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

22-ORD-137

June 22, 2022

In re: Shawn Pursley/Kentucky Parole Board

Summary: The Kentucky Parole Board ("the Board") did not violate the Open Records Act ("the Act") when it did not provide copies of records that do not exist in its possession.

Open Records Decision

Inmate Shawn Pursley ("the Appellant") submitted a request to the Board seeking copies of any recordings of his parole hearings conducted in 2018, 2020, and 2022. In a timely response, the Board denied the request because no responsive records existed in the Board's possession. Specifically, the Board explained that, due to the Appellant's classification as a non-violent offender and the type of felony for which he was convicted, his case was subject to a "Parole Release Review," which is not a "face-to-face hearing" and is not recorded. The Board also noted that its retention schedule requires the destruction of recorded parole hearings 18 months after the hearing. Thus, even if the Board had recorded the "file reviews" in 2018 and 2020, those records would have been destroyed in conformity with the Board's retention scheduled. This appeal followed.

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, to make his *prima facie* case, the Appellant states "nowhere in the [*sic*] KRS 439.340(2)" does it state that file reviews are not required to be recorded.[1] However, the Board "*in its discretion* may hold interviews and hearings for prisoners convicted of Class C felonies not included within the definition of 'violent offender' in KRS 439.3401 and Class D felonies not included within the definition of 'sex crime' in KRS 17.500." KRS 439.340(2) (emphasis added). Moreover, the Board "shall adopt administrative regulations with respect to . . . the conduct of parole and parole revocation hearings." KRS 439.340(3).

On appeal, the Board explains that it has adopted regulations governing the review process of parole eligibility for non-violent offenders, as authorized under KRS 439.340(2) and (3). Specifically, the Board has promulgated a policy, KYPB 10-01, which has been incorporated by reference under 501 KAR 1:108. That policy states that the Board may conduct "file reviews," as opposed to full "face-to-face hearings" of cases such as the Appellant's. The Board states that these "file reviews" are never recorded. Neither the policy cited by the Board, nor KRS 439.340, cited by the Appellant, explicitly require the reviews to be recorded. Instead, under the policy, "the Board . . . shall make appropriate arrangements for any offender denied parole after a file review pursuant to KRS 439.340(2) to have access to information explaining the Board's vote or any program recommendations or other suggestions by the Board." KYBI 10-01 § N(2)(c).

The statute cited by the Appellant, KRS 439.340, does not explicitly require the Board to record these "file reviews." Accordingly, the Appellant has failed to make a *prima facie* case that the requested record should exist. The Board has explained that it does not record "file reviews," such as the one conducted for the Appellant. At bottom, the Board does not possess a record responsive to the Appellant's request. Accordingly, this Office cannot find that the Board violated the Act. *See Univ. of Ky. v. Hatemi*, 636 S.W.3d 857, 870 (Ky. App. 2021).

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

[1] The Appellant also claims that his most recent review was conducted on April 26, 2022, by Zoom, a video-teleconferencing application. The Appellant claims that, during this review, a Board member engaged in "misconduct." The Appellant asks this Office to consider whether his due process rights have been violated if it is true that the hearing was never recorded, because the Appellant claims he is unable to prove the misconduct without a recording of the review. However, this Office cannot consider ancillary questions of law, such as whether the Appellant's due process rights were violated, when reviewing a denial of a request to inspect records. *See* KRS 61.880(2)(a) ("The Attorney General shall review the request and denial and issue . . . a written decision stating whether the agency violated provisions of KRS 61.870 to [KRS] 61.884.")

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/Marc Manley
Marc Manley
Assistant Attorney General

#195

Distributed to:

Shawn Pursley #166730
Edward A. Baylous, II