



COMMONWEALTH OF KENTUCKY
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In re: Jeffrey Coffey/Kentucky Parole Board

Summary: The Kentucky Parole Board (“Board”) did not violate the Open Records Act (“the Act”) by failing to respond to a request for records it did not receive.

Open Records Decision

Jeffrey Coffey (“Appellant”) claims he requested from the Board a copy of two audio recordings, but that he received no response. On appeal, the Board asserts that it never received the request. For the reasons that follow, the Board did not violate the Act.

An agency’s obligations under the Act arise only after receipt of an actual request. KRS 61.872(5). And when a person appeals a public agency’s disposition of a request to inspect records, the public agency carries “[t]he burden of proof in sustaining the action[.]” KRS 61.880(2)(c). Here, the Board diligently searched its records and could not find any record that it received Appellant’s request. Moreover, the request Appellant attached to his appeal was undated, written in pen, and contained visible whiteout. Accordingly, the record before this Office supports the Board’s assertion that it did not receive Appellant’s request. Not having received a request or having been afforded the opportunity to timely respond, the Board did not violate the Act.

Although on appeal the Board provided one of the records Appellant seeks, the Board explains that the other record – an audio recordings of the Board’s votes

to grant or deny parole— does not exist. An agency cannot provide records that do not exist. See *Bowling v. Lexington-Fayette Urban County Government*, 172 S.W.3d 333, 341 (Ky. 2005). Once an agency affirmatively states that a record does not exist, the burden then shifts to the requester to present a *prima facie* case that it does exist. *Id.* Here, the Board claims that it does not make audio recordings of its votes to grant or deny parole. Appellant presents no evidence to the contrary. Accordingly, the Board did not violate the Act because it cannot produce that which does not exist.

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
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/s/Marc Manley
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Distributed to:

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