



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

DANIEL CAMERON
ATTORNEY GENERAL

CAPITOL BUILDING, SUITE 118
700 CAPITAL AVENUE
FRANKFORT, KENTUCKY 40601
(502) 696-5300
FAX: (502) 564-2894

21-ORD-163

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In re: Glenn Odom/Kentucky State Penitentiary

Summary: The Kentucky State Penitentiary (the “Penitentiary”) did not violate the Open Records Act (“the Act”) when it provided all records in its possession responsive to a request. This Office is unable to adjudicate the factual disputes raised by the Appellant.

Open Records Decision

On July 13, 2021, Glenn Odom (“Appellant”) submitted to the Penitentiary a request for records related to the Penitentiary placing him on observation for suicidal behavior. On July 21, 2021, the Penitentiary responded to the Appellant’s request and provided 30 pages of responsive records. On July 20, 2021, the Appellant sent two additional requests for records related to other records. However, the Penitentiary did not respond to these requests. The Appellant then initiated this appeal after he received no response from the Penitentiary to his July 20 requests. He also claims that he received only 28 of 30 pages of responsive records to his July 13 request.

Under KRS 61.880(1), upon receiving a request for records under the Act, a public agency “shall determine within five (5) [business] days . . . after the receipt of any such request whether to comply with the request and shall notify in writing the person making the request, within the five (5) day period, of its decision.”¹ However, the Penitentiary claims to have never received the

¹ Likewise, under KRS 197.025(7), a correctional facility must respond to requests submitted by inmates within five business days of receipt. Now that KRS 61.880(1) has been amended to require all public agencies to respond to requests made under the Act within five business days, the distinction between KRS 197.025(7) and KRS 61.880(1) is no longer relevant.

Appellant's requests that were dated July 20, 2021. Upon receiving notice of this appeal, the Penitentiary searched its records and confirmed that it did not receive the Appellant's request. This Office has historically found that it is unable to resolve factual disputes between requesters and public agencies, such as whether an agency has or has not received a request. *See, e.g.*, OAG 89-81; 03-ORD-172; 04-ORD-223; 08-ORD-066; 12-ORD-122. Therefore, this Office is unable to find that the Penitentiary violated the Act when it did not issue a response to a request it claims to have never received.

The Penitentiary did receive the Appellant's request dated July 13, 2021, and it issued a timely response to that request. In doing so, it claims it provided the Appellant with 30 pages of responsive records. The Appellant claims that he only received 28 pages, but does not specify which pages he believes are missing. On appeal, the Penitentiary provided a copy of the records it claims to have sent the Appellant, and the records total 30 pages. While the parties present competing factual claims, there is no evidence in the record to contradict the Penitentiary's claim that it provided the Appellant with the same records it provided this Office on appeal.

Finally, the Appellant claims that the observation logs he received are incomplete and that additional observation notes should have been made. The Penitentiary, however, claims to have provided all responsive records in its possession. A public agency cannot grant a requester access to a record that does not exist. *Bowling v. Lexington Urban County Government*, 172 S.W.3d 333, 341 (Ky. 2005). 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. *Id.* at 341. If the requester can 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).

To make a *prima facie* case, the Appellant claims that the relevant observation shift began at 6:00 a.m., but the logs he received reflected the first observation entry at 9:30 a.m. The Penitentiary claims it "provided the only documents in its possession from the log." There is no evidence that the Penitentiary has withheld additional logs or altered the content of the records produced. Whether the Penitentiary should have recorded an entry at 6:00 a.m., as the Appellant claims, is a different question than whether the Penitentiary actually made such an entry and denied the Appellant's inspection of it. Like his other claims, this Office "is not equipped to resolve

factual disputes when presented with conflicting factual narratives.” 18-ORD-080 (cleaned up). Accordingly, this Office is unable to find that the Penitentiary violated 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
Attorney General

/s/Matthew Ray
Matthew Ray
Assistant Attorney General

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Distributed to:

Glenn Odom #219489
Jesse L. Robbins