



COMMONWEALTH OF KENTUCKY
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20-ORD-179

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In re: Chris Hawkins/Kentucky State Penitentiary

Summary: The Kentucky State Penitentiary (“the Penitentiary”) did not violate the Open Records Act (“the Act”) when it denied a request for a record that did not exist.

Open Records Decision

Chris Hawkins (“Appellant”) submitted a request to the Penitentiary to obtain copies of a “list of [his] current medications” and “any documentation related to [his] Johnson’s Body Wash being discontinued during September 2020.” In a timely response, the Penitentiary produced two documents relating to Appellant’s current medications, and charged Appellant’s inmate account \$0.20.¹ The Penitentiary denied the request relating to the discontinuation of the body wash because “[a]fter a thorough search of our records, the requested documentation does not exist during September 2020.” Thereafter, Appellant initiated this appeal. On appeal, he asks that he be refunded the twenty cents that he was charged because his medication list referenced an additional document that explains the frequency with which Appellant should take the medication, but that the additional document was not provided to him.

¹ Under KRS 197.025(7), the Penitentiary had to respond within five business days after receipt of the request. The Penitentiary explains that it received the request on October 2, 2020, and responded on October 9, 2020. The Penitentiary’s October 9, 2020, response was timely because it was issued within five business days from October 2, 2020, the date the request was received.

Upon receiving notice of the appeal, the Penitentiary searched for records relating to Appellant's body wash and discovered an "order" for the body wash that "was made on August 6 and expired in 30 days." The Penitentiary has invited Appellant to submit an additional request for that record, which it would provide once it received an "executed money authorization to pay for the cost of the record." The Penitentiary further explained that Appellant's original request sought "a list" of his current medications, and that the Penitentiary had provided that list. The Penitentiary explained that to obtain the list, it searched the Department of Corrections' healthcare records system and searched for all current medication orders relating to the Appellant. Although Appellant now claims on appeal that he was actually seeking the instructions regarding the frequency with which he must use his medications, that is not what he sought in his original request.

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 sought any records from September 2020 that might explain why he no longer receives his prescribed body wash. Appellant has failed, however, to make a *prima facie* showing that such a record relating to his body wash should exist for that time period. Although his medication records contain an entry that says "see note" in reference to his body wash, the Penitentiary explains that the note was created in August, and that no such note was created in September 2020. Regardless, the Penitentiary has stated that it will provide Appellant with a copy of this note if he submits a request for it and pays the accompanying fee. Accordingly, the Penitentiary did not violate the Act.

Finally, Appellant requests that he be refunded the cost of copying his medication list. However, the Act provides no such remedy.

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
Attorney General

/s/Marc Manley
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Distributed to:

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