



COMMONWEALTH OF KENTUCKY
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20-ORD-190

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In re: Stephen Marshall/Kentucky Parole Board

Summary: Kentucky Parole Board (“Board”) did not violate the Open Records Act (“the Act”) when it was unable to provide a record that no longer exists due to a technical malfunction.

Open Records Decision

On September 30, 2020, Stephen Marshall (“Appellant”) requested a copy of the audio recording of his 2019 parole hearing. The Board responded that the electronic recording system used in 2019 was “no longer functional” and that the Board had “exhausted all efforts” in attempting to retrieve the audio record. For that reason, the Board stated in response to Appellant’s request that the “record does not exist.” This appeal followed.

Once a public agency states affirmatively that it does not possess any responsive records, the burden shifts to the requester to present a *prima facie* case that the requested records do exist. *Bowling v. Lexington-Fayette Urban Cty. Gov’t*, 172 S.W.3d 333, 341 (Ky. 2005). If the requester establishes a *prima facie* case that records do or should exist, the agency must provide “a written explanation for their nonexistence.” *Eplion v. Burchett*, 354 S.W.3d 598, 603 (Ky. App. 2011) (quoting 10-ORD-078). Furthermore, “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) (citing *Bowling*, 172 S.W.3d at 341).

Appellant claims that the record should exist because KRS 439.330(4) requires the Board to “keep . . . an electronic record of its meetings[.]” While this may establish a *prima facie* case for the record’s existence, the Board has explained that the record sought no longer exists due to the failure of the electronic recording system. On appeal, the Board further states that representatives of both the contractor and the Commonwealth Office of Technology have made “multiple attempts . . . to retrieve the recordings from the failed system.” Those efforts were unsuccessful. Thus, the Board has provided, as is its duty, “a written explanation for [the] nonexistence” of the audio recording sought. Moreover, in 20-ORD-047, this Office found that a technical malfunction was a sufficient explanation for the nonexistence of a recording. Therefore, the Board 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/ James M. Herrick

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Assistant Attorney General

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Distributed to:

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