



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

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20-ORD-084

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In re: Donald R. Phillips/Office of the Attorney General

Summary: Office of the Attorney General (“Office”) did not violate the Open Records Act (“the Act”) by failing to produce a record that did not exist in its possession.

Open Records Decision

On April 14, 2020, inmate Donald R. Phillips (“Appellant”) submitted a request to the Office for a copy of an executive order from the Governor granting Appellant’s request for commutation. On April 17, 2020, the Office replied that it possessed no records responsive to the request, but that the Office of the Governor might possess such records. The Office provided contact information for Appellant to make an open records request to the Office of the Governor.

On May 4, 2020, Appellant initiated this appeal, claiming that the Office had not responded to his request. That same day, the Office received notice that Northpoint Training Center had refused delivery of its response because the address did not include Appellant’s offender identification number. In its response to the appeal, the Office noted that Appellant had not included his identification number with his request. Thus, the Office’s timely response to the request could not be delivered to Appellant due to his failure to provide necessary address information.

With regard to the merits of the response, a public agency cannot provide a requester access to a record that does not exist. *See Bowling v. Lexington-Fayette*

Urban County Government, 172 S.W.3d 333, 341 (Ky. 2005). Once an agency affirmatively states that it has no responsive records, the burden then shifts to the requester to present a *prima facie* case that the requested records should exist in the agency's possession. *Id.* Appellant has made no *prima facie* showing that a copy of the Governor's executive order should exist in the possession of the Attorney General. Accordingly, the Office did not violate the Act.

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 proceedings.

Daniel Cameron
Attorney General

/s/ James M. Herrick

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Assistant Attorney General

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Distributed to:

Donald R. Phillips, #149748

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