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**23-ORD-107**

May 8, 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 did not provide records that do not exist in its custody or control.

***Open Records Decision***

On March 16, 2023, inmate Uriah Pasha (“Appellant”) requested a copy of all correspondence he exchanged with the Board between June and October 2020. In response, the Board stated it did not have any records responsive to the request. The Board explained that inmate correspondence is part of “the official inmate record,” which is “maintained in the Kentucky Offender Management System (KOMS) and the custodian of those records is the [Kentucky] Department of Corrections.” Finally, the Board provided the name and address of the records custodian for the Department of Corrections. This appeal followed.

Once a public agency states affirmatively that it does not possess any responsive records, the burden shifts to the requester to present a *prima facie* case that the requested records do exist in the agency’s custody or control. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov’t*, 172 S.W.3d 333, 341 (Ky. 2005). If the requester establishes a *prima facie* case that records do or should exist in the agency’s custody or control, “then the agency may also be called upon to prove that its search was adequate.” *City of Ft. 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 claims the Board “has access to KOMS” and failed to search that system for records. However, “an agency’s ‘access’ to digital records, without more, does not mean that the public agency is the custodian of such records.” 22-ORD-131 (quoting 20-ORD-109). A public agency “is responsible only for those

records within its own custody or control.” *City of Ft. Thomas*, 406 S.W.3d at 856 (citing *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136 (1980)); see also *Dep’t of Revenue v. Eifler*, 436 S.W.3d 530, 534 (Ky. App. 2013) (“The ORA does not dictate that [a] public agenc[y] must gather and supply information not regularly kept as part of its records.”). Thus, the Appellant has not established a *prima facie* case that the responsive records are in the Board’s custody or control.

Under KRS 61.872(4), “[i]f 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.” The Appellant addressed his application to the Board, which does not have custody or control of the requested records. By providing the name and location of the records custodian for the Department of Corrections, the Board complied with KRS 61.872(4). Thus, the Board did not violate the Act in its disposition of the Appellant’s request.

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 action or in any subsequent proceedings. The Attorney General will accept notice of the complaint emailed to [OAGAppeals@ky.gov](mailto:OAGAppeals@ky.gov).

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s/ James M. Herrick  
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Distributed to:

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