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21-ORD-050

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In re: Chris Hawkins/Department of Corrections

Summary: The Department of Corrections ("Department") violated the Open Records Act ("the Act") when it failed to respond to a request to inspect records. However, the Department did not violate the Act when it did not provide a record that does not exist in its possession.

Open Records Decision

On January 27, 2021, inmate Chris Hawkins ("Appellant") asked the Department to provide copies of all e-mails and other correspondence to or from the Appellant, the Department's Prison Rape Elimination Act ("PREA") coordinator, or mental health staff at the Kentucky State Penitentiary ("Penitentiary"), regarding allegations of PREA violations. The Appellant also requested a copy of a letter that he had sent to the Secretary of the Justice and Public Safety Cabinet ("Cabinet") on the same subject. The Department did not respond to the Appellant's request. Rather, for unknown reasons, the Department forwarded the Appellant's request to the Penitentiary. The Penitentiary then denied the request because it did not include an authorized Cash Paid Out ("CPO") form, which must accompany such requests under departmental policy. This appeal followed.

The Appellant requested records from the Department, not the Penitentiary. The request was addressed to "KDOC Central Office Open Records Coordinator." And because the Department received a request that was addressed to it, the Department had to respond within the time required

under KRS 61.880(1).[1] But the Department did not respond to the request. Instead, it forwarded the request to the Penitentiary for response and never communicated that fact to the Appellant. "If the person to whom the application is directed does not have custody or control of the public record requested, *that person shall notify the applicant and* shall furnish the name and location of the official custodian of the agency's public records." KRS 61.872(4) (emphasis added). The Department did not notify the Appellant that it was sending his request to a different public agency, or issue any response at all.[2] Such conduct violates the Act.

On appeal, the Department states that it has searched for the requested records and that no letter from the Appellant to the Cabinet Secretary exists in its possession. Once a public agency states affirmatively that it does not possess responsive records, the burden shifts to the requester to present a *prima facie* case that the requested record does exist in the agency's possession. *Bowling v. Lexington-Fayette Urb. Cty. Gov't,* 172 S.W.3d 333, 341 (Ky. 2005). Here, the Appellant has not made a *prima facie* showing that the Department possesses, or should possess, the letter he seeks. Accordingly, the Department did not violate the Act with regard to the requested record.[3]

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.

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[1] Ordinarily that is three business days. During the state of emergency, however, the General Assembly has extended a public agency's response time to ten days. *See* 2020 SB 150 § 1(8).

[2] A public agency may discharge its duty under the Act by forwarding the request to the proper agency, *see, e.g.*, 19-ORD-132, but KRS 61.872(4) specifically requires the public agency that received the request to notify the applicant that the request was sent to the wrong public agency. Although a public agency may forward a request, it must notify the applicant that it has done so. KRS 61.872(4).

[3] The Department located the remaining correspondence that the Appellant had requested and provided those records on appeal. Thus, any dispute about those records is moot. 40 KAR 1:030 § 6.

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/s/ James M. Herrick

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Distributed to:

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