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24-ORD-127

May 24, 2024

In re: Donald Phillips/Lee Adjustment Center

Summary: The Lee Adjustment Center (“Center”) violated the Open Records Act (“the Act”) when it denied a request for records without citing a specific exemption to justify its denial of the request. The Center did not violate the Act when it did not provide records that do not exist.

Open Records Decision

Inmate Donald Phillips (“Appellant”) submitted a request to the Center for “the results of [his] most recent risk and needs assessment.” In response, the Center denied the request stating, “inmate risk and need assessments are not subject to open record[s].” This appeal followed.

Upon receiving a request to inspect records, a public agency must decide within five business days whether to grant or deny the request. KRS 61.880(1). If it denies the request, the agency’s response “shall include a statement of *the specific exception authorizing the withholding of the record* and a brief explanation of how the exception applies to the record withheld.” *Id.* (emphasis added). However, the Center’s response did not cite an exemption, merely stating that the records “are not subject to open record[s].” Accordingly, the Center violated the Act because its initial response failed to comply with KRS 61.880(1).

On appeal, the Center now states that it does not possess a copy of the Appellant’s most recent risk and needs assessment.¹ Once a public agency states affirmatively that a record does not exist, the burden shifts to the requester to present a *prima facie* case that the requested record does or should exist. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov’t*, 172 S.W.3d 333, 341 (Ky. 2005). If the requester

¹ Rather, the Center states the record is most likely in the possession of the Kentucky Parole Board. *See* KRS 61.872(4) (“If the person to whom the application is directed does not have custody or control of the public record requested, that person shall notify the applicant and shall furnish the name and location of the official custodian of the agency’s public records.”).

makes 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 has not made a *prima facie* case that the Center possesses his most recent risk and needs assessment. Accordingly, the Center did not violate the Act when it did not provide it.²

A party aggrieved by this decision may appeal it by initiating an 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.

Russell Coleman
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/s/ Zachary M. Zimmerer
Zachary M. Zimmerer
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Distributed to:

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² Because the Center has explained that it does not possess the requested record, it is not necessary to address its arguments that the record is exempt under KRS 439.510 or as a request for information.