



COMMONWEALTH OF KENTUCKY OFFICE OF THE ATTORNEY GENERAL

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24-ORD-003

January 16, 2024

In re: Timothy D. Day/Kentucky Parole Board

Summary: The Office cannot find that the Kentucky Parole Board (“the Board”) violated the Open Records Act (“the Act”) when it denied a request for records that do not exist.

Open Records Decision

Inmate Timothy D. Day (“Appellant”) claims he submitted a request to the Board on November 14, 2023, for a copy of the “Preliminary Parole Revocation Hearing Tapes and Record” from January 1, 2022, and January 1, 2023. The Appellant also requested “the Final Hearing Dates for August 4, 2022, and August 5, 2022.” The Appellant noted the recordings “were made on the Franklin Circuit Court Arraignment Video Recording.” The Board denied his request because it does not possess any responsive records.¹ The Appellant then initiated this appeal, claiming the Board should possess responsive records.

¹ The request the Appellant provided with his appeal is dated November 14, 2023, but he dated his appeal November 6, 2023. The Board’s response is also dated November 6, 2023, but indicates it received his request that was dated November 14, 2023, on November 17, 2023. Presumably, the November 6 date on both the Appellant’s appeal and the Board’s denial are erroneous. It is not clear when the Board issued its response denying the Appellant’s request. The date of the Board’s denial is important because, under KRS 197.025(3), “all persons confined in a penal facility shall challenge any denial of an open record [request] with the Attorney General by mailing or otherwise sending the appropriate documents to the Attorney General within twenty (20) days of the denial.” If the Board issued its denial the same day it allegedly received the Appellant’s request, November 17, 2023, then the Appellant’s appeal would be time-barred because he did not mail the appropriate documents to the Office until December 8, 2023, or 21 days later, as reflected by the postmark of his appeal. *See, e.g.*, 19-ORD-176 (dismissing an inmate’s appeal as untimely based on the postmark of his appeal); 18-ORD-233 (same). Ultimately, the Office cannot conclusively determine from this record that the Appellant’s appeal is untimely, and therefore, is satisfied it has jurisdiction to proceed to the merits of the Appellant’s appeal.

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 the requested records do or should exist. 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, “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).

In an attempt to make a *prima facie* case that the Board possesses responsive records, the Appellant merely claims that “Parole Hearing Records are recorded and stored for eighteen (18) months.” Even if that were true,² he provides no evidence that records were created on the dates he specified in his request. Rather, he provides on appeal two documents indicating his parole revocation hearing may have occurred, but neither reflect that any such proceeding occurred on the dates he identified.³ The Office has previously found that a requester’s bare assertion that records exist is not enough to establish a *prima facie* case that the records actually exist. See, e.g., 23-ORD-335; 22-ORD-040. And the Board has again affirmed on appeal that none of the Appellant’s hearings were conducted “on the dates requested by him.” Accordingly, the Office cannot find that the Board violated the Act when it denied a request for records that do not exist.

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.

² Indeed, the Board’s retention schedule for public records does require such records to be retained for 18 months. See Series 04480, 04540, Parole Board Retention Schedule, available at <https://kdla.ky.gov/records/RetentionSchedules/Documents/State%20Records%20Schedules/kyParoleBoard.PDF> (last accessed January 16, 2024).

³ One document is merely an order entered October 10, 2022, referring the “matter” to the Board “for a final decision,” and the other is a notice scheduling a probable cause hearing on September 21, 2022, to determine whether to revoke the Appellant’s parole. Moreover, it is highly unlikely any hearings occurred on January 1, 2022 or 2023, as that would have been the New Year Day holiday.

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/s/ Matthew Ray
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Distributed to:

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