COMMONWEALTH OF KENTUCKY
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21-ORD-051

March 22, 2021

In re: Anthony Sadler/Kentucky State Penitentiary

Summary: The Kentucky State Penitentiary (the "Penitentiary") did not violate the Open Records Act ("the Act") when it was unable to produce a record that did not exist in its possession or when it denied a request due to the inmate's failure to use the proper form.

Open Records Decision

Inmate Anthony Sadler ("Appellant") requested a copy of all correspondence between himself and the deputy warden at another correctional facility, as well as copies of some of his medical records. In a timely response, the Penitentiary denied the Appellant's request for copies of the correspondence because those records do not exist within the Penitentiary's possession. The Penitentiary denied the Appellant's request for copies of his medical records because the Appellant failed to use the proper form for such a request. This appeal followed.

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* case that the requested records do exist. *Bowling v. Lexington-Fayette Urb. 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, "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, the Appellant claims that he emailed the deputy warden using the JPay email service provided to inmates. The Penitentiary explains, however,

that the recipient of the requested email is employed at a different correctional facility. For that reason, the Penitentiary does not possess the requested email. Regardless, the Penitentiary has provided the Appellant with the contact information for the records custodian of the correctional facility that employs the identified employee, and in doing so, the Penitentiary has discharged its duty under the Act. KRS 61.872(4).[1]

The Appellant claims that the Penitentiary violated the Act when it denied his request for medical records because he did not use the appropriate form to submit his request. The Department of Corrections has promulgated certain policies and procedures in 501 KAR 6:020. Among those procedures is Department of Corrections Policies and Procedures 6.1 ("CPP 6.1"), which requires "medical and mental health professionals" to process requests for medical or psychological records. Under that policy, inmates must submit a request for medical records using a specific form. This Office has expressly held that the Penitentiary's use of this form is permissible under the Act. *See* 19-ORD-131.[2] Therefore, the Penitentiary did not violate the Act when it denied the Appellant's request, which was not made on the appropriate form.

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
Marc Manley
Assistant Attorney General

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[1] In 20-ORD-109, this Office held that JPay emails are not "public records" as defined in KRS 61.870(2) unless the requested emails are created, used, or in the possession of a public agency. Emails sent to correctional facility staff (rather than emails sent to private citizens outside the facility) are public records because such emails are in the possession of the facility.

[2] A courtesy copy of 19-ORD-131 is enclosed for the parties' reference.

#058

Distributed to:

Anthony Sadler #151598
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