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21-ORD-199

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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 could not provide copies of records that do not exist in its possession.

Open Records Decision

Chris Hawkins ("Appellant") sent the Penitentiary a request for copies of the second part of reports related to three different disciplinary investigations that were dismissed.[1] In a timely response, the Penitentiary provided the Appellant with two pages of responsive records in connection with one disciplinary investigation, but denied the Appellant's request for the second part of the other two investigations because those investigations were "dismissed before it got to the Warden level." The Penitentiary then affirmatively stated that the second part of the other two investigative reports do not exist. This appeal followed.

The Penitentiary stated affirmatively that the second part of two of the disciplinary reports that the Appellant requested do not exist. 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 requested records do exist in the possession of the public agency. *See Bowling v. Lexington-Fayette Urb. Cnty. Gov.*, 172 S.W.3d 333, 341 (Ky. 2005). If the requester is able to make a *prima facie* case that the records do or should exist, then the public agency "may also be called upon to prove that its search was

[1] Both the Appellant and the Penitentiary refer to the second part of the report as "Part II's."

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 that these records do exist, and that the Penitentiary should possess them, on appeal, the Appellant submits a copy of the second part of the one disciplinary report that the Penitentiary provided to him. The Appellant claims that if this disciplinary report contained a second part and was dismissed then that proves that the other two disciplinary reports that were also dismissed should likewise contain second parts. However, even if the Appellant's claim were sufficient to establish a *prima facie* case, the Penitentiary explains the cause of this discrepancy on appeal.

According to the Penitentiary, the second part of the disciplinary report is prepared in connection with an "adjunct hearing." If a disciplinary investigation is dismissed prior to the hearing stage, then the second part of the report is not completed. Of the three disciplinary reports that the Appellant requested, only the first made it to the hearing stage and thus the second part of that report was created and provided to the Appellant. However, the other two investigations were dismissed prior to the hearing stage, and thus the second parts of those reports were not created.

Even if the Appellant had made a *prima facie* case that the records he requested should exist, the Penitentiary has sufficiently explained why such documents do not exist and why it does not possess them. Accordingly, the Penitentiary did not violate the Act when it could not produce copies of records that do not exist in its possession.

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
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Assistant Attorney General

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Distributed to:

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