**19-ORD-154**

July 31, 2019

In re: Uriah Pasha/Kentucky State Reformatory

***Summary:*** Kentucky State Reformatory (“KSR”) initially violated KRS 61.880(1) by failing to confirm or deny whether responsive records existed because it failed to conduct a search, but remedied the error on appeal. KSR did not violate the Open Records Act in requiring inmate requester to comply with relevant provisions of CPP 6.1 or in denying a request for records in the possession of the records custodian of another correctional facility.

***Open Records Decision***

 The question presented in this appeal is whether the Kentucky State Reformatory (“KSR”) violated the Open Records Act (“Act”) in the disposition of an open records request submitted by Uriah Pasha (“Appellant”). For the reasons stated below, we find that KSR initially violated KRS 61.880(1) but remedied the error on appeal. We also find that KSR did not violate the Act in requiring inmate requester to comply with relevant provisions of CPP 6.1 or in denying his request for records in the possession of the records custodian of a different correctional facility.

 On June 24, 2019, Appellant, an inmate at the Kentucky State Penitentiary (“KSP”), requested from KSR “[a] copy of each and every receipt Uriah Pasha #092028 received for purchases made from the Inmate Canteen during the period of April 14, 2018 thru June 21, 2019. A copy of Uriah Pasha #092028 Inmate Account showing purchase for April 1, 2018 thru June 21, 2019.” On June 26, 2019, KSR denied Appellant’s request, stating, “you were transferred to KSP along with your inmate funds prior to this response…please contact the KSP open records coordinator for assistance.” KSR directed Appellant to request responsive records from KSP, but it failed to conduct a search for responsive records in its own possession.

 On July 1, 2019, Appellant appealed the disposition of his request. Appellant argued that KSR violated the Act by not providing all responsive records located in the Kentucky Offender Management System (“KOMS”), because KSR has access to any record located in the computer system. Appellant argued that the Department of Corrections (“DOC”) requirement that inmates submit their open records requests to the records coordinator of the facility in possession of the records, even if DOC is not housing the inmate at that facility, imposed needless mailing costs on inmates. Appellant argued that this office should find the policy invalid and that KSR violated the Act.

 On July 17, 2019, Justice and Public Safety Cabinet Attorney Oran S. McFarlan, III, responded on behalf of KSR. Mr. McFarlan first informed this office that KSR had amended its response and made the responsive records in its possession available to Appellant and attached a July 11, 2019 letter to Appellant reflecting such. KSR provided records from KSP verifying that it provided Appellant access to copies of 51 pages of canteen receipts from October 24, 2018 through June 21, 2019. Mr. McFarlan argued the appeal is now moot because Appellant has received all existing responsive records.

 This appeal is not moot because KSR only made a partial disclosure of the records identified in Appellant’s request. 40 KAR 1:030, Section 6, provides: “If the requested documents are made available to the complaining party after a complaint is made, the Attorney General shall decline to issue a decision in the matter.” An agency’s inability to produce records due to their nonexistence, or lack of possession, is tantamount to a denial. *See* 01-ORD-38, p. 9; 12-ORD-162. KSR stated that it provided only part of the responsive records to Appellant, and KSP provided the remaining responsive records. “[U]nless all records identified in an open records request are released, not just those the agency deems nonexempt, the issue before the Attorney General is not moot.” 09-ORD-007. KSR argued on appeal that it is not obligated to provide Appellant copies of the responsive canteen receipts and inmate account receipts in possession of KSP. As such, the issues raised in this appeal are not moot.

KSR initially violated the Act by failing to conduct a reasonable search for responsive records, but it remedied the error on appeal. KSR violated KRS 61.880(1) by initially speculating that it did not possess responsive records and directing Appellant to submit his request to KSP without first conducting a search. A public agency cannot provide a requester with access to a record it does not have or that does not exist. 99-ORD-98; 07-ORD-190, p. 6. However, in construing KRS 61.880(1), the Court of Appeals held, “[t]he language of the statute directing agency action is exact. It requires the custodian of records to provide particular and detailed information in response to a request for documents.” *Edmondson v. Alig*, 926 S.W.2d 856, 858 (Ky. App. 1996). As the court recognized, “a limited and perfunctory response” does not “even remotely compl[y] with the requirements of the Act—much less [amount] to substantial compliance.” *Id*. Because an agency’s inability to produce records due to their lack of possession is tantamount to a denial, this office recognizes that a a public agency’s response violates KRS 61.880(1), “if it fails to advise the requesting party whether the requested record exists,” but a public agency discharges its duty under the Act in affirmatively so indicating. 98-ORD-154, p. 2; 03-ORD-205, p. 3. *See also* 01-ORD-38, p. 9; 12-ORD-162.

A public agency must offer some explanation for the nonexistence of records in order to satisfy its burden of justifying a denial, per KRS 61.880(2)(c). *See* 01-ORD-38; 04-ORD-075; 12-ORD-231. As such, KSR was required to do more than speculate that the responsive records were nonexistent, or in the possession of KSP. “[KSR] cannot produce for inspection a record[s] that never existed, but it is incumbent on [KSR] to retrieve all responsive records and review those records before issuing a denial.” 12-ORD-013, p. 2; 15-ORD-109; 17-ORD-204. As such, KSR was required to “expend reasonable effort to identify and locate the requested records.” 95-ORD-96, p. 7 (a public agency is not required to “conduct an ‘exhaustive exhumation of records,’” but is required “’to make a good faith effort to conduct a search using methods which can reasonably be expected to produce the records requested.’”) Accordingly, KSR violated KRS 61.880(1) by failing to conduct a reasonable search to locate any such recording before denying Appellant’s request. *See* 13-ORD-205; 14-ORD-045; 15-ORD-178; 16-ORD-255

KSR corrected this error during the appeal, because the record shows it eventually satisfied its duty under the Act by making “a good faith effort to conduct a search using methods which [could] reasonably be expected to produce the records requested[.]” 95-ORD-96, p. 4 (citing *Cerveny v Central Intelligence Agency*, 445 F. Supp. 772, 775 (D.Colo. 1978)); 18-ORD-164. In its response to the appeal, KSR described its search for responsive records and provided a credible explanation for the nonexistence of some responsive records. KSR found that it possessed some responsive records, and others were in the possession of the KSP custodian of records. The response discharged KSR’s duties under KRS 61.880(1) and KRS 61.880(2)(c). *See* 16-ORD-258; 17-ORD-204; 18-ORD-230; 19-ORD-013. “Our analysis turns not on whether the fruits of the agency’s search met the requester’s expectations, but whether it conducted an adequate search.” 06-ORD-042, p. 5. Accordingly, KSR corrected its initial error on appeal.

Further, KSR did not violate the Act when it declined to produce the responsive records in possession of KSP. Corrections Policy and Procedure (“CPP”) 6.1[[1]](#footnote-1) controls the handling of institutional inmate open records requests. Pursuant to CPP 6.1, an inmate must send the request through institutional mail to the records coordinator at the institution. CPP 6.1(II)(B)(2). The inmate must make the request for records with the coordinator who is the custodian of the requested record. 6.1(II)(C)(2).

 This office has upheld the validity of CPP 6.1 and has determined that it is an acceptable way to manage the written requests at a prison given its security issues and the special circumstances of prison life and management.[[2]](#footnote-2) The Attorney General first upheld CPP 6.1 by affirming the denial of an inmate’s request due to his failure to provide the inmate identification information required by the policy, holding that the denial was “proper and consistent with its policies and procedures relating to inmate open records requests,” as well as KRS 197.025(2), incorporated into the Open Records Act by operation of KRS 61.878(1)(l). *See* 04-ORD-004, p. 3. Likewise, this office upheld the procedural requirement in CPP 6.1(II)(B)(2) requiring that inmates submit requests through institutional mail to the Open Records Coordinator, based on KRS 197.025(1)[[3]](#footnote-3) and KRS 197.025(4).[[4]](#footnote-4) 17-ORD-042;

 We find that CPP 6.1(II)(C)(2) and the requirement that the inmate make the request for records with the coordinator who is the custodian of the requested record is valid. Inasmuch as the challenged policy “does not interfere, or threaten to interfere, with [Appellant’s] statutory right of access to nonexempt public records,” and is consistent with provisions of the Open Records Act, this office finds that KSR did not violate the Act by requiring compliance with it[.]” 11-ORD-119, p. 4; 12-ORD-117 (*quoting* *Dept. of Corrections v. Chestnut*, 250 S.W.3d 655, 662 (Ky. 2008)). Moreover, this office has recognized that DOC is vested with broad discretion in matters related to the safety, security, and operation of its correctional institutions. *See* 94-ORD-40. We are not in the position to second guess the Department or to conclude that its policies are an abuse of discretion.

Pursuant to 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.” KSR ascertained that it did not possess Appellant’s canteen receipts from November 16, 2018 to June 17, 2019, and it provided him contact information for the KSP records custodian. With respect to the responsive records in KSP’s possession, KSR fulfilled its duty under the Act. *See* KRS 61.872(4); 17-ORD-019.

 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. 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 proceeding.

 Andy Beshear

 Attorney General

 J. Marcus Jones

 Assistant Attorney General

#279

Distributed to:

Uriah Pasha, #092028

Oran S. McFarlan, III, Esq.

Kasey Schank

1. CPP 6.1 is incorporated by reference in 501 KAR 6:020 and can be found at: <https://corrections.ky.gov/About/cpp/Documents/06/CPP%206.1.pdf> (last visited July 25, 2019). [↑](#footnote-ref-1)
2. *See* 17-0RD-042; 16-0RD-089; 12-ORD-091; 12-ORD-077; 11-ORD-047; 08-ORD-242; 08-ORD-044; 06-ORD-030; and 04-ORD-004. [↑](#footnote-ref-2)
3. KRS 197.025(1) provides: KRS 61.870 to 61.884 to the contrary notwithstanding, no person shall have access to any records if the disclosure is deemed by the commissioner of the department or his designee to constitute a threat to the security of the inmate, any other inmate, correctional staff, the institution, or any other person. [↑](#footnote-ref-3)
4. KRS 197.025(4) provides: KRS 61.870 to 61.884 to the contrary notwithstanding, the Department of Corrections shall refuse to accept the hand delivery of an open records request from a confined inmate. [↑](#footnote-ref-4)