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**22-ORD-224**

October 20, 2022

In re: Carlos Harris/Eastern Kentucky Correctional Complex

**Summary:** The Eastern Kentucky Correctional Complex (the “Complex”) violated the Open Records Act (“the Act”) when it failed to respond fully to a request within five business days of receiving it. However, the Complex did not violate the Act when it denied a request for a record that does not exist within its possession. An agency is not required to create a record to satisfy a request under the Act.

***Open Records Decision***

On September 21, 2022, inmate Carlos Harris (“Appellant”) submitted a request to the Complex for a “[r]eport from video footage” of a specific date and time “where [the Appellant] had complication[s] standing up due to lower back issues.” The Complex responded the next day, cited KRS 61.878(1)(l) and KRS 197.025(1), and denied “a copy of the camera footage” because the “[r]elease of security camera video for an adult correctional institution is a security threat.” This appeal followed.

Upon receiving a request to inspect records, a public agency must decide within five business days whether to grant the request, or deny the request and explain why. KRS 61.880(1).<sup>1</sup> If the agency denies all or any portion of the request, it must cite the specific exception authorizing nondisclosure of the requested records, and briefly explain how the exception applies to the record withheld.

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<sup>1</sup> Similarly, under KRS 197.025(7), a correctional facility must respond to an inmate's request to inspect public records within five business days of receipt of the request

Here, the Complex issued a response within five business days but it did not address the Appellant's actual request. The Complex denied a request for "security camera video," but the Appellant requested a "report" related to the video footage, not the video itself. On appeal, the Complex admits it failed to respond to the Appellant's actual request because it "misread" the request. Accordingly, the Complex violated the Act when it did not issue a response within five business days that granted or denied the Appellant's actual request.

Having read the Appellant's request again, the Complex now claims on appeal that it searched its "offender management system for a report about security video involving [the Appellant] for that date and no report was located." Furthermore, the Complex claims that the requested "report about specific video footage is not a record that is regularly made at the institution."

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 Appellant does not attempt to make a *prima facie* case that the record he seeks exists within the Complex's possession. Instead, the Appellant claims in a supplemental response that "there is no statute, provision, or rule which prohibit the preparing of a report from video footage[.]" However, the absence of a statute or regulation prohibiting the creation of a record does not mean an agency *must* create such a record. To the extent the Appellant implies that the Complex should create such a report in response to his request, he is incorrect. An agency is not required to create a record to satisfy a request under the Act. *See Dept. of Revenue v. Eifler*, 436 S.W.3d 530, 534 (Ky. App. 2013); *see also* 18-ORD-184, 18-ORD-021, 17-ORD-089, 12-ORD-026, 11-ORD-091, 10-ORD-187. Thus, the Complex did not violate the Act when it denied a request for 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 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](mailto:OAGAppeals@ky.gov).

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

s/ Matthew Ray  
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Assistant Attorney General

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