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21-ORD-137

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In re: Christopher 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 for records related to a Prison Rape Elimination Act ("PREA") investigation, or when it denied inspection of records related to an event still under investigation. The Office cannot decide factual disputes regarding whether additional records responsive to a request should exist.

Open Records Decision

Inmate Christopher Hawkins (the "Appellant") submitted a multi-part request for copies of various records from the Penitentiary. The Penitentiary granted certain parts of the Appellant's request, but denied other parts of the request on various grounds. The Appellant now appeals, and claims that the Penitentiary failed to provide copies of all documents responsive to the first part of the request, and that the Penitentiary improperly denied other parts of his request.

In the first part of his request, the Appellant sought records related to the Penitentiary placing him in the restrictive housing unit. The Penitentiary provided to the Appellant the detention order authorizing such placement. The Appellant claims that there are additional records associated with this placement, but he does not describe the additional records he believes should exist or provide any proof that additional records should exist. The

Penitentiary denies the existence of such additional records. Without any evidence that additional records responsive to this part of the Appellant's request exist, this Office cannot conclude that the Penitentiary failed to provide all responsive records. *See, e.g.*, 19-ORD-083.

The Appellant also sought copies of letters he sent to various Penitentiary staff. The Penitentiary claims that these letters are part of a PREA investigation. 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, which is 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. Therefore, the Penitentiary did not violate the Act when it denied copies of the Appellant's letters, which relate to the Penitentiary's PREA investigation.

Finally, the Appellant sought records related to a disciplinary report involving him. The Penitentiary denied this part of the request under KRS 61.878(1)(i) and (j), claiming that the disciplinary action was still under investigation at the time of the request, and any records relating to the disciplinary action were preliminary. KRS 61.878(1)(i) exempts from inspection records which are "preliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency." Under KRS 61.878(1)(j), a separate and distinct exemption, records that are "preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended" are also exempt from inspection. This Office has previously held that disciplinary reports, and related investigative records, generated by correctional facilities during the course of a disciplinary investigation are preliminary in nature until the investigation is complete and final action is taken. *See, e.g.*, 16-ORD-266. Such records are exempt from disclosure unless and until such records are adopted and made a part of the investigative agency's final action. *See Univ. of Ky. v. Courier-Journal & Louisville Time Co.*, 830 S.W.2d 373, 378 (Ky. 1992) (finding that "investigative

materials that were once preliminary in nature lose their exempt status once they are adopted by the agency as part of its action").

Here, the Penitentiary confirms that, at the time the Appellant made his request, the disciplinary investigation "was still pending." Therefore, the Penitentiary did not violate the Act when it denied the Appellant's request for such records.[1]

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

#204

Distributed to:

Chris Hawkins #103061
Amy V. Barker, Assistant General Counsel, Justice and Public Safety Cabinet

[1] It is not clear from this record whether the disciplinary investigation has concluded since the Appellant initiated this appeal. The Penitentiary has confirmed only that the investigation "*was* pending" at the time of the request. If the investigation has since concluded, and the Penitentiary has adopted certain investigation reports in taking final action on the disciplinary investigation, then such records might have now forfeited their preliminary status. *See Univ. of Ky.*, 830 S.W. 2d at 378.