



COMMONWEALTH OF KENTUCKY
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23-ORD-302

November 13, 2023

In re: Lewis Davenport/Department of Corrections

Summary: The Department of Corrections (“the Department”) did not violate the Open Records Act (“the Act”) when it did not provide records that do not exist.

Open Records Decision

On September 17, 2023, inmate Lewis Davenport (“Appellant”) submitted a request to the Department seeking a variety of records related to the revocation of his parole.¹ Having received no response by October 10, 2023, the Appellant initiated this appeal.

Under KRS 61.880(1), upon receiving a request for records under the Act, a public agency “shall determine within five (5) [business] days . . . after the receipt of any such request 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.”

However, the Office has consistently found it is unable to resolve factual disputes between a requester and a public agency, such as whether a requester received an agency’s response to a request. *See* 21-ORD-233 (the agency claimed it issued a response, but the requester claimed he did not receive it); *see also* 22-ORD-125 (the agency claimed it did not receive the request); 22-ORD-100 (same); 22-ORD-051 (same); 21-ORD-163 (same).

¹ Specifically, the Appellant sought (1) the “violation of supervision report,” (2) the “written notice of the claimed violations of parole and the evidence used against” the Appellant, (3) the “notice of preliminary hearings including the signed waiver forms with initials and signature of” the Appellant, (4) the “parole violation warrant,” and (5) “copies of any and all documents related to” the Appellant.

Here, the Department states it received the request on September 20, 2023. It further provides a copy of the response it claims to have mailed to the Appellant on September 27, 2023, which was the fifth business day after the Department received the request. Accordingly, the Office cannot resolve the factual dispute between the parties about whether the Department issued the response or whether the Appellant received it, and therefore, cannot find that the Department's response was untimely in violation of the Act.²

In its response, the Department also notified the Appellant that the requested "Notice of Preliminary Hearing, and the Notice of the Claimed violations of Parole" do not exist. 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 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 Department possesses these records. Therefore, the Department did not violate the Act when it did not provide them.

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.

Daniel Cameron
Attorney General

s/ Zachary M. Zimmerer
Zachary M. Zimmerer
Assistant Attorney General

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² In its response, the Department offered to provide all existing records responsive to the request upon payment of copying fees.

Distributed to:

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