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

23-ORD-048

March 3, 2023

In re: Marvin T. Pennington/Kentucky Department of Corrections

Summary: The Eastern Kentucky Correctional Complex ("the Complex") did not violate the Open Records Act ("the Act") when it denied a request for a record that does not currently exist within its possession. This Office cannot resolve the factual dispute of whether the Complex's denial was timely issued.

Open Records Decision

On December 27, 2022, inmate Marvin T. Pennington ("Appellant") submitted a request to the Complex for a copy of an "exit property form" created on a specific date when he was transferred to the Little Sandy Correctional Complex. On February 1, 2023, the Appellant initiated this appeal and claimed he did not receive a response to his request.

Under KRS 61.880(1), upon receiving a request to inspect records under the Act, a public agency "shall determine within five (5) [business] days . . . whether to comply with the request and shall notify in writing the person making the request, within the five (5) day period, of its decision."

Here, the Appellant submitted a request to the Complex on December 27, 2022, and claims he did not receive a response to that request. On appeal, the Complex states it received the Appellant's request on January 9, 2023, and issued its response on January 12, 2023. As proof, the Complex provides a copy of a letter dated January 12, 2023, in which it denied the Appellant's request because the Complex does not currently possess the requested record. The Complex's response instructed the Appellant to contact the Little Sandy Correctional Complex's official records

custodian because the responsive record was sent to that correctional facility with the Appellant. If the Complex's response was mailed on January 12, 2023, it would have been issued timely. However, this Office is unable to resolve factual disputes, such as whether the requester received the agency's response once the agency provides proof that it mailed the response.[1] *See, e.g.,* 23-ORD-036; 21-ORD-233.

Regarding the merits of the Complex's denial, it stated affirmatively that it does not possess the requested record. 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 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, although the Appellant claims he did not receive the Complex's response denying his request, he nevertheless cites Correctional Policies and Procedures ("CPP") 17.1 (II)(E)(1) and CPP 17.1 (II)(E)(3) in an attempt to make a *prima facie* case that the Complex should possess the requested record. Under CPP 17.1(II)(E)(1), "[i]f an inmate is transferred by Corrections from one institution to another, all personal effects, personal and state issued clothing and property, including legal material, shall be inventoried and transferred with the inmate." Pursuant to CPP 17.1(II)(E)(2), "(t)he sending institution shall inventory all property prior to the inmate leaving the institution on transfer to another facility." Thus, under CPP 17.1, the Complex was required to create the requested form before transferring the Appellant to the Little Sandy Correctional Complex and the Appellant has made a *prima facie* case the record should exist.

However, the Complex does not deny that it created the requested record. Rather, the Complex claims it did not possess the record at the time of the Appellant's request. The Complex's response explained that the Complex does not currently possesses the requested property inventory form because such forms are transferred with the inmate's property to the receiving institution.[2] Moreover, according to the

[1] Likewise, this Office cannot adjudicate ancillary legal disputes in the context of an appeal brought under KRS 61.880(2). *See, e.g.,* 22-ORD-244 n.3. As such, this Office cannot adjudicate whether the Complex violated CPP 17.1(II)(E)(1), as the Appellant claims, when it allegedly did not allow him to sign the property form that is the subject of this appeal.

[2] Under CCP 17.1 (II)(E)(3), "[t]he receiving institution shall inventory the items of the arriving inmate and assist in the disposition of all unauthorized items."

Department of Corrections' retention schedule, inmate inventory and property forms must be retained "at [the] assigned correctional institution" for five years from the date of issue.[3] Thus, under the applicable retention schedule, the Little Sandy Correctional Complex should possess the requested record, not the Complex. Complying with KRS 61.872(4), the Complex provided the Appellant the contact information for the Little Sandy Correctional Complex's official custodian of records. Accordingly, the Complex did not violate the Act when it denied a request for a record that it does not currently possess.

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

#055

Distributed to:

Marvin T. Pennington #119935
Edward A. Baylous
Lydia C. Kendrick
Ann Smith

[3] Dept. of Corrections Records Retention Schedule, Series 05952, available at https://kdla.ky.gov/records/RetentionSchedules/Documents/State%20Records%20Schedules/kycorrections.PDF (last accessed Mar. 3, 2023)