COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

DANIEL CAMERON
ATTORNEY GENERAL

CAPITOL BUILDING, SUITE 118
700 CAPITAL AVENUE
FRANKFORT, KENTUCKY 40601
(502) 696-5300
FAX: (502) 564-2894

20-ORD-125

August 14, 2020

In re: Kris Carlson/Department of Corrections

Summary: The Department of Corrections ("Department") did not violate the Open Records Act ("Act") in denying a request to inspect records that did not exist at the time of the request.

Open Records Decision

Kris Carlson ("Appellant") requested from the Department an opportunity "to inspect or obtain copies of public records" pertaining to two Department employees' use of staff housing provided by the Department. In particular, Appellant requested (Item 1) any documentation substantiating that the Department complied with a specific policy related to Department staff housing.[1] He also requested (Item 2) a copy of the rental agreement executed by the Department employees as required under the same policy. Finally, Appellant requested (Item 3) that the Department define the phrase, "over ten (10) days," for purposes of applying the policy.

The Department issued a timely response notifying Appellant that it was unable to locate any documents responsive to Item 1 of his request. In response to Item 2 of the request, the Department provided a copy of the rental agreement executed by one of the two identified Department employees. In response to

[1] Kentucky Corrections Policies and Procedures ("CPP") 3.12, Institutional Staff Housing, § II, (B)-(D).

Appellant's request that the Department interpret the phrase "over ten (10) days," the Department advised that 10 days "means consecutive days."

Appellant initiated this appeal shortly thereafter and made additions to Item 1 of his original request, such as requesting that the Department "produce electronic date and time stamped documents/emails, not documents that they can go and back date."[2] However, this Office cannot adjudicate issues that Appellant did not raise in his original request because they are not ripe for administrative review. KRS 61.880(1); *see also* 05-ORD-057 (holding that a requester could not expand the parameters of his original request retrospectively because the agency must have an opportunity to respond to a request before this Office adjudicates the propriety of the agency's response). Therefore, the only remaining question on appeal is whether the Department violated the Act in denying Appellant's request for Items 1 and 2 because the requested records did not exist.[3]

The right to inspect and receive copies of public records only attaches if the records are "prepared, owned, used, in the possession of or retained by a public agency." KRS 61.870(2). 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 an unsubstantiated claim that certain records exist. *Bowling v. Lexington-Fayette Urban Cty. Gov't*, 172 S.W.3d 333, 341 (Ky. 2005). Rather, the requester is first required to make a *prima facie* showing that records he requested exist in the possession of the agency. *Id.*

Here, the Appellant established a *prima facie* case that records may exist by citing a Department policy that requires Department staff to submit certain forms when they request housing. He further asserted that he knew the second

---

[2] Appellant also argued that the Department was violating various Department policies and procedures. However, these arguments are unrelated to the Act and this appeal is not the appropriate forum to address such matters. *See, e.g.*, 12-ORD-162 (noting that "proper interpretation of KRS 147A.027 or a determination of what exactly is required to achieve full compliance therewith is beyond our purview").

[3] Appellant also challenges the Department's interpretation of the policy that "ten days" means "ten consecutive days." However, the Department was not required to provide any response to this request for information. *See, e.g.*, 19-ORD-062 (holding that requests for information are not requests to inspect public records and an agency is not required to honor a request for information).

Department employee had been using staff housing due to his personal relationship with that employee. Therefore, the burden shifted back to the Department to explain the adequacy of its search. *Id*. The Department explained on appeal that at the time it received the request, the second of the two Department employees had not yet applied for Department staff housing. Upon receiving notice of this appeal, the Department conducted another search and discovered that it had received the second application the same day it sent its original response to Appellant. Thus, the Department satisfied its burden of establishing that it adequately searched for responsive records and that, when it received the request, no responsive records existed in the possession of the agency. Accordingly, this Office finds that the Department 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 proceeding.

Daniel Cameron
Attorney General

/s/ Michelle D. Harrison

Michelle D. Harrison
Assistant Attorney General

#222

Distributed to:

Kris Carlson
Amy V. Barker