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-225

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In re: Dominique R. Dudley/Kentucky State Reformatory

Summary: The Kentucky State Reformatory (the "Reformatory") did not violate the Open Records Act ("the Act") when it denied an inmate's duplicative request for records that had previously been granted in part and denied in part. The Reformatory also did not violate the Act when it denied a request for records that do not exist in its possession or that would constitute a security threat under KRS 61.878(1)(l) and KRS 197.025(1) if released.

Open Records Decision

Dominique R. Dudley ("Appellant") sent the Reformatory a request containing eleven subparts to inspect various records related to various occurrences and incidents involving himself and other individuals. In a timely response, the Reformatory denied all subparts of the Appellant's request for various reasons. This appeal followed.

First, the Reformatory denied parts two through six, and part eight, of the Appellant's request because these parts were duplicative of an earlier request submitted by the Appellant. This Office has found that the Act does not require a public agency to satisfy identical requests submitted by inmates. *See, e.g.*, 20-ORD-046. That is because, under KRS 197.025(3), "all persons confined in a penal facility shall challenge any denial of an open record [request] with the Attorney General by mailing or otherwise sending the appropriate documents to the Attorney General within twenty (20) days of the denial[.]" By enacting KRS 197.025(3), the General Assembly has established a deadline by which an inmate must seek review of a request that has been denied. An inmate cannot extend the statutory deadline for review by submitting a duplicate request and appealing the subsequent denial.

Here, the Reformatory previously provided the Appellant with some records responsive to these subparts of his request, and previously denied his inspection of other records because no responsive records existed or because the requested records did not make a specific reference to the Appellant.[1] The Appellant was thus required to appeal the Reformatory's denial of his original request within twenty days. Having failed to do so, the Appellant cannot extend the statutory deadline by submitting a duplicative request to the Reformatory and appealing the Reformatory's duplicate denial. Accordingly, the Reformatory did not violate the Act when it denied the Appellant's duplicate request.

Second, the Reformatory denied the Appellant's requests for surveillance videos and "use of force reviews" under KRS 197.025(1) because the release of such records would constitute a security threat to the Reformatory. Under KRS 61.878(1)(l), public records that have been made confidential by an enactment of the General Assembly are exempt from inspection. And under KRS 197.025(1), "no person shall have access to any records if the disclosure is deemed by the commissioner of the department or his designee to constitute a threat to the security of the inmate, any other inmate, correctional staff, the institution, or any other person." This Office has historically deferred to the judgement of the correctional facility in determining whether the release of certain records would constitute a security threat. *See e.g.,* 18-ORD-220 (video recordings); 17-ORD-060 (internal memoranda). This Office has also affirmed the denial of use of force reports under KRS 197.025(1) so long as the agency sufficiently explains how such release poses a security risk. *See, e.g.,* 16-ORD-247; 17-ORD-097.

Here, the Reformatory denied the request for "all use of force reviews pertaining to [the Appellant] and the listed correctional staff[]" under KRS 197.025(1) and KRS 61.878(1)(l) because the release of such records would reveal "confidential use-of-force practices and trainings that are a part of secured policies and procedures." The Reformatory explains that the release of such information would increase "the risk of retaliation against correctional staff" and also describe the tactics used by employees in response to certain incidents. Moreover, the Reformatory explains that the release of the surveillance video would reveal the "methods or practices used to obtain the

[1] *See* KRS 197.025(2) ("[T]he department shall not be required to comply with a request for any record from any inmate . . . unless the request is for a record which contains a specific reference to that individual.")

video, the areas of observation and blind spots for the cameras[.]" The Reformatory has sufficiently explained how the release of these records would constitute a security threat under KRS 197.025(1).[2] Accordingly, the Reformatory did not violate the Act when it denied the Appellant's request for these records.

Finally, the Reformatory denied the Appellant's request for the second part of certain disciplinary reports, which the parties refer to as "Part II's." As explained in 21-ORD-199, the second part of these disciplinary reports is only completed when a disciplinary proceeding advances to "the hearing stage." If the disciplinary report is dismissed prior to the hearing stage, then the second part of the report is not completed. Here, the Reformatory explains that both of these disciplinary reports were dismissed prior to the hearing stage, and thus, the second part of the reports were not completed and 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 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). Although the Appellant has not made a *prima facie* case that the second part of these reports should exist, the Reformatory has nevertheless explained why the second part of the reports do not exist. Accordingly, the Reformatory did not violate the Act when it denied a request for records that do not exist in its possession.[3]

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 within 30 days from the date of this decision. 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. The

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[2] Although this Office has historically deferred judgment to institutions in determining if a release of records would constitute a security threat, such deference is not absolute. *See*, 21-ORD-167 (finding that a correctional facility subverted the Act when it issued a blanket denial under KRS 197.025(1) and the facts indicated the correctional facility never actually reviewed the records before issuing a denial).

[3] The Appellant also asked for legal advice on the best method to obtain pretrial discovery in his pending civil litigation. However, this Office cannot provide the Appellant such legal advice.

Attorney General accepts notice of the complaint through e-mail to OAGAppeals@ky.gov.

Daniel Cameron
Attorney General

/s/Matthew Ray
Matthew Ray
Assistant Attorney General

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Distributed to:

Dominique R. Dudley #265335
Jesse L. Robbins