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**20-ORD-077**

May 26, 2020

In re: Aaron Turner/Green River Correctional Complex

**Summary:** Green River Correctional Complex (“Complex”) did not violate the Open Records Act (“Act”) by denying a request for a record it did not possess.

***Open Records Decision***

On March 27, 2020, Aaron Turner (“Appellant”) requested a copy of the Inmate Inventory and Property Form (“property form”) created for his January 15, 2020 transfer from the Complex to the Luther Lockett Correctional Complex (“Luther Lockett”). On April 8, 2020, the Complex denied the request because the Property Sergeant advised that there was no property form located at the Complex. The Sergeant stated that the property form should have transferred with Appellant when he transferred to Luther Lockett. Thereafter, Appellant initiated this appeal.

The right of inspection attaches only if the requested records are “prepared, owned, used, in the possession of or retained by a public agency.” KRS 61.870(2). A public agency cannot provide access to a record that that does not exist. *Bowling v. Lexington-Fayette Urban Cty. Gov’t*, 172 S.W.3d 333, 341 (Ky. 2005). Once the public agency affirmatively states the requested record does not exist, the burden shifts to the requester to present a *prima facie* case that the requested records do exist. *Id.* The record on appeal provides *prima facie* evidence that the Complex should have created the property form, but that Luther Lockett should be in possession of it.

On appeal, the Complex provided communications among staff members. In those communications, the staff members indicated that the normal procedure during inmate transfers is for the transferring institution to create the property form. However, Complex staff believed the form was transferred to Luther Lockett with the Appellant. Applicable authority supports the staff's description of this policy. Under Correctional Policies and Procedures ("CPP") 17.1,<sup>1</sup> the Complex was required to create the property form. However, according to the Department of Correction's Record Retention Schedule, issued by Kentucky Department of Library and Archives, the Inmate Inventory and Property Form (Series 05952) must be retained "at [the] assigned correctional institution" for five years from the date of issue. Under the retention policy, Luther Lockett should be in possession of the property form, not the Complex.

Because there is *prima facie* evidence that the requested property form should exist, the burden shifts back to the Complex to explain that its search was adequate. *City of Ft. Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 848 n. 3 (Ky. 2013). The Complex met this burden. In its response to the appeal, the Complex states that its staff searched the property records, property rooms, and computer files for the requested property form, but the Complex could not locate it. The applicable retention policy supports the Complex's position that the record does not exist in its possession, because the record should exist in Luther Lockett's possession.<sup>2</sup> Accordingly, the Complex did not violate the Act.

A party aggrieved by this decision shall 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.

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<sup>1</sup> CPP 17.1(II)(E)(1) provides that "[i]f an inmate is transferred by Corrections from one institution to another, all personal effects, personal and state issued clothing and property, including legal material, shall be inventoried and transferred with the inmate." Pursuant to CPP 17.1(II)(E)(2), "(t)he sending institution shall inventory all property prior to the inmate leaving the institution on transfer to another facility." Accordingly, CPP 17.1 required the Complex to create the responsive record prior to transferring Appellant to Luther Lockett.

<sup>2</sup> In fact, the Complex's initial response notified Appellant that the property form "should have been sent with" Appellant when he transferred to Luther Lockett. This provided sufficient notice to Appellant that he should have submitted his request to Luther Lockett.

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