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-234

December 1, 2021

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 did not provide records that do not exist. The Penitentiary did not subvert the intent of the Act, within the meaning of KRS 61.880(4), when it did not commingle nonresponsive records with responsive records.

Open Records Decision

On October 14, 2021, inmate Chris Hawkins ("Appellant") requested that the Penitentiary provide him a copy of the request he submitted on October 1, 2021 to move cells, "and any related documents/emails." The Penitentiary granted the request and provided the Appellant four pages of records. This appeal followed.

On appeal, the Appellant argues that the Penitentiary improperly denied him a copy of a Prison Rape Elimination Act ("PREA") investigation. The Penitentiary, however, states that the four pages provided are the only responsive records and no PREA investigation exists because no such investigation was conducted.

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 attempts to establish that PREA records should exist because an earlier request to move cells that he submitted on September 12, 2021, required the Penitentiary to conduct a PREA investigation based on the statements made in his request.

A requester may establish a *prima facie* case that a record exists by citing "a statute, regulation, or case law directing the creation of the requested record." *See, e.g.,* 11-ORD-074. In such an instance, the agency must rebut the presumption by giving "a written explanation for [its] nonexistence." *Eplion v. Burchett,* 354 S.W.3d 598, 603 (Ky. App. 2011) (quoting 10-ORD-078). However, the Appellant has not established such a presumption here. The Appellant cites a federal regulation, 28 C.F.R. § 115.11, which requires zero tolerance of sexual abuse and sexual harassment in prisons and compliance with PREA standards. The Appellant also cites Corrections Policies and Procedures ("CPP's") that require allegations of sexual abuse and sexual harassment allegations to be investigated. The Appellant also points to allegations he made in his requests to moves cells that, according to him, trigger the Penitentiary's duty to investigate the allegations as a PREA complaint.

This Office is unable to determine whether the Penitentiary was required to initiate a PREA investigation based on the Appellant's allegations in his requests to move cells. Complaints about whether public agencies are following laws specific to them are beyond the purview of this Office's review under the Act. *See, e.g.*, 20-ORD-125; 12-ORD-162. But even if the Appellant had presented a *prima facie* case that the investigation should have been conducted, and that such an investigation should have created records, the Appellant still could not inspect such records even if they did exist. *See e.g.*, 18-ORD-206 (finding that PREA investigations are confidential and exempt from disclosure under KRS 61.878(1)(k) and 28 C.F.R. § 115.61(b)). Therefore, this Office cannot find that the Penitentiary has violated the Act.

In addition, the Appellant argues that the Penitentiary improperly provided him with two pages of records that were nonresponsive to his request. Under KRS 61.880(4), a person may petition the Attorney General to review an agency's action, short of denial of inspection, if the "person feels the intent of [the Act] is being subverted by an agency short of denial of inspection[.]" A public agency may subvert the intent of the Act by "commingling nonresponsive records with responsive records so as to create unnecessary impediments to effective review." *See, e.g.,* 07-ORD-105; 08-ORD-032; 17-ORD-272. However, that was not the case here. The Penitentiary provided only two pages of records that the Appellant claims were nonresponsive. Even if those records had been nonresponsive, two pages would not "create unnecessary impediments to effective review" of the remaining two pages.

Furthermore, the two pages in question are reasonably responsive to the Appellant's request. The Appellant argues that he requested a copy of a request to move cells he submitted on October 1, 2021, which was approved, but the Penitentiary provided copies of other requests to move cells dated October 1 and September 12, 2021, that were not approved. The Penitentiary asserts that there are no other requests to move cells from the Appellant for the relevant time period. The Appellant has not presented a *prima facie* case that an approved request to move cells exists. Accordingly, the Penitentiary neither violated nor subverted the intent of the Act in its disposition of the Appellant's request.

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.

Daniel Cameron
Attorney General

/s/ James M. Herrick

James M. Herrick
Assistant Attorney General

#343

Distributed to:

Chris Hawkins, #103061
Jesse L. Robbins, Esq.
Ms. Courtney Martin