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-134

August 24, 2020

In re: Michael Eaves/Luther Luckett Correctional Complex

Summary: Luther Luckett Correctional Complex ("Complex") did not violate the Open Records Act ("Act") by denying a request for nonexistent records.

Open Records Decision

On July 21, 2020, inmate Michael Eaves requested from the Complex a copy of "3 [specified] Records Retention Requests." The Complex issued a timely written response and stated that a search of Appellant's Kentucky Offender Management System ("KOMS") file did not locate any responsive documents. The Complex further stated that a public agency cannot provide a requester with access to nonexistent records or those which it does not possess.

The Act only regulates access to records that are "prepared, owned, used, in the possession of or retained by a public agency." KRS 61.870(2). A public agency cannot provide a requester with access to nonexistent records nor is a public agency required to "prove a negative" to refute a claim that certain records exist. *See Bowling v. Lexington-Fayette Urban Cnty. Gov't*, 172 S.W.3d 333, 341 (Ky. 2005) ("The unfettered possibility of fishing expeditions for hoped-for but nonexistent records would place an undue burden on public agencies."). However, under KRS 61.880(1), a public agency that denies a request to inspect records must "include a statement of the specific exception authorizing the withholding of the record and a brief explanation of how the exception applies to

the record withheld." Thus, a public agency discharges its obligation to explain its denial when it clearly states that no responsive records exist. *See, e.g.*, 13-ORD-052.

Once a public agency states affirmatively that it does not possess any responsive records, then the burden shifts to the requester to make a *prima facie* showing that the requested records do exist. *Bowling*, 172 S.W.3d at 341. If the requester makes a *prima facie* showing that records exist, "then the agency may also be called upon to prove that its search was adequate." *City of Ft. Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 848 n. 3 (Ky. 2013).

To support his claim that the requested records exist, Appellant provides copies of the envelopes he claims he used to mail the "records retention requests" that he now seeks. Attached to one envelope is a certified mail receipt documenting that Appellant mailed that envelope to Department of Corrections ("DOC") Commissioner Cookie Crews located in Frankfort, Kentucky. The other envelope is stamped and addressed to Deputy Warden Plappert, located at the Complex in La Grange, Kentucky. On appeal, the Complex responds that:

> After receipt of the appeal, [Complex] staff confirmed that they had not received the letters Inmate Eaves stated that he mailed to the Offender Information office and Deputy Warden Plappert. . . . Offender Information staff searched for the items the inmate stated he mailed to staff at [the Complex] and Department staff in Frankfort in [KOMS] and no records were found.

In further support of its denial, the Complex attaches an e-mail from Complex staff to its legal counsel in which staff explain how incoming mail is processed. Upon receipt of any letter, the Complex sends a response or, if a letter is mistakenly received, staff forwards it to the correct location. The Complex does not maintain a log for incoming mail. Further, the Complex does not save all of the letters it receives from inmates. According to Complex staff, "We receive them, respond to them, and then scan them into KOMS if they are about something the records office would handle." Following a complete and thorough search of KOMS, the Complex staff did not locate any responsive documents. On appeal, the Complex also provides this Office with a copy of a memorandum from Deputy Warden Plappert in which she verifies that she conducted a search for any responsive documents, but she did not receive "any records retention request regarding" Appellant.

This Office has consistently acknowledged that it cannot resolve factual disputes concerning the actual delivery and receipt of an open records request. *See* OAG 89-81; 18-ORD-056. Even assuming that Appellant has made a *prima facie* showing that the records should exist, the Complex has carried its burden of establishing that it conducted a reasonable search for responsive records in all possible locations. Accordingly, the Complex did not violate the Act.

Either party may appeal this decision may appeal by initiating action in the appropriate circuit court per 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

#236

Distributed to:

Michael Eaves
Amy V. Barker