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24-ORD-103

April 26, 2024

In re: Timothy Day/Kentucky Parole Board

Summary: The Kentucky Parole Board (“the Board”) did not violate the Open Records Act (“the Act”) when it did not provide a record that does not exist.

Open Records Decision

Inmate Timothy Day (“Appellant”) submitted a request to the Board for a copy of any digital recordings created as a result of his “Final Revocation Hearing” held on November 3, 2022. In a timely response, the Board denied the request because it determined a “Final Parole Revocation Decision” in the Appellant’s case was rendered “on November 6, 2023.” The Board claimed the process “is conducted by file review and . . . is never digitally (Audibly) recorded.” As such, the Board claimed the requested recording does not exist. This appeal followed.

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, to make a *prima facie* claim the recording should exist, the Appellant cites 501 KAR 1:040 § 13(1)(e), which states that a final revocation hearing “shall be conducted on the record and may be recorded and preserved by any means practical, including electronically, mechanically, or stenographically.” In response, the Board states the date of the Appellant’s final revocation hearing was October 7, 2022. The Board’s written decision to revoke the Appellant’s parole was rendered on November

3, 2022.¹ The Board further explains that its final written decision is issued following its review of the person's file and this process is not recorded. Accordingly, no recording from November 3, 2022, exists.

Because the Appellant's final revocation hearing occurred on October 7, 2022, he has not made a *prima facie* case that a recording dated November 3, 2022, exists. Accordingly, the Board did not violate the Act when it denied the Appellant's request.

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.

Russell Coleman
Attorney General

/s/ Marc Manley
Marc Manley
Assistant Attorney General

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Distributed to:

Timothy Day #137492
Seth Fawns
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¹ On appeal, the Board admits its original response mistakenly identified the date of its decision as November 6, 2022