



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

22-ORD-038

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In re: Alan Rubin/Louisville Metro Department of Corrections

Summary: The Louisville Metro Department of Corrections (“the Department”) violated the Open Records Act (“the Act”) when it denied portions of a request for records without explanation. However, the Department did not violate the Act when it could not provide records that do not exist or when it denied a request for records posing a security threat under KRS 197.025(1).

Open Records Decision

On January 14, 2022, attorney Alan Rubin (“Appellant”) requested copies of all surveillance footage from the Department showing his client who was incarcerated on December 15, 2021, as well as call logs and recordings of phone calls to the Department made by the Appellant on behalf of his client. The Department denied the request for video footage under KRS 197.025(1), explaining that its release would pose a security threat because the footage could be used “to assess the technology and/or procedures [used] in the management of inmates,” “to develop strategies used to overtake [Department] Staff [or] other law enforcement agents,” or “to study the camera’s range of sight [in order] to smuggle contraband [or form] other strategies of takeover or escape.” The Department’s response did not address the Appellant’s request for call logs and phone recordings. This appeal followed.

When a public agency receives a request to inspect records, that agency must decide within five business days “whether to comply with the request” and notify the requester “of its decision.” KRS 61.880(1). An agency response denying inspection of public records must “include 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.” *Id.* A public agency cannot simply ignore portions of a request. *See, e.g.*, 21-ORD-090. If the requested records exist and an exception applies to deny inspection, the agency must cite the exception and explain how it applies. Conversely, if the records do not exist, then the agency must affirmatively state that such records do not exist. *See Bowling v. Lexington-Fayette Urb. Cnty. Gov.*, 172 S.W.3d 333, 341 (Ky. 2005). By failing to respond to the request for call logs and phone recordings, the Department violated the Act.

On appeal, the Department states that it has now provided the requested call logs. Accordingly, that portion of this appeal relating to the call logs is moot. 40 KAR 1:030 §6. The Department further states that no recordings of phone calls from the Appellant exist. Once a public agency states affirmatively that it does not possess any responsive records, the burden shifts to the requester to present a *prima facie* case that requested records do exist. *See Bowling*, 172 S.W.3d at 341. Here, the Appellant has not made a showing that the Department possesses any telephone recordings. Accordingly, the Department did not violate the Act when it could not provide records that do not exist.

With regard to the Department’s denial of the request for video footage, under KRS 197.025(1), “no person shall have access to any records if the disclosure is deemed by the commissioner of the department or his designee to constitute a threat to the security of the inmate, any other inmate, correctional staff, the institution, or any other person.” The exemption under KRS 197.025(1) is incorporated into the Act under KRS 61.878(1)(l), which incorporates any enactment of the General Assembly that exempts public records from inspection. This Office has historically deferred to the judgment of correctional facilities in determining whether the release of certain records would constitute a security threat under KRS 197.025(1). In particular, this Office has consistently upheld the denial of security camera footage from a detention center. *See, e.g.*, 18-ORD-074; 13-ORD-022; 10-ORD-055. Such footage poses a security risk in that it would reveal “methods or practices used to obtain the video, the areas of observation and blind spots for the cameras.” *See, e.g.*, 17-ORD-211; 15-ORD-121; 13-ORD-022. Accordingly, the Department did not violate the Act when it withheld the requested video footage.¹

¹ While the Appellant requested both “audio and video” recordings, the Department states that its video cameras do not record sound and that consequently no audio recordings exist.

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 within 30 days from the date of this decision. 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. The Attorney General will accept notice of the complaint e-mailed to OAGAppeals@ky.gov.

Daniel Cameron
Attorney General

/s/ James M. Herrick

James M. Herrick
Assistant Attorney General

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Distributed to:

Alan S. Rubin, Esq.
Dee Baltimore, Esq.
Tauheedah El-Saadiq