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21-ORD-108

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In re: Jeremy Henley/Kentucky State Penitentiary

Summary: The Kentucky State Penitentiary (the "Penitentiary") did not violate the Open Records Act ("the Act") when it provided records it deemed responsive to an overly broad request, when it denied a request for information, or when it was unable to produce records that did not exist in its possession.

Open Records Decision

Inmate Jeremy Henley ("Appellant") submitted three requests to the Penitentiary. In his first request, the Appellant broadly requested all records "generated, authorized, delegated, or approved by" the former warden of the Penitentiary "concerning, involving or consisting of or about" the Appellant. In a timely response, the Penitentiary produced 89 pages of records it deemed responsive. However, the Penitentiary withheld records relating to an investigation under the Prison Rape Elimination Act ("PREA") because those records are made confidential under federal law. The Penitentiary also withheld portions of certain incident reports in which the Penitentiary discusses its policy on "restraint, extraction, or use-of-force" because it considers the release of such information to be a security risk.

For his second request, the Appellant sought copies of records documenting any decision by the deputy warden or other employees in which the Appellant was denied permission to use an "x-mark" for his signature. He further sought "each and every name of each and every recipient" of an email

from the deputy warden that prohibited the use of "x-mark" as a signature. In a timely response, the Penitentiary produced records responsive to the request, but denied the request for the "name" of the recipients of the memorandum on the basis that it was a request for information.

For his third request, the Appellant sought copies of records related to two specific grievances that he had filed. In a timely response, the Penitentiary produced records within its possession, but according to the Appellant, it failed to produce records the Appellant allegedly submitted as part of his grievances. He also claims that the Penitentiary did not produce the Commissioner of the Department of Corrections' response to one of the grievances. Appellant has appealed the response of the Penitentiary for each of these requests.

In response to his first request, the Penitentiary provided 89 pages of records from its centralized database that referenced Appellant and that were created or approved by the former warden of the Penitentiary. The Penitentiary, however, withheld records that relate to investigations involving the Appellant brought under PREA, a federal law that requires such records to remain confidential. Records related to PREA investigations are confidential and exempt from inspection under KRS 61.878(1)(k) and 28 CFR § 115.61(b). *See, e.g.*, 21-ORD-088; 18-ORD-237; 18-ORD-206. In denying such records, the Penitentiary did not violate the Act.

The Penitentiary also withheld certain records that described the Penitentiary's "restraint, extraction, and use-of-force" policies. According to the Penitentiary, the release of such records would pose a security risk to the Penitentiary. Under KRS 197.025(1), correctional facilities such as the Penitentiary are given wide discretion to deny inspection of records that would "constitute a threat to the security of the inmate, any other inmate, correctional staff, the institution, or any other person" if inspected. In the hands of inmates, records that describe the Penitentiary's policy on the use of force could pose a security risk to the Penitentiary. Therefore, it did not violate the Act in denying inspection of these records.[1]

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[1] It is unclear if the Appellant seeks additional records from the Penitentiary in addition to the 89 pages that were produced and the records properly withheld. He claims that the Penitentiary should possess additional records, but the Penitentiary explains that it has searched its centralized database for all records involving the Appellant and it has produced

The Penitentiary also denied a portion of the Appellant's second request, in which he sought the names of any individuals who had received the deputy warden's memorandum regarding the use of an "x-mark" for his signature. The Penitentiary claimed that such a request did not identify a public record, but rather, sought information. This Office has consistently held that the Act does not require public agencies to answer requests for information. *See Dept. of Revenue v. Eifler*, 436 S.W.3d 530, 534 (Ky. App. 2013) ("The ORA does not dictate that public agencies must gather and supply information not regularly kept as part of its records."); 21-ORD-075; 20-ORD-098; 16-ORD-236; 05-ORD-230; OAG 76-375. Here, the Appellant did not describe a record to be inspected, but rather, he asked for "each and every name." The Penitentiary claims that it does not possess a list of such names, and that to comply with the request it would have to create such a list. The Act does not require the Penitentiary to create a list of the requested names or to answer a request for information. Therefore, the Penitentiary did not violate the Act in failing to provide Appellant with the requested names.

Regarding the Appellant's third request, in which he sought records pertaining to grievances he had filed, the Appellant alleges that the Penitentiary failed to provide all attachments associated with the grievances, including the response from the Commissioner of the Department of Corrections to one of the grievances. In response, the Penitentiary explains that the grievances were processed in 2017, and that under its record retention policy it retains physical files of grievances "until December 31 of the following year after filing."[2] The portions of the grievance file that were made available to the Appellant had been previously scanned into the Penitentiary's database and had not been destroyed.

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all such records in its database. Thus, the Penitentiary has conducted an adequate search for records and produced all nonexempt records that it could locate. Moreover, this Office is unable to resolve factual disputes in which a requester claims that additional records should exist where the public agency states otherwise. *See, e.g.*, 19-ORD-083.

[2] Department of Corrections Records Retention Schedule, Series 03436, "Inmate Grievance File," *available at* https://kdla.ky.gov/records/recretentionschedules/Documents/State%20Records%20Schedules/kycorrections.PDF (last accessed June 4, 2021)

Once a public agency states affirmatively that it does not possess any responsive records, 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, "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, Appellant alleges that the Penitentiary should have produced additional records along with the grievance records the he was provided, including a response from the Commissioner. Even if the Appellant had made a *prima facie* case that these records should exist, the Penitentiary has adequately explained why it no longer possesses such records. According to the Penitentiary's retention schedule, it was authorized to destroy these records as early as December 31, 2018, the year after the Appellant filed his grievances. Therefore, any additional documents not provided to Appellant no longer exist.[3] As such, the Penitentiary did not violate the Act in failing to provide additional documents in response to Appellant's third request.

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.

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[3] Presumably, if these additional records existed at one time in physical form, such records were not scanned into the database along with the rest of the records. The Penitentiary does not explain why some of the grievance records would be scanned into the database and others would not be scanned. Regardless, under the records retention policy, the Penitentiary was not required to retain any of these records after December 31, 2018.

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