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20-ORD-109

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In re: Ben Richard, Jr./Luther Luckett Correctional Complex

Summary: Luther Luckett Correctional Complex ("the Complex") did not violate the Open Records Act ("the Act") in denying access to emails transmitted between private parties and an inmate using the JPay email service.

Open Records Decision

On May 8, 2020, Ben Richard, Jr. ("Appellant") requested copies of certain emails that he had exchanged with private parties on JPay, an email system to which he has access as an inmate. On May 11, 2020, the Complex denied the request, stating that certain emails were "communications of a purely personal nature unrelated to any governmental function," and thus exempt under KRS 61.878(1)(p). The Complex was unable to locate other emails. After that, Appellant initiated this appeal. He then submitted another request to the Complex on June 6, 2020, seeking additional JPay emails he had received from a private party. The Complex denied the second request on the same grounds and Appellant again appealed.

This Office consolidated these two appeals to resolve a threshold question—whether JPay emails are public records subject to the Act. That question is an important one—especially since this Office has, at times, reached conflicting answers to that question. In 15-ORD-062, this Office concluded, without analysis, that JPay emails were public records but that the correctional facility did not violate the Act by refusing to provide copies to an inmate in segregated housing

because the inmate could not conduct an in-person inspection. In 17-ORD-212, 18-ORD-133, and 18-ORD-217, this Office presumed, without analysis, that JPay emails were public records but that the correctional facilities did not violate the Act when they were unable to locate and produce the requested emails for inspection. Then, in 18-ORD-239, this Office held that JPay emails were not public records. That decision likened JPay emails to "library reference materials," which this Office had previously concluded were not public records. In 19-ORD-172, this Office reversed course and again presumed JPay emails were public records, but found that the correctional facility did not violate the Act in denying a request for a specific email because its release would constitute a security threat, according to the correctional facility.

According to the Department of Corrections ("DOC"), the JPay system is owned by JPay, Inc., a private company under contract with DOC that has been awarded the right to facilitate email correspondence with inmates at JPay-owned kiosks within the correctional facilities. JPay also provides a printer next to the kiosk that allows the inmate to print physical copies of their emails. Under the contract, JPay does not receive any public funds. Rather, JPay is compensated for its services by charging fees directly to the people (both inmates and non-inmates) who use its services. For example, if an inmate's mother chooses to send her son an email using JPay, the mother is charged a fee before the email is sent.

In the JPay email system, inmates have access to the 200 most recent emails they have received. JPay retains all copies of the emails on its own servers, and Complex staff may view the emails through a portal to ensure the emails conform to controlling policies. Each correctional facility is able to access an email for up to five years. After that time, JPay purges the email from its system. JPay also automatically purges the oldest email from the inmate's account after he receives his 201st email. Correctional facilities do not keep copies of the emails on a server owned by DOC and they do not maintain physical copies of inmate emails.

For the reasons that follow, this Office concludes that the JPay emails Appellant seeks are not "public records." As such, they are not subject to inspection under the Act.

The Open Records Act broadly grants any person a statutory right to inspect "public records" subject to certain exceptions. KRS 61.872(1) (defining

right to inspect public records). Because that right under the Act only attaches to "public records," the definition is important. KRS 61.870(2) provides that "public record" includes "all books, papers, maps, photographs, cards, tapes, discs, diskettes, recordings, software, or other documentation regardless of physical form or characteristics, which are prepared, owned, used, in the possession of or retained by a public agency."

In using terms like "owned," "possessed," and "retained," the General Assembly has broadly defined "public records" in terms of property rights. Moreover, KRS 61.870(2) specifically excludes the private records of private companies that are deemed public agencies pursuant to KRS 61.870(1)(h) if those records are unrelated to the "functions, activities, programs, or operations funded by [a] state or local authority." This distinguishes those records that remain the private property of private companies from those records that become public records, and thus subject to inspection, because they relate to the purpose for which the private company was employed by the public agency.

But JPay is not a public agency under KRS 61.870(1)(h) because it does not receive any public funds, so the emails that pass through its system are "public records" only if they are "prepared, owned, used, in the possession of, or retained by" the Complex. KRS 61.870(2). The Complex has admitted that, sometimes, Complex staff and inmates will communicate through JPay. Clearly, an email sent by the Complex to an inmate would be "prepared" by the Complex, and it would be a public record.

On the other hand, correctional facilities may handle inmate correspondence for limited purposes, including ensuring that the correspondence complies with relevant policies, as in the case of physical mail. For example, correctional facilities screen physical mail prior to delivering it to the inmate. After the physical mail is screened, some correctional facilities give the mail to the inmate and do not keep copies.[1] But once the physical mail is delivered to the inmate, the only "access" the correctional facility would have to the mail would be based upon the correctional facility's access to the inmate's cell. Correctional facilities access an inmate's JPay emails for similar purposes; however, the

[1] Other correctional facilities copy the original letter and give a copy to the inmate for security purposes. It is unclear if those correctional facilities retain or destroy the original document.

correctional facility is not the custodian of such private correspondence. This Office has previously held that an agency's "access" to digital records, without more, does not mean that the public agency is the custodian of such records. *See*, *e.g.*, 19-ORD-091 (finding that the Commonwealth Office of Technology is not the records custodian for other public agencies even though it has access to those agencies' digital records).

Emails between private parties and an inmate simply do not meet the definition of "public record." They are not "prepared" by a public agency. Neither are the emails "owned," "possessed," or "retained" by the correctional facility. In fact, the emails are not digitally stored on any equipment owned by DOC and the correctional facilities do not ordinarily keep physical copies of the emails. *See*, *e.g.*, 15-ORD-190 (finding the Kentucky Department of Education did not possess or retain emails stored on local school district-owned servers even though the Department had an administrative password that permitted the Department to access the local district's emails).

It is possible that a correctional facility may "use" specific JPay emails for administrative purposes, such as taking disciplinary action if the email violates a policy. And emails sent from an inmate to Complex staff could be "used" by the Complex, either to address an issue raised by the inmate or for some other administrative purpose. That "use" would bring those specific emails within the statutory definition of a public record. But apart from such use, an email from a mother to son is the same as a letter from mother to son – it is private correspondence belonging to an inmate and not a public record under the Act. *Cf. Cole v. Warren County*, 495 S.W.3d 712, 720 (Ky. App. 2015) (finding that the legal "holder" of a check made payable to an inmate was the inmate, not the jail, and the funds were the personal property of the inmate).[2]

Of course, whether certain JPay emails are "public records" must be determined on a case-by-case basis. But here, there is no evidence in the record that the emails Appellant has requested are "public records" within the meaning of the Act. The Complex did not prepare, own, use, possess, or retain the emails that Appellant seeks. Private parties sent Appellant the emails he has requested,

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[2] JPay also provides a wire-fund service for inmates so that individuals can directly deposit money into an inmate's account. Under *Cole*, that money is the personal property of the inmate. So too are emails that pass through the very same system.

and he does not suggest that the Complex has used these emails in any way, *e.g.*, as evidence against him in a disciplinary hearing or for any other administrative purpose. Accordingly, the emails sought are not public records and the Complex did not violate the Act in denying the request.

This holding is consistent with the fundamental purpose of the Act. The public has a "right to be informed as to what their *government* is doing." *Zink v. Com., Dept. of Workers' Claims, Labor Cabinet*, 902 S.W.2d 825, 829 (Ky. App. 1994) (emphasis added). JPay emails transmitted between inmates and private parties shed no light on what the government is doing.

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 proceedings.

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