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20-ORD-170

October 29, 2020

In re: Laterrance Neal/Little Sandy Correctional Complex

Summary: The Little Sandy Correctional Complex ("Complex") did not violate the Open Records Act ("Act") when it denied a request for a record that did not exist. The Complex discharged its duty under the Act when it provided a written explanation for the nonexistence of the record in response to Appellant's *prima facie* showing that such a record was created.

Open Records Decision

Laterrance Neal ("Appellant") requested a copy of the "witness statement used against [him] during the adjustment hearing for DR#: LSCC: 2020-0002164 (in which Inmate Dahntel Newsome #249519 stated he alone was responsible for the contraband)." In a timely response, the Complex denied Appellant's request, stating that Mr. Newsome's statement was verbal and, for that reason, it did not possess a responsive written statement. Appellant initiated this appeal shortly thereafter.

The Act only regulates access to public records that are "prepared, owned, used, in the possession of or retained by a public agency." KRS 61.870(2). A public agency cannot provide a requester with access to a record that does not exist and a public agency is not required to "prove a negative" to refute a claim that a certain record exists. *See Bowling v. Lexington-Fayette Urban Cnty. Gov't*, 172 S.W.3d 333, 341 (Ky. 2005) ("The unfettered possibility of fishing expeditions for hoped-for but nonexistent records would place an undue burden on public agencies."). Once a

public agency states affirmatively that it does not possess any responsive records, the burden shifts to the requester to make a *prima facie* showing that the requested records do exist. *Id*. If the requester establishes a *prima facie* case that records did or should exist, "then the agency may also be called upon to prove that its search was adequate." *City of Ft. Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 848 n. 3 (Ky. 2013) (citing *Bowling*, 172 S.W.3d at 341).

Here, Appellant made a *prima facie* showing that the requested statement may exist in the Complex's possession by providing a copy of a disciplinary report pertaining to him. In the disciplinary report, the reporting employee wrote that Mr. Newsome "was questioned and stated that he alone was responsible for the contraband being sent to the institution." A reasonable person interpreting this language could conclude that Mr. Newsome provided a formal written or audio-recorded statement. The language contained in the disciplinary report constituted a *prima facie* showing that the Complex possessed a record of Mr. Newsome's statement. *See, e.g.*, 19-ORD-175 (finding that a reference to an "attached" letter in a police report created a presumption that the police department possessed that letter).

In *Eplion v. Burchett*, the Kentucky Court of Appeals held 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." 354 S.W.3d 598, 604 (Ky. App. 2011). The Complex explained initially, and confirmed on appeal, that Mr. Newsome was questioned verbally and, therefore, no written or recorded statement was created. By explaining the nonexistence of the written statement Appellant reasonably presumed was created, the Complex satisfied its burden under KRS 61.880(2)(c) because it adequately justified its denial of his request. For this reason, the Complex did not violate the Act.

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.

Daniel Cameron
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/s/ Michelle D. Harrison

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