COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

DANIEL CAMERON
ATTORNEY GENERAL

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

21-ORD-127

July 19, 2021

In re: Brian Mackey/Department of Fish and Wildlife

Summary: The Department of Fish and Wildlife ("Department") did not violate the Open Records Act ("the Act") when it denied a request to inspect text messages on privately owned devices because the request did not seek records prepared, owned, used, in the possession of, or retained by the Department.

Open Records Decision

Brian Mackey ("Appellant") submitted a request to the Department in which he asked to inspect, among other things, "any and all emails [or] text messages" exchanged between the Commissioner of the Department, the deputy commissioner, the Chairman of the Commission, any Commission members, and two legislators. The scope of his request included "any secondary [or] personal (nongovernmental [or] department) email accounts [and] phones." In a timely response, the Department provided some responsive records, and explained that additional time was necessary to retrieve and review other responsive emails. The Department denied the Appellant's request to the extent it sought text messages stored on the personal cell phones of the Commissioner and Commission members. According to the Department, such personal text messages "are not government records, and are not retained by the Department." This appeal followed.[1]

"'Public record' means 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

[1] The Appellant does not object to the Department invoking KRS 61.872(5) to delay inspection of a large number of emails that the Department had to retrieve and review.

possession of or retained by a public agency." KRS 61.870(2). Under KRS 61.870(1)(b), every "state or local government *department*, division, bureau, board, *commission*, and authority," is a public agency that is subject to the Act. As such, both the Department and the Commission are public agencies under KRS 61.870(1)(b). If the requested records were prepared by, are being used by, are retained by, in the possession of, or owned by the Department or Commission, then they are public records subject to public inspection, unless an exemption applies to deny their inspection.

Documents in the possession of private parties can be considered public records so long as the public agency "owns" the record. That is why this Office found that records prepared by, possessed by, and retained by a private attorney are public records, because the public agency that used public funds to procure the legal services *owned* the attorney's work product. *See, e.g.*, 20-ORD-115. But in 15-ORD-226, this Office held that "[c]ell phone communications, including calls or text messages, made using a private cell phone that is paid for with private funds, are not prepared by or in the possession of a public agency." Thus, when no public funds have been spent to procure the cell phone services, then a public agency does not "own" the text messages. And there is no doubt that neither the Department nor the Commission are in possession of the private cell phones. Nor is there any evidence that the Department or Commission are using any particular text messages on any particular private cell phone. Therefore, the Appellant's request for the private text messages on the private cell phone of the identified parties was not a request for "public records" under KRS 61.870(2), and the Department did not violate the Act when it denied the Appellant's request.

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 proceeding.

Daniel Cameron
Attorney General

/s/Marc Manley
Marc Manley
Assistant Attorney General

#149

Distributed to:

Brian Mackey
Evan Jones