**16-ORD-072**

April 13, 2016

In re: Uriah M. Pasha/Kentucky State Reformatory

***Summary:*** Kentucky State Reformatory cannot produce nonexistent Inmate Property Forms and ultimately explained that any responsive forms not already provided were properly destroyed in accordance with applicable records retention schedule. Nothing else is required.

***Open Records Decision***

Uriah M. Pasha initiated this appeal by letter dated February 29, 2016, challenging the partial denial by the Kentucky State Reformatory (“KSR”) of his February 15, 2016, request for a copy of “all of Uriah Pasha, aka, Kenneth Ross #092028’s Ky. Dept. of Corrections – Inmate Personal Property Inventory Forms from March 19, 1984 showing both transfers and segregation pack-ups and releases of property.” KSR received Mr. Pasha’s request on February 17, 2016, and issued a timely written response on February 23, 2016, per KRS 197.025(7), advising that he arrived at KSR on September 10, 2014, and the eight (8) forms attached were the only existing responsive forms. Offender Information Supervisor Jodi Williams further advised Mr. Pasha that KSR did not possess all of the requested forms but provided him with contact information for the facilities that would possess other forms per KRS 61.872(4). On appeal Mr. Pasha listed six different arrival dates and questioned why none of the forms provided were completed on those dates, including September 10, 2014.

Upon receiving notification of Mr. Pasha’s appeal from this office, Staff Attorney Catherine M. Stevens, Justice and Public Safety Cabinet, responded on behalf of KSR. Ms. Stevens noted that all of the forms provided to Mr. Pasha were completed between December 24, 2014, and December 8, 2015. KSR further observed that Mr. Pasha has been incarcerated in various DOC facilities beginning in 1984 and has been housed at KSR on several different occasions. Ms. Stevens advised that retention of Inmate Property Forms is governed by the *Department of Corrections Records Retention Schedule*, and specifically Records Series 05952, which provides that such forms must be maintained for a period of five (5) years. Accordingly, the September 10, 2014, form is the only record that falls within the applicable retention period. The other forms were previously destroyed.

Upon his arrival on September 10, 2014, Ms. Stevens explained, Mr. Pasha was immediately placed in the Segregation Unit. Mr. Pasha did not sign his Inmate Property Form until he was released from segregation and placed in the general population on December 24, 2014. For this reason, KSR does not have a form dated September 10, 2014. KSR cannot produce that which it does not have, Ms. Stevens argued, “nor does the inability of the agency to produce a nonexistent record violate the Open Records Act.” KSR cited prior decisions of this office in support of its position. Because KSR cannot provide nonexistent records for inspection or copying, and ultimately satisfied its burden of proof under KRS 61.880(2)(c) in explaining that any other forms responsive to Mr. Pasha’s request were properly destroyed in the normal course of business per the applicable *Records Retention Schedule*, this office affirms the disposition of Mr. Pasha’s request.

KSR was correct in asserting that a public agency cannot produce that which it does not have; nor is a public agency required to “prove a negative” in order to refute a claim that certain records exist in the absence of a *prima facie* showing by the complainant. *See* *Bowling v. Lexington-Fayette Urban County Government*, 172 S.W.3d 333, 341 (Ky. 2005); 11-ORD-037 (affirming the denial by KSR of a request by Mr. Pasha “in light of its explanation for the nonexistence of the records sought and the absence of any facts or law importing the records’ existence”). As in 11-ORD-118, 12-ORD-025, and 13-ORD-018, for example, this office declines to unnecessarily lengthen the instant decision with another summary of the relevant legal authorities given that Mr. Pasha “is no doubt familiar with the line of open records decisions issued by the Attorney General recognizing that, in general, public agencies that deny access to requested records based on the nonexistence of the records cannot be held to have violated the Open Records Act.” 11-ORD-118, pp. 1-2.

However, the Attorney General began applying a higher standard of review to denials based upon the nonexistence of the record(s) when the General Assembly enacted KRS 61.8715 in 1994, pursuant to which “public agencies are required to manage and maintain their records according to the requirements of [KRS 171.410 to 171.740].” In order to satisfy its burden of proof under KRS 61.880(2)(c), a public agency must explain why it cannot produce the record(s) being sought and under what authority the record(s) was destroyed, if appropriate. *See* *Eplion v. Burchett*, 354 S.W.3d 598, 604 (Ky. App. 2011) (declaring that “when it is determined that an agency’s records do not exist, the person requesting the records is entitled to a written explanation for their nonexistence”); 12-ORD-195. Loss or destruction of a public record creates a *rebuttable* presumption of records mismanagement. 11-ORD-104, p. 5. Here, KSR ultimately explained that any responsive forms not already provided were properly destroyed in the normal course of business per the applicable *Records Retention Schedule,* a review of which confirms the propriety of such action by KSR and validates the agency’s position that no additional records exist*.* When, as in this case, a public agency has denied that additional records currently exist and fully explained why, and the unrefuted evidence presented confirms, rather than refutes that position, further inquiry is unwarranted. 05-ORD-065, pp. 8-9. The disposition of Mr. Pasha’s request is affirmed. See 11-ORD-014.

Either party may appeal this decision may appeal by initiating action in the appropriate circuit court per KRS 61.880(5) and KRS 61.882. Pursuant to KRS 61.880(3), the Attorney General should be notified of any action in circuit court, but should not be named as a party in that action or in any subsequent proceeding.

Andy Beshear Attorney General

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Assistant Attorney General

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Distributed to:

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