



COMMONWEALTH OF KENTUCKY  
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**22-ORD-029**

February 22, 2022

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 a record that does not exist within its possession.

***Open Records Decision***

Chris Hawkins (“Appellant”) submitted a request for records to the Penitentiary that contained two subparts. First, the Appellant requested a copy of a specific property request form that she gave a specific employee on specific date. Second, the Appellant requested copies of letters she wrote to a specific deputy warden during a specific period of time concerning the possession of certain clothing while housed in a restricted housing unit. In a response, the Penitentiary granted the first subpart and provided three pages of records it believed were responsive to the Appellant’s request. The Penitentiary denied the second subpart because it claimed it does not possess any records responsive to that request. This appeal followed.

The Appellant appealed the Penitentiary’s response to the first subpart of her request because she claimed the records she was provided were unresponsive to her request. On appeal, the Penitentiary now claims it provided the Appellant the correct records she requested free of charge. Under 40 KAR 1:030 § 6, “[i]f requested documents are made available to the complaining party after a complaint is made, the Attorney General shall

decline to issue a decision in the matter.” Accordingly, the issue related to the first subpart of the request is now moot.

Regarding the second subpart of the Appellant’s request, 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).

Here, the Penitentiary affirmatively stated that it does not possess records responsive to the second subpart of the Appellant’s request. To make a *prima facie* case that the records should exist in the possession of the Penitentiary, the Appellant submits a copy of a letter that she claims to have submitted to the specific deputy warden. Such a letter could be considered responsive to the Appellant’s request. However, the fact that the Appellant possesses a letter that seemingly is responsive to the second subpart of her request does not prove that the Penitentiary currently possesses a similar record responsive to her request, nor does it prove that the specific deputy warden ever received such a letter. As such, the Appellant has not made a *prima facie* case that the records she seeks exists in the possession of the Penitentiary.

Even if the Appellant had made a *prima facie* case, the Penitentiary sufficiently explains on appeal why such a record does not exist in its possession. The deputy warden’s office claims it never received any letter from the Appellant concerning the possession of certain clothing while in the restricted housing unit. Thus, the Penitentiary did not violate the Act when it could not provide a record that does not exist within 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 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

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be named as a party in that action or in any subsequent proceedings. The Attorney General will accept notice of the complaint emailed to OAGAppeals@ky.gov.

**Daniel Cameron**  
**Attorney General**

/s/Matthew Ray  
Matthew Ray  
Assistant Attorney General

#029

Distributed to:

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