



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

DANIEL CAMERON
ATTORNEY GENERAL

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

20-ORD-004

January 16, 2020

In re: Tessa Duvall/Department of Juvenile Justice

Summary: Department of Juvenile Justice ("DJJ") violated the Open Records Act ("the Act") in denying a request for a copy of existing public records contained in its databases because complying would not require DJJ to create a record. DJJ has a duty to separate any exempt material per KRS 61.878(4), which is not equivalent to creating a record; DJJ is not being asked to produce the record in a specially tailored or nonstandard format within the meaning of KRS 61.874(3). The analysis contained in 18-ORD-078 is controlling.

Open Records Decision

The question presented in this appeal is whether DJJ violated the Act in the disposition of seven requests made by *Courier-Journal* reporter Tessa Duvall ("Appellant") between August 2, 2019, and September 16, 2019 - specifically, the question is whether DJJ erred in declining to provide the records in electronic format with electronic redactions. The following is a chronological summary of the requests:

August 2, 2019 (ORR 19-36)¹: Request for "access to or copies, preferably in electronic form," of "[a]ny database, roll or list of all

¹ The remainder of this decision will refer only to the specific open records requests ("ORRs") and the dates DJJ responded, as this chronological summary contains the date each ORR was initially submitted to the agency.

current and former staff of [DJJ] programs and facilities from FY2016 through present. As applicable, please include name, job title, facility, hire date, last date worked and reason for departure.

August 8, 2019 (ORR 19-39): Request for "access to or copies, preferably in electronic form," of "[a]ny report, study, audit or analysis of DJJ facilities conducted between Jan. 1, 2014 and present."

August 13, 2019 (ORR 19-41): Request for "access to or copies, preferably in electronic form," of "[a]ny reports or databases that indicate the number of youth in DJJ custody for public offenses in each calendar year since 2014. Please include demographic data, county of charges and charges when applicable." Request for the same records, but for youthful offenses during that period.

August 13, 2019 (ORR 19-42): Request for "access to or copies, preferably in electronic form," of "[a]ny master, facilities or capital plans for DJJ between Jan. 1, 2014 and present[.]"

August 14, 2019 (ORR 19-43): Request for "access to or copies, preferably in electronic form," of "[a]ny policy or directive that provides guidance on transport and intake procedures at DJJ-run detention centers."

August 27, 2019 (ORR 19-44): Request for "access to or copies, preferably in electronic form," of "[a]ll DJJ Prison Rape Elimination Act compliance reports, annual reports and statistical reports from 2015 through present" and "weekly DJJ reports, detailing staffing levels and youths [sic] populations[.]"

September 16, 2019 (ORR 19-47): Request for "access to or copies in electronic form of" the "six-year capital plan for 2014-2020 that was finalized in April 2013[.]"

September 19, 2019 (ORR 19-48): Request for "access to or copies, preferably in electronic form," of "Open [R]ecords register thus far for

2019” and [a]ll requests to Inspect Public Records (includes responses to those requests) thus far for 2019[.]”

DJJ responded to Appellant’s initial ORR 19-36 request on August 7, 2019, but “noted more time was needed to accurately respond.” By e-mail dated August 26, 2019, DJJ notified Appellant that it was attaching the agency’s final response to ORR 19-36, consisting of a cover letter and ten pages of responsive documents. Appellant confirmed receipt and inquired as to whether the “database is an excel file, word doc, etc.” Having received no response to her inquiry, Appellant again requested that DJJ specify the format in which it would provide the records and suggested an electronic format would be better. Appellant also requested that DJJ provide “electronic copies of the other fulfilled requests” if possible. DJJ ultimately stated, “[I]t is our policy to produce printed copies and charge \$.10 per page accordingly. And for 19-41 and 19-42 we will not provide electronic copies.”

By e-mail directed to DJJ on September 12, 2019, Appellant asserted that DJJ’s aforementioned “policy” of printing and mailing a hard copy of a database in response to 19-36 – “and its refusal to provide electronic copies” for her remaining requests did not comply with the Act. She further maintained that a database, as requested in ORR 19-36, is, by its nature, maintained electronically. In addition, records potentially responsive to her remaining requests “would also be maintained electronically and therefore should be provided in that same format.” The Appellant cited 18-ORD-078 on appeal in support of her position that making the necessary redactions “to the requested staff database while maintaining the electronic format would not constitute the creation of a new record,” nor would it require DJJ to print a hard copy of an electronic document. At no point in responding to Appellant’s ORR 19-41 or ORR 19-43 did any representative of DJJ specify that the requested records existed only in hard copy format; instead, DJJ cited “only its ‘policy’ and issued a blanket refusal.”

In DJJ’s September 25, 2019, response to Appellant’s ORR 19-48, it cited KRS 61.878(1)(a) to justify the withholding of personal information of DJJ employees, juvenile names, and case numbers. DJJ also generally stated that “some records” were protected from disclosure per KRS 61.878(1)(l), KRS 447.154, CR 26.02, and KRE 503, due to being “confidential records protected by the attorney-client privilege and work product rule.” On appeal, the Appellant

admitted that such redactions were reasonable to maintain the privacy of the juveniles DJJ serves, but maintained that DJJ must perform such redactions electronically, referencing KRS 61.874(2)(a). Citing the agency's response to her ORR 19-47, in which DJJ explained that responsive documents were only maintained in hard copy format, she argued that DJJ is capable of specifying when records are not available in electronic format.²

In summary, the Appellant "is not challenging the need for redactions." Rather, at issue is DJJ's refusal to make electronic redactions to electronic files. The effect of this policy requires the public to pay unnecessary printing costs for hard copies of voluminous records maintained in an electronic format and circumvents compliance with the Act.

In responding to this appeal, DJJ first noted that Appellant stated electronic format was "preferable," but did not "solely seek electronic documents." According to DJJ, if Appellant had asked for electronic records only, "production processes and responses would have been completed with that in mind." Next, DJJ argued that Appellant's requests for electronic records are nonstandardized requests, quoting KRS 61.874(2)(b).³ Because DJJ does not maintain records in ASCII format, DJJ asserted that "any request for electronic information would be a nonstandardized request." Quoting KRS 15A.0651(2) and 610.340(1)(a), DJJ emphasized it "has an escalated duty to protect [sic] confidential juvenile personal and facility information, which by its nature is part and parcel to DJJ's records."

However, DJJ did not deny any of the requests based on the confidentiality of information contained in the responsive documents. DJJ maintains "much of the requested information . . . such that it cannot be produced in its original form because it includes protected information including juvenile identifiers, facility specifications, and metadata that cannot be removed or redacted without first converting the record from its original form to a form in

² DJJ provided the records in hard copy format and the related issues are moot. See 40 KAR 1:030 Section 6.

³ "An ASCII delimited file is a text file with the extension .csv. All fields of a record are on one line, separated typically by commas[.]" *ASCII delimited (*csv.)*, AXIEL, http://documentation.axiell.com/alm/en/ds_eiefcommadelimited.html. (last visited January 14, 2020).

which it can be safely and securely redacted and produced.” DJJ further argued that providing the records in electronic format “would be a very onerous undertaking.” DJJ would have to “purchase third party software to redact information and remove hidden metadata and utilize IT staff to verify all confidential information has been removed.”

DJJ explained, “The native form of the list that was compiled in response to [ORR 19-36] is Microsoft Excel. It is not possible to redact information in Excel without use of third party software, and the DJJ does not currently have such software.” Accordingly, to remove confidential employee and non-responsive information, “DJJ would have to actually delete it from the spreadsheet, which is arguably [a] violation of KRS 61.874(1).” With regard to ORR 19-39, DJJ again stated that such records are not maintained in ASCII format, and the request is therefore nonstandardized. “Furthermore, confidential juvenile and employee information had to be removed from the Quality Assurance Audits.” With regard to ORR 19-41, DJJ noted, “[o]ffender counts and statistics are maintained in a Microsoft Excel spreadsheet.” In order to provide any responsive information without inadvertently disclosing confidential information, “DJJ prepared charts and graphs from the data in the spreadsheet.” DJJ reiterated its position regarding the nonstandardized nature of the request and the agency’s inability to redact confidential information contained in the responsive Excel spreadsheet; DJJ made this identical argument relative to ORRs 19-41, 19-43, 19-44, and 19-48.

In support of its decision to provide the records in hard copy format only, DJJ provided the November 18, 2019, affidavit of Brian Kiser, a Systems IT Consultant for DJJ. He first confirmed that DJJ does not currently maintain electronic documents in ASCII format. According to Mr. Kiser, the “versions of Microsoft Office programs that are in use at [DJJ] retain metadata and do not offer the ability to redact information.” DJJ would have to purchase “a third party software tool that has adds [sic] redaction capabilities to Microsoft Office programs,” print documents “and redact by hand, then scan or copy documents in order to ensure end users cannot view the redacted material or remove the redactions,” or “[c]onvert the Microsoft office file(s) to a different type of file format that has redaction capabilities[.]” If DJJ is able to redact information electronically, DJJ “still must remove metadata from electronic files. In my

experience, the most secure way to remove metadata is to print a document.”⁴ Mr. Kiser suggested that someone in DJJ’s IT branch review the documents “to ensure such information will not be accessible to the end user.” Such action is an existing duty of any public agency.

This Office resolved the fundamental question presented here in 18-ORD-078; a copy of that decision is attached hereto and incorporated by reference. As such, this Office need not restate the rationale of that decision here. The Appellant “did not ask [DJJ] to reformat its existing database” nor did she ask the agency “to tailor the format to satisfy [her] particular needs, but instead ask[ed] for a copy of the database in its entirety [following permissible redactions]. It is therefore not within the discretion of [DJJ] to deny [her] request [for electronic records] per KRS 61.874(3).” 06-ORD-148, p. 7; 18-ORD-078. DJJ is authorized to redact any information that is exempt under KRS 61.878(1)(a) or 61.878(1)(l)(incorporating relevant confidentiality provisions), but “is obligated to so notify [Appellant], identifying the protected information, citing the applicable exception, and explaining how the exception applies to the information withheld per KRS 61.880(1), redact or mask the protected information fields per KRS 61.878(4), and make the nonexempt information available” per KRS 61.872(1).” 06-ORD-148, p. 8; 18-ORD-078.

Furthermore, in 95-ORD-82, the Attorney General analyzed KRS 61.847(3) as it relates to a public agency’s duty to “separate the excepted and make nonexcepted material available for examination” pursuant to KRS 61.878(4). Significantly, this Office held that separating excepted material is *not* equivalent to producing a record in a specially tailored format, or nonstandardized format, within the meaning of KRS 61.874(3) as required to allow a public agency to recover staff costs; rather, agencies are required to discharge this duty under KRS 61.878(4) and must bear the cost of redaction. *Id.*, p. 2; 08-ORD-183. “If it is necessary to separate confidential from non-confidential information in order to permit the inspection, examination, or copying of public information, the agency shall bear the cost of such separation.” 95-ORD-82, p. 3. (Citation omitted). “It is the opinion of this office that the type of storage system in which an agency has chosen to maintain its records does not diminish its duties under the Open

⁴ As of yet, DJJ has not attempted to justify the redaction of any metadata or explained its position with adequate specificity per KRS 61.880(1) and (2)(c).

Records Act. Accordingly, [this Office believes] that [DJJ] must discharge its duty under KRS 61.878(4), and must bear the costs attendant to [this] duty," if any. 03-ORD-004, p. 10; 98-ORD-33; 02-ORD-148; 18-ORD-078. This appeal presents no basis to depart from the reasoning found in 18-ORD-078. "It is commonly understood that exporting to an Excel or Comma-delimited text file generates the fields of data in a 'tabular' format whereby an entire field can be deleted. [DJJ] is not being asked to create a record to satisfy [the Appellant's] request." *Id.* Although DJJ argued it "would have to actually delete [exempt material] from the spreadsheet, which is arguably [a] violation of KRS 61.874(1)," 18-ORD-078 states otherwise. Based upon the foregoing, this Office finds that DJJ violated the Act in denying to provide the Appellant with any existing responsive documents in electronic format after making necessary redactions. Here, as in 18-ORD-078, this Office notes that "[o]ur holding today is not a departure from those decisions recognizing that a public agency such as [DJJ] is not statutorily required to compile information, perform research, or create a list/record in order to comply with a request; instead, our holding comports with prior decisions recognizing that redaction of exempt information by a public agency is not equivalent to creation of a record." *Id.* DJJ is required to separate protected information per KRS 61.878(4) and provide the Appellant with a redacted copy of the subject database(s) in electronic form.

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



Michelle D. Harrison
Assistant Attorney General

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Tessa Duvall

Capella McFarland

William Codell