

COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

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20-ORD-009

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In re: Bobby Brock/Kentucky Department for Libraries and Archives

Summary: Kentucky Department for Libraries and Archives ("KDLA") violated KRS 61.880(1) by failing to respond to an open records request, but met its burden of proof on appeal and justified withholding records belonging to the Kentucky Court of Justice (KCOJ) because these records are not subject to the provisions of the Open Records Act ("the Act"), per *Ex Parte Farley*, 570 S.W.2d 617 (Ky. 1978), KRS 26A.200, and KRS 26A.220.

Open Records Decision

On December 2, 2019, Bobby Brock ("Appellant") submitted an open records request to the KDLA to inspect, "[a]ll files and briefs filed, as well as all motions filed in Kentucky Court of Appeals case no. 2001-CA-1604, Bobby D. Brock vs. Commonwealth of Kentucky." On December 10, 2019, Appellant appealed to this Office, asserting that KDLA failed to respond.

On January 2, 2020, KDLA responded to the appeal, stating that it referred the request to the KCOJ on December 4, 2019 because the requested records are court records. However, KDLA did not provide evidence it responded to Appellant's original request in writing. On appeal, KDLA provided a copy of a Memorandum of Agreement ("MOA") between KDLA and KCOJ. Under the MOA, KDLA provides archival services to KCOJ, but KDLA must limit access to archived records in its possession to KCOJ personnel. The MOA also requires KDLA to refer open records requests pertaining to the courts records to KCOJ,

and to comply with all orders of the Chief Justice of the Kentucky Supreme Court relating to court records.

As a threshold matter, KRS 26A.200(1) provides that “[a]ll records which are made by or generated for or received by any agency of the Court of Justice, or by any other court or agency or officer responsible to such court ... shall be the property of the Court of Justice and are subject to the control of the Supreme Court.” The Kentucky Supreme Court has declared that records generated by the courts and judicial agencies are not subject to the Act. In *Ex parte Farley*, 570 S.W.2d 617, 624 (Ky. 1978), the Court held that “the custody and control of records generated by the courts in the course of their work are inseparable from the judicial function itself, and are not subject to statutory regulation.” Thus, KCOJ records are court records, rather than public records subject to the Act. KRS 26A.220; *see also* 15-ORD-216; 14-ORD-180.

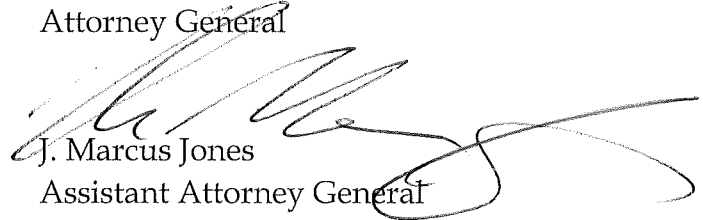
Although KDLA clearly possesses the records, the Supreme Court retains control of those documents under the MOA. *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 856 (Ky. 2013) (“The agency is responsible only for those records within its own custody *and* control.” (emphasis added)). Thus, this Office cannot resolve any dispute relating to access to the KCOJ records, because, “disputes relating to access to court records must be resolved by the court.” 98-ORD-6, p. 2.

While KDLA simply possesses the records and has no authority to release those records, KDLA remains a public agency subject to the Act’s requirements. In particular, KDLA must still discharge its duty to respond to a request. Here, KDLA violated KRS 61.880(1), which provides that upon receipt of a request, a public agency “shall determine within three (3) days, excepting Saturdays, Sundays, and legal holidays . . . whether to comply with the request and shall notify in writing the person making the request, within the three (3) day period of its decision.” At a minimum, KDLA should have “notif[ied] the applicant” and “furnish[ed] the name and location of the official custodian of the agency’s public records.” For these reasons, KDLA violated the Act, but is under no obligation to provide records that are not subject to the Act’s requirements.

A party aggrieved by this decision shall 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.

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