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21-ORD-090

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In re: Aaron Kidd/Whitley County Detention Center

Summary: Whitley County Detention Center ("Center") violated the Open Records Act ("the Act") when it failed to respond in writing to a request for records in accordance with KRS 61.880(1), denied portions of the request without explanation, and delayed providing records beyond the statutory response period without explaining the reason for delay.

Open Records Decision

On February 22, 2021, Aaron Kidd ("Appellant") requested records relating to the arrest and detention of a certain individual, including video of a purported altercation between that individual and Center employees, incident reports related to the altercation, and "use of force" records. The Appellant also sought employee disciplinary records and personnel files, employee attendance logs, and the Center's use of force policies. In response, the Center timely provided a "stack" of requested records.[1] Mixed within the stack of records were two memoranda that noted certain requested documents were not included. This appeal followed.

When a public agency receives a request to inspect records, that agency must decide within three business days "whether to comply with the request" and notify the requester "of its decision." KRS 61.880(1). Therefore, even if a public agency decides to approve a request to inspect certain records, it must issue a written response notifying the requester "of its decision." However, a response "denying, in whole or in part, inspection of any record" must "include

[1] The Appellant claims that he received a "stack" of documents, but does not state how many records were in the "stack."

a statement of the specific exception authorizing the withholding of the record and a brief explanation of how the exception applies to the record withheld." KRS 61.880(1).

Instead of providing any formal written response, however, the Center provided records haphazardly. Mixed within the records it produced, the Center provided two memoranda that together demonstrated that it was not providing all the records that had been requested. For example, in one memorandum the Center claimed that certain videos that were requested could not "be retrieved." And although the Appellant had requested disciplinary records for all of the Center's employees, another memorandum explained that there were no disciplinary records for two employees referenced in the request. Thus, the Center had narrowed the scope of the Appellant's request, and claimed no records were responsive to the request as narrowed by the Center. By mixing these memoranda within the records it provided, instead of providing one formal, written response to explain that certain portions of the request had been denied and explaining why those portions of the request has been denied, the Center obfuscated its decision to deny inspection of certain records.[2] Such conduct violates KRS 61.880(1).

A public agency cannot ignore portions of a request. If the records exist and an exemption applies to deny inspection, the public agency must cite the exemption and explain how it applies. KRS 61.880(1). If the records do not exist, then instead of ignoring those portions of the request, the public agency must affirmatively state that such records do not exist. *See Bowling v. Lexington-Fayette Urban Cty. Gov't*, 172 S.W.3d 333, 341 (Ky. 2005). This is so because, once the public agency affirmatively states that no responsive records exist, the burden shifts to the requester to make a *prima facie* showing that the records should exist. *Id*. If the requester makes a *prima facie* showing that records should exist, the public agency is then required to explain the adequacy of its search. *Id*. Moreover, if it becomes clear that a record should but no longer does exist, the public agency is required to explain to the requester why the record no longer exists. *Eplion v. Burchett,* 354 S.W.3d 598, 603 (Ky. App. 2011).

Here, the Appellant sought, among other things, a specific video, which documents an altercation between an inmate and Center staff. In response, the

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[2] As further evidence that the Center did not fully comply with the Appellant's request, the Center provided the Appellant with additional records on appeal. But the Center never explains why these records were not provided initially, or why a delay was necessary to obtain them. *See* KRS 61.872(5).

Center claimed that the video could not "be retrieved here at [the Center] due to the amount of time [the Appellant] requested." This vague statement does not affirmatively state that no video exists, but rather that no video can be retrieved. Presumably then, the video existed at one point or still exists. Although the Center's record retention policy provides for the destruction of "non-evidentiary" video after 30 days, it is not clear from this record whether the video was "non-evidentiary."[3] If the Center destroyed the video in conformity with its record retention schedule, it should have explained to the Appellant that this was the reason the video no longer exists. *Eplion,* 354 S.W.3d at 603.

The Center wholly ignored other portions of the Appellant's request. For example, the Appellant sought copies of "logs, incident reports, use of force reports, charging documents, photographs, videos, and case jacket or file pertaining to [the] arrest of" the subject person. The Center provided uniform citations and charging documents. It also provided unsigned drafts of three incident reports. It is not clear whether a final version of the incident report exists because the Center did not provide one, or explain that the investigation was ongoing and therefore no final report exists. The Center has not responded at all to the Appellant's request for use of force reports, photographs, or a "case jacket or file." And as mentioned previously, the Appellant had sought disciplinary records of all Center employees, but the Center only provided a memorandum stating that two specific employees had no disciplinary record. This Office and the Appellant are left to wonder whether the other records exist. If they do exist, the Center has not claimed that an exemption applies to deny inspection of these records. If such records do not exist, the Center must say so. *Bowling*, 172 S.W.3d at 341.

Moreover, the Appellant sought records relating to "Jail Trustee assignments, paperwork [or] files between April 11 [and] April 13, 2020." The Center ignored this portion of the request and waited until this appeal to explain that "there are no records showing trustee assignments." But the Appellant did not limit his request to trustee "assignments." He also sought any paperwork or files related to jail trustees during the requested period. It is not clear whether the Center possesses any records relating to jail trustees,

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[3] *See* County Jailer Records Retention Schedule, "Video/Audio Recordings," Series L5220, *and* "Body-Worn Camera Recordings (Audio/Video)," Series L6924, *available at* https://kdla.ky.gov/records/recretentionschedules/Documents/Local%20Records%20Schedules/CountyJailerRecordsRetentionSchedule.pdf (last accessed May 13, 2021).

and it has not affirmatively stated that no records relating to jail trustees exist.[4]

Similarly, the Appellant sought a copy of "the Jail Employee Roster showing the last name and employee number for the staff who were working on April 11, 2020[,] through April 13, 2020." But the Center has never claimed that this "roster" does not exist. Instead, it initially provided the Appellant with yet another memorandum in which the Jailer provides the names of the employees who were working during the dates in question. Then, on appeal, the Center provided timecards for all employees who worked during the dates in question. If the Center's timecards are responsive to the Appellant's request for "the Jail Employee Roster," the Center does not explain why it failed to provide these timecards in the first instance.[5]

Finally, the Center ignored other portions of the request because, according to the Center, it had previously provided copies of those records to the Appellant. No provision of the Act permits the Center to deny a request on that basis. Although KRS 61.872(6) provides that a public agency may deny a request if the "records custodian has reason to believe that repeated requests are intended to disrupt other essential functions of the public agency," the agency must sustain its action by clear and convincing evidence. The Center has not invoked KRS 61.872(6) or any other provision to justify its denial on the basis of a previous request for the same records. In these ways, the Center violated the Act.

In sum, the Center violated the Act because it failed to provide a written response that explained that portions of the request had been denied and the reasons why those portions were denied. KRS 61.880(1).

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[4] Perhaps this request is too vague. But the Center makes no such claim. The Center simply fails to meaningfully engage with the request or attempt to meet its statutory burdens.

[5] The relevant records retention schedule does not provide for a category of records entitled, "Jail Employee Roster." However, it does provide for the retention of "daily jail logs and special reports," which may include "jail personnel roster[s] for each shift." *See* County Jailer Records Retention Schedule, "Daily Jail Logs and Special Reports" Series L6920, *available at* https://kdla.ky.gov/records/recretentionschedules/Documents/Local%20Records%20Schedules/CountyJailerRecordsRetentionSchedule.pdf (last accessed May 13, 2021). Regardless, the Appellant clearly sought public records that would indicate which Center employees were working on certain days. The timecards appear to be sufficiently responsive to the Appellant's request, but as noted, the Center only provided these records after the Appellant sought this Office's review and long after the ten-day period to respond had elapsed.

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.

Daniel Cameron
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/s/Marc Manley
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Distribution:

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