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OFFICE OF THE ATTORNEY GENERAL

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20-ORD-174

November 13, 2020

In re: John C. Buckley IV/Northpoint Training Center

Summary: Northpoint Training Center ("Center") did not violate the Open Records Act ("Act") when it denied an inmate's request for records that do not contain a specific reference to him, nor did the Center violate the Act when it denied inspection of nonexistent records.

Open Records Decision

On September 22, 2020, John C. Buckley IV ("Appellant") requested from the Center a copy of a detention order, all statements, draft incident reports, notifications or emails "pertaining to [the alleged] staff assault that occurred on" March 2, 2020, and a "summary of all video footage" of the alleged assault. In a timely response, the Center denied inspection of "notes, preliminary drafts, or preliminary documents containing opinions, observations, and recommendations that are not incorporated into or do not reflect final agency action" under KRS 61.878(1)(i) and (j). This appeal followed.

The Center explains that none of the records referenced in Appellant's request contain a specific reference to Appellant and, consequently, the Center denied access under KRS 61.878(1)(l) and 197.025(2). Because the records do not contain a specific reference to Appellant, the Center correctly relied upon KRS 197.025(2), incorporated into the Act under KRS 61.878(1)(l), to deny Appellant's request. Under KRS 197.025(2), the Center is not "required to comply with a request for any record from any inmate . . . unless the request is for a record which

contains a specific reference to that individual." The Attorney General has consistently recognized that KRS 197.025(2) expressly authorizes correctional facilities like the Center to deny a request by any inmate unless the record(s) contains a *specific reference* to that inmate. *See, e.g.,* 20-ORD-130; 10-ORD-216; 08-ORD-008. Accordingly, this Office affirms the Center's denial to produce copies of the statements and reports that do not specifically reference Appellant.

Likewise, the Center did not violate the Act when it denied Appellant's request for records that do not exist. The right to inspect records attaches only if the records in dispute are "prepared, owned, used, in the possession of or retained by a public agency." KRS 61.870(2). 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 in the absence of a *prima facie* showing by the requester. *See Bowling v. Lexington-Fayette Urban Cty. 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."). Appellant has not made a *prima facie* case that the Center was required to create a written summary of video recordings, or that emails pertaining to the event exist. The Center, on the other hand, denies having created these records. Because Appellant has failed to make a *prima facie* case that these records exist, this Office finds that the Center did not violate the Act by failing to produce records that do not exist.[1]

Either party may appeal this decision may appeal 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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[1] On October 16, 2020, after receiving notice of this appeal, the Center reviewed Appellant's request again and offered, upon receipt of payment for copies and postage, to provide him with a copy of the responsive detention order and a statement from the alleged assault victim, which specifically references Appellant. Accordingly, any appeal regarding those records is now moot under 40 KAR 1:030 § 6.

Daniel Cameron
Attorney General

/s/Marc Manley
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Assistant Attorney General

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Distributed to:

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