



COMMONWEALTH OF KENTUCKY
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20-ORD-193

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In re: Shelby Shell/Eastern Kentucky Correctional Complex

Summary: Eastern Kentucky Correctional Complex (“Complex”) did not violate the Open Records Act (“the Act”) when it did not provide a recording that does not exist.

Open Records Decision

On October 16, 2020, inmate Shelby Shell (“Appellant”) requested a copy of a recording of his October 14, 2020, telephone call to his attorney. The Complex initially denied the request on the basis of “attorney client privilege and the work product rule.” This appeal followed.

On appeal, the Complex acknowledges that it was “mistaken” to invoke attorney-client privilege and the work product doctrine to deny inspection of the requested record, but the Complex instead asserts that the recording does not exist. After searching for the recording, the Complex found that the call was logged, but that the attorney’s number was listed in the inmate telephone system as a “private call” number at the attorney’s request. Consequently, the Complex does not record calls to or from that number.

Once a public agency states affirmatively that it does not possess a responsive record, the burden shifts to the requester to present a *prima facie* case that the requested records do exist. *Bowling v. Lexington-Fayette Urban Cty. Gov’t*, 172 S.W.3d 333, 341 (Ky. 2005). If the requester establishes a *prima facie* case that records do or should exist, the agency must provide “a written explanation for

their nonexistence.” *Eplion v. Burchett*, 354 S.W.3d 598, 603 (Ky. App. 2011) (quoting 10-ORD-078).

Appellant claims that the record should exist because he used a phone line that is normally recorded. However, even if this served to establish a *prima facie* case for the existence of the record, the Complex has explained that a call to an attorney listed as a “private call” number is not recorded on any line. Therefore, although its initial basis for denying the request was improper, the Complex did not violate the Act because it is unable to permit inspection of a recording that does not exist.

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 proceeding.

Daniel Cameron
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/s/ James M. Herrick

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Distributed to:

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