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21-ORD-088

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In re: Chris Hawkins/Kentucky State Penitentiary

Summary: The Kentucky State Penitentiary (the "Penitentiary") did not violate the Open Records Act ("the Act") when it denied a request to inspect records that are preliminary under KRS 61.878(1)(j) and records that are exempt from inspection under the Prison Rape Elimination Act. The Penitentiary also did not violate the Act when it denied a request to inspect records that do not exist within its possession.

Open Records Decision

On two occasions, Chris Hawkins ("Appellant") asked to inspect the Penitentiary's records. First, on March 16, 2021, he asked to inspect every "pending grievance" that he has filed against the Penitentiary since he came into its custody. On March 19, 2021, the Penitentiary responded and claimed that it needed additional time to respond to the request.[1] Then, on April 9, 2021, the Penitentiary denied the request under KRS 61.878(1)(i) and (j) and claimed that the Appellant had thirty pending grievances, but none of them had reached a final conclusion.

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[1] Ordinarily, a public agency must invoke KRS 61.872(5) to delay inspection of records. But a different rule applies to correctional facilities, like the Penitentiary. Under KRS 197.025(7), a correctional facility must respond to a request to inspect records and "state whether the record may be inspected or may not be inspected, or that the record is unavailable and when the record is expected to be available." Thus, correctional facilities are not required to provide an explanation for the cause of delay under KRS 197.025(7), unlike public agencies seeking to delay inspection under KRS 61.872(5).

On March 30, 2021, the Appellant submitted his second request, in which he asked to inspect records related to a conversation he had with a Penitentiary employee on a certain date. In a timely response, the Penitentiary denied the request under KRS 61.878(1)(k) and 28 CFR 115.61(b), and explained that the conversation to which the Appellant was referring related to an investigation being conducted under the Prison Rape Elimination Act ("PREA"). After both requests were denied, this appeal followed.

The Act allows public agencies to deny a request to inspect records that are "preliminary drafts, notes, and correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency." KRS 61.878(1)(i). Under KRS 61.878(1)(j), an exemption that is separate and distinct from KRS 61.878(1)(i), records that are "preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies are formulated or recommended" are also exempt from inspection.

Kentucky courts have held that records containing preliminary recommendations or opinions can lose their exempt status once adopted by the public agency as part of their final action. *See University of Kentucky v. Courier-Journal & Louisville Times Company*, 830 S.W.2d 373, 378 (Ky. 1992); *Ky. Bd. of Med. Licensure v. The Courier-Journal and Louisville Times Co.*, 663 S.W.2d 953, 956 (Ky. App. 1983). In *Kentucky Board of Medical Licensure*, the Court of Appeals held that complaints against licensees, and "internal preliminary investigative materials" regarding those complaints, were exempt from inspection under KRS 61.878(1)(j).[2] "However, once such notes or recommendations are adopted by the Board as part of its action, the preliminary characterization is lost, as is the exempt status." *Id*. In *University of Kentucky*, the Supreme Court affirmed this rationale, and held that the University took final action when it adopted its final response to an investigation conducted by the NCAA. *Id*. As such, the final response was no longer preliminary, and KRS 61.878(1)(j) no longer applied to deny inspection of the record. *Id*.

Here, the Appellant specifically asked to inspect "every pending grievance." The grievances, and the records from the relevant investigations, are exempt from disclosure until the Penitentiary takes final action on the

[2] At the time this decision was rendered in 1983, the "preliminary recommendations" exception was codified at KRS 61.878(1)(h). Although this exception is now codified at KRS 61.878(1)(j), the text of the exception has not changed since 1983.

grievances. *See Ky. Bd. of Med. Licensure*, 663 S.W.2d at 956. Once the Penitentiary takes final action on the grievances, then under Kentucky case law, the Penitentiary will be required to assess the records to determine which records will have forfeited their preliminary status, which records are subject to inspection, and whether an exception permits the Penitentiary to withhold the documents. Accordingly, the Penitentiary did not violate the Act when it denied the Appellant's request under KRS 61.878(1)(j).

In his second request, the Appellant asked the Penitentiary to provide copies of all documents from January 28, 2021 to present related to a conversation the Appellant had with a Penitentiary employee on January 28, 2021. The Penitentiary timely responded and denied Appellant's request under KRS 61.878(1)(k), 28 CFR 115.61(b), and CPP 14.7 § 2(J) because the conversation was related to a PREA investigation, and records created as a result of that conversation would be confidential under federal law.

Under KRS 61.878(1)(k), "[a]ll public records or information the disclosure of which is prohibited by federal law or regulation" are excluded from inspection. Under PREA, a federal law, "staff shall not reveal any information related to a sexual abuse report to anyone other than to the extent necessary, as specified in agency policy, to make treatment, investigation, and other security and management decisions." 28 CFR 115.61(b). This Office has previously explained that PREA investigation records are confidential and exempt from inspection under KRS 61.878(1)(k) and 28 CFR § 115.61(b). *See, e.g.*, 18-ORD-237; 18-ORD-206.

On appeal, however, the Penitentiary now claims that its employee did not create any documents following the conversation with the Appellant. 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 records do exist in the agency's possession. *Bowling v. Lexington Urban County Government*, 172 S.W.3d 333, 341 (Ky. 2005). If the requester is able to make 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 Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 848 n.3 (Ky. 2013) (citing *Bowling*, 172 S.W.3d at 341).

According to the Kentucky Department of Corrections policies and procedures for reporting unlawful conduct under PREA, "staff members shall immediately report all knowledge, suspicions or information of an incident of

a sexual offense" within a correctional facility. CPP 14.7 § 2(G)3.[3] However, "[s]taff can privately report offender sexual abuse and sexual harassment directly to the warden or deputy warden of the facility, or by contacting the PREA hotline at the number posted in staff break areas." *Id*. Thus, if the Penitentiary employee verbally reported the Appellant's reports to the appropriate authorities, it does not appear that such action would violate the applicable policy. It would also explain why no records of the Appellant's conversation were created. And even if such records were created, as previously discussed, they would be exempt from inspection. Therefore, the Penitentiary 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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Distributed to:

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[3] A copy of the applicable policy is available at https://corrections.ky.gov/About/Documents/PREA/2018/CPP%2014.7%2005202020.pdf (last visited May 11, 2021).