



COMMONWEALTH OF KENTUCKY  
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**20-ORD-202**

December 17, 2020

In re: Darryn B. Sharber/Louisville Metro Department of Corrections

*Summary:* Louisville Metro Department of Corrections (“Department”) did not violate the Open Records Act (the “Act”) when it was unable to produce a record that did not exist in its possession.

*Open Records Decision*

Darryn B. Sharber (“Appellant”) claims that on September 2, 2020, he requested from the Department a copy of the negatives of x-rays taken of him in 2016. After receiving no response from the Department, Appellant initiated this appeal. The Department claims that the first time it received Appellant’s September 2 request was when this Office issued a notice of appeal in this matter. On appeal, the Department provided Appellant with a copy of a radiological report, but, according to the Department, it does not possess the requested x-rays. Those x-rays, the Department claims, are in the custody and control of MobileX, the private medical services provider that performed the x-rays.

An agency’s obligations under the Act arise only after it receives a request to inspect records. KRS 61.880(1); KRS 197.025(7) (granting correctional facilities five days to respond after receiving the request). Here, it is disputed whether the Department received Appellant’s initial request. This Office has historically declined to resolve such factual disputes. *See, e.g.,* 20-ORD-134; 18-ORD-056; OAG 89-81. This Office does so again here.

On appeal, the Department explains that a private medical services provider performed the x-rays sought, and that the Department does not retain copies of inmate x-rays. Once an agency affirmatively states that it has no responsive records, the burden then shifts to the requester to present a *prima facie* case that the requested records should exist in the agency's possession. *See Bowling v. Lexington-Fayette Urban County Government*, 172 S.W.3d 333, 341 (Ky. 2005). Appellant has made no *prima facie* showing that a copy of his x-rays should exist in the possession of the Department. Accordingly, 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  
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/s/Marc Manley  
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Assistant Attorney General

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Distributed to:

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