect probation and parole records are properly denied under KRS 439.510. *See, e.g.*, 17-ORD-022; 05-ORD-265; 01-ORD-120. Accordingly, the Complex did not violate the Act in denying Appellant's request for his entire probation and parole file.

Regarding the Complex's denial of Appellant's request for victim impact statements, the Complex explains on appeal that after conducting a search it was unable to locate any responsive records. However, in its original response the Complex claimed that if the requested records existed they would be exempt under several statutes. 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). However, under KRS 61.880(1), an agency's denial of a request to inspect records must state the exception authorizing denial and explain how the exception applies to the requested records. When denying a request due to the nonexistence of records, it is incumbent on the agency to state affirmatively that the requested records do not exist.

Here, the Complex's initial response suggests that it did not even search for the requested records because "if [they] exist" they purportedly would have been exempt under several statutes. In failing to conduct a search and affirmatively state that responsive records did not exist, the Complex's initial response was

deficient. Nevertheless, once a public agency states that the records sought do not exist, the burden shifts to the Appellant to make a *prima facie* showing that the records do exist. *Bowling*, 172 S.W.3d at 341. Appellant has not made a *prima facie* showing that the requested records exist. Accordingly, this Office is unable to find that the Complex violated the Act in denying Appellant's request for these records.

Finally, the Complex directed Appellant to the Kentucky State Reformatory to seek copies of his SOTP file. Under KRS 61.872(4), "[i]f the person to whom the application is directed does not have custody or control of the public record requested, that person shall notify the applicant and shall furnish the name and location of the official custodian of the agency's public records." The Complex discharged its duty under the Act by directing Appellant to the appropriate agency that may have custody or control of the SOTP records.

A party aggrieved by this decision may appeal it 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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Distributed to:

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