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20-ORD-181

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In re: John Shockley/Department of Corrections

Summary: The Department of Corrections ("Department") did not violate the Open Records Act ("the Act") when it denied a request for a record that does not exist.

Open Records Decision

John Shockley ("Appellant") submitted a request to the Department to obtain a copy of a settlement agreement, including the settlement amount, reached by the parties in a civil suit filed in the United States District Court for the Eastern District of Kentucky. In a timely response, the Department denied the request because no such settlement agreement exists in its possession. This appeal followed.

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 a settlement agreement should exist because local jails were a party to the civil suit that was dismissed and an order approving settlement was entered. In response, the Department explains that it was never made a party to the civil suit and, for that reason, it does not possess a copy of any settlement reached between the local jails and the plaintiffs in that suit. Instead, the Department suggests that Appellant should submit his request to the counties or local jails that were a party to the suit. This Office agrees. The Department carried its burden that it adequately searched for the record and explained why the record does not exist in its possession. Thus, the Department 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
Attorney General

/s/Marc Manley
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Assistant Attorney General

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Distributed to:

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