COMMONWEALTH OF KENTUCKY
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20-ORD-173

November 12, 2020

In re: [redacted]/Nelson County Judge/Executive

Summary: The Nelson County Judge/Executive ("Judge/Executive") did not violate the Open Records Act ("Act") when it provided the requester a copy of all existing documents responsive to a request for jail records, including specific daily activity logs and inmate telephone logs. This Office cannot resolve a dispute relating to discrepancies between the records provided and those a requester believes did or should exist.

Open Records Decision

[redacted] ("Appellant") requested jail records relating to her arrest in April of 2019 from two agencies – the Nelson County Judge/Executive and the Nelson County Jailer. She specifically sought "complete inmate phone calls" and inmate activity logs relating to her arrest. But Appellant has only included with her appeal the request she submitted to the Nelson County Judge/Executive's Office, and that Office's timely[1] response providing some records. There is nothing

[1] Appellant has claimed that Judge/Executive's response was untimely because he did not issue a written response within three days. Normally, a public agency must respond to an open records request within three business days per KRS 61.880(1). To address the novel coronavirus public health emergency, however, the General Assembly modified that requirement by enacting Senate Bill 150 ("SB 150"), which became law on March 30, 2020, following the Governor's signature. SB 150 provides, notwithstanding the provisions of the Act, "a public agency shall respond to the request to inspect or receive copies of public records within 10 days of its receipt." SB 150 § 1(8)(a). Appellant submitted her request on September 1, 2020, and the Judge/Executive issued a written response ten days later on September 11, 2020.

before this Office that indicates that the Nelson County Judge/Executive's Office is the official records custodian of jail records. In fact, the evidence that Appellant has submitted on appeal, and the arguments she raises, suggest that her dispute lies with the Nelson County Jailer, not with the Judge/Executive. However, because Appellant has provided this Office only with a request submitted to the Judge/Executive, and his response, the Judge/Executive is the agency defendant in this matter. *See* KRS 61.880(2) (requiring a person seeking to appeal an agency's decision to attach a copy of the original request and the agency's response.).

The Nelson County Attorney ("County Attorney") responded on behalf of both county agencies. He argues that the crux of Appellant's complaint is that she did not receive all of the records that she requested. The Judge/Executive provided 14 responsive records. Moreover, the County Attorney provided an affidavit executed by Jailer John Snellen. In that affidavit, the Jailer swears that the jail "has produced all records in its possession that are responsive to [Appellant's] request. [He does] not know what records that [Appellant] alleges are missing or have not been produced."

The right to inspect records only attaches if the records that a requester seeks are "prepared, owned, used, in the possession of or retained by a public agency." KRS 61.870(2). A public agency cannot produce that which it does not have nor is a public agency required to "prove a negative" in order to refute an unsubstantiated claim that certain records exist in the absence of a *prima facie* showing by the requester. *See Bowling v. Lexington-Fayette Urban Cty. 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.").

Here, Appellant has not made a *prima facie* showing that records should exist. Attached to her appeal, Appellant provided recordings of phone conversations she had with county employees. In one recording, an employee in the Judge/Executive's Office stated that the jail destroys documents within the categories of the requested records after six months. In a phone call with the Jailer, however, the Jailer denied that the records were improperly destroyed and asserted that he searched for them and produced all the records he could find. Appellant argues that the applicable records retention schedule requires the

requested records to be preserved for five years, not six months.[2] But the fact that a records retention schedule provides for the preservation of records does not mean that an agency has created a record in the first instance. To make a *prima facie* showing, Appellant must assert some fact demonstrating that the requested record exists or was created. *See e.g.*, 19-ORD-105 (finding that a requester failed to provide any "affirmative evidence" that a specific records should exist.). Only then does the records retention schedule become relevant, because it provides evidence that a record *should* still exist in the agency's possession.

Because Appellant has not made a *prima facie* showing that a recording of her phone call was made and should exist, the agency is not required to explain the adequacy of its search. *See Bowling*, 172 S.W.3d at 341. Nevertheless, on appeal, the County Attorney has explained why there is no such audio recording. Specifically, he states that the phone call Appellant attempted at approximately 2:25 a.m. on April 27, 2019, did not connect with the intended recipient and therefore was not completed. For that reason, no audio recording of the call was made. Accordingly, the Judge/Executive did not violate the Act.

Either party may appeal this decision 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.

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[2] But there appears to be a conflict in the applicable records retention schedule. Series L2678 applies to records of inmate phone calls, including audio recordings, and jails are required to preserve records within that series for at least six months. On the other hand, Series L2751 includes "Inmate Record Files," which may include "telephone calls." Records within that series must be preserved for five years. *See* County Jailer Records Retention Schedule, available at https://kdla.ky.gov/records/recretentionschedules/Documents/Local%20Records%20Schedules/CountyJailerRecordsRetentionSchedule.pdf (last accessed November 10, 2020). It is beyond the scope of this Office's review to determine whether recordings of inmate phone calls must be preserved for six months or for five years. Regardless, the public agency has explained that in this instance, no recording of Appellant's phone call exists because she did not complete the phone call.

Daniel Cameron
Attorney General

/s/Marc Manley
Marc Manley
Assistant Attorney General

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Distributed to:

[redacted]
Neal Watts
Matthew Hite
Commissioner Terry Manuel, KDLA

*This unofficial version of this decision was altered on September 13, 2022, to redact the name of the Appellant, at her request. Since this decision was rendered, the Appellant has had her criminal record expunged. No other changes have been made to this document. The official and unaltered version of this decision remains in the Office's possession and is subject to public inspection under the Act.