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**23-ORD-028**

February 7, 2023

In re: Uriah Pasha/Kentucky Parole Board

**Summary:** The Kentucky Parole Board (“the Board”) did not violate the Open Records Act (“the Act”) when it explained why it could not provide a copy of a record that no longer exists.

***Open Records Decision***

Inmate Uriah Pasha (“Appellant”) submitted a request to the Board for a “copy of the Recording of the Parole Board Hearing for [the Appellant], October 2020.” In a timely response, the Board denied the request because “[i]n compliance with [the] State Agency Records Retention Schedule, recorded Parole Hearings records are retained in the Agency for eighteen (18) months and then destroyed or erased and reused[.] [T]herefore, [it] does not have any records responsive to [the Appellant’s] request.” This appeal followed.

Once a public agency states affirmatively 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’t*, 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). Moreover, if evidence supports a finding that requested records should exist but do not, the requester “is entitled to a written explanation for their nonexistence.” *Eplion v. Burchett*, 354 S.W.3d 598, 603 (Ky. App. 2011).

Here, to make a *prima facie* case, the Appellant cites 06-ORD-109, stating “the record should not have been destroyed until 18 months after the parole was revoked or the parole was served out.” The Appellant further states, “As long as the parole was active the hearing recording was relevant and needed, to be saved.” The Appellant does not cite to any authority for these statements other than the decision he cited.

In 06-ORD-109, the Office found the agency did not violate the Act when it failed to produce records that were misplaced or lost but also that it subverted the intent of the Act “through its apparent failure to establish effective controls over the creation, maintenance, and use of the records, thereby frustrating [the Appellant’s] right of access.” The decision cited by the Appellant does not explicitly state the Board must retain the requested record beyond 18 months. Nor does the decision stand for the proposition that the Board must retain the record until “after the parole was revoked or the parole was served out.” Rather, Series 04540 of the Board’s retention schedule states recordings of the Board’s hearings shall be retained for 18 months and then either be destroyed or erased and reused.<sup>1</sup> Thus, the Appellant has failed to make a *prima facie* case the record should still exist.

Unlike the decision cited by the Appellant, here, the requested record was destroyed in compliance with the Board’s records retention schedule. So, although the Board admits the requested record did exist at one time, it also explained why the record does not currently exist. Accordingly, this Office cannot find the Board violated the Act when it explained why it could not provide a copy of a record that no longer exists. *See Eplion*, 354 S.W.3d at 603.

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.

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<sup>1</sup> See Series 04540, Parole Board Retention Schedule, available at <https://kdla.ky.gov/records/RetentionSchedules/Documents/State%20Records%20Schedules/kyParoleBoard.PDF> (last accessed February 7, 2023).

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Distributed to:

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