



COMMONWEALTH OF KENTUCKY
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22-ORD-153

July 18, 2022

In re: Gerardo Rodriguez/Kentucky State Penitentiary

Summary: The Kentucky State Penitentiary (the “Penitentiary”) did not violate the Open Records Act (“the Act”) when it denied a request for a record that does not exist within its possession.

Open Records Decision

Inmate Gerardo Rodriguez (“Appellant”) submitted a request to the Penitentiary for a copy of a “faxed message” that he thought was sent “to the pharmacy” to place one of his prescriptions “on hold.” In a timely response, the Penitentiary denied his request because no responsive records exist within its possession. This appeal followed.

On appeal, the Penitentiary states affirmatively that no records responsive to the Appellant’s request exist within its possession. 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).

To make a *prima facie* case the Appellant submits a copy of a “Condensed Health Services Encounter” which lists the status of his prescription as “on hold” and

contains a note that states that the “[p]harmacy faxed message with [sic] detail (OH).” The Appellant claims that because this document lists the prescription status as being on hold and also indicates that the pharmacy faxed a message “with detail,” that a faxed message that requested the prescription be put on hold does or should exist. However, the Appellant specifically requested a “copy of the complete, message, the [sic] was send [sic] to the pharmacy.” (emphasis added). Although the document indicates that the pharmacy sent a fax regarding the prescription being placed on hold, it does not indicate that a message was faxed to the pharmacy to place the prescription on hold. The evidence Appellant provides may be sufficient to establish a *prima facie* case that the pharmacy faxed a message to medical staff about the status of the Appellant’s prescription, but it does not establish a *prima facie* case that medical staff faxed a message “to the pharmacy,” which is the record the Appellant specifically requested. Thus, the Appellant fails to make a *prima facie* case that the requested records do or should exist.

Even if the Appellant had made a *prima facie* case, the Penitentiary sufficiently explains on appeal that the faxed message requested by the Appellant does not exist. The Penitentiary explains that the medical staff did not fax a message to the pharmacy to place the Appellant’s prescription on hold. Nor did the medical staff receive a fax from the pharmacy as indicated in the document the Appellant submits. Furthermore, the Penitentiary explains that it searched the Appellant’s medical records and could not find any faxed messages to or from the pharmacy explaining why his prescription was placed on hold. Thus, even if the Appellant had established a *prima facie* case that responsive records exist, the Penitentiary has adequately explained its search and therefore, the Penitentiary did not violate the Act.

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court under KRS 61.880(5) and KRS 61.882 within 30 days from the date of this decision. Under 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 emailed to OAGAppeals@ky.gov.

Daniel Cameron
Attorney General

s/Matthew Ray
Matthew Ray
Assistant Attorney General

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Distributed to:

Gerardo Rodriguez, #266631
Amy V. Barker