



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-229

November 24, 2021

In re: Joshua Orr/Eastern Kentucky Correctional Complex

Summary: The Eastern Kentucky Correctional Complex (“the Complex”) did not violate the Open Records Act (“the Act”) when it did not provide records that do not exist or records deemed a security risk under KRS 197.025(1).

Open Records Decision

On September 29, 2021, inmate Joshua Orr (“Appellant”) requested that the Complex provide him a copy of his classification hearing “from August 20, 2021[,] through September 13, 2021, and the documentation classifying [him] to dormitory 3”; “documentation of any notification of classification during the aforementioned dates”; “documentation of any gang affiliation in which [he] may be listed”; and “documentation of reason(s) for dormitory placement and/or holds by” staff members who have refused his request to move out of Dormitory 3. After receiving no response by October 25, 2021, the Appellant initiated this appeal.

KRS 61.880(1) allows a public agency five business days to respond to an open records request. On appeal, the Complex asserts that it never received the Appellant’s request prior to this appeal. This Office cannot resolve a factual dispute as to whether a public agency actually received a request to inspect records. *See, e.g.*, 18-ORD-151. Accordingly, there is no basis to find that the Complex violated the Act by failing to respond to the request.

Upon receiving this appeal, the Complex issued a timely response and asserted that the Appellant was not “classified” during August or September 2021, and consequently no records relating to such classification exist. The Complex also stated that after “a thorough search of [the Appellant’s] records”

it determined that no records “pertaining to any holds for placement in dorm 3” exist.

Once a public agency states affirmatively that records do not exist, the burden shifts to the requester to present a *prima facie* case that the requested records do exist. *Bowling v. Lexington-Fayette Urban Cnty. Gov’t*, 172 S.W.3d 333, 341 (Ky. 2005). Here, the Appellant has not established a *prima facie* case that records relating to a “classification” in August or September 2021, or holds for placement in Dormitory 3, exist. Thus, the Complex did not violate the Act in responding to those portions of the Appellant’s request.

The Complex denied the Appellant’s request for records pertaining to gang affiliation under KRS 197.025(1), which permits the Complex to deny inspection of records that it believes would constitute a security threat to the institution. Specifically, the Complex explained that knowledge of “how [this] information was disclosed to [correctional] staff” would place “other inmates and staff at risk” and that “[i]f status is known on the yard, an inmate may become a target for other gangs or be coerced to participate in threat group activities.”

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 judgment of correctional facilities in determining whether the release of certain records would constitute a security threat under KRS 197.025(1). In particular, this Office has consistently upheld the denial of information relating to membership in a gang or “security threat group.” *See, e.g.*, 16-ORD-023; 16-ORD-070; 17-ORD-032; 17-ORD-169; 18-ORD-004; 18-ORD-186; 19-ORD-140. Accordingly, the Complex did not violate 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 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 Attorney General will accept notice of the complaint e-mailed to OAGAppeals@ky.gov.

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Daniel Cameron
Attorney General

/s/ James M. Herrick

James M. Herrick
Assistant Attorney General

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Distributed to:

Joshua Orr, #245552
Jesse L. Robbins, Esq.
Ms. Debbie Parker