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22-ORD-249

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In re: Dennis Bell/McCracken County Regional Jail

Summary: The McCracken County Regional Jail ("the Jail") did not violate the Open Records Act ("the Act") when it denied a request for certain incident reports and medical and injury reports of inmates. However, the Jail failed to meet its burden of proof to sustain its denial of visitor logs, phone logs, and "communications with any law enforcement personnel."

Open Records Decision

On August 29, 2022, Dennis Bell ("Appellant") attempted to deliver a request to inspect records to the Jail. But the Jail refused to accept it and told the Appellant to deliver the request to the County Judge/Executive's office. The Appellant then immediately submitted his request to the County/Judge Executive's office and asked for the "complete and unredacted records" related to a specified inmate at the Jail that were created between February 11 and June 2, 2022, including "incident reports, medical reports, injury reports, visitor logs, phone logs and communications with any law enforcement personnel." Having received no response to his request by September 8, 2022, the Appellant initiated this appeal.

Under KRS 61.880(1), a public agency must respond in writing within five business days after receiving a request to inspect records. On appeal, the Jail relies on a response it issued on September 9, 2022. However, this response was not timely because the Jail received the request on August 29, 2022,[1] making its response due

[1] The Appellant presented his request directly to the Jail on August 29, 2022. Although the Jail did not accept delivery, the Appellant complied with the Jail's delivery instructions and submitted his request to the County Judge/Executive's office. Accordingly, the Jail received the request on August 29, 2022.

by September 6, 2022. Accordingly, the Jail violated the Act when it failed to issue a timely response.

The Jail denied several portions of the Appellant's request based on different exceptions to the Act. First, the Jail denied the request for "incident reports" under KRS 197.025(1), which is an enactment of the General Assembly incorporated into the Act under KRS 61.878(1)(l). 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 [here, the Jail] to constitute a threat to the security of the inmate, any other inmate, correctional staff, the institution, or any other person." Specifically, the Jail states that an incident report released to the public could "make its way into the hands of an individual that would exploit [it] in a manner that could create animosity and discord among the inmates [and] security personnel and chill the effectiveness and reliability of the facility reporting and investigative process." The Jail also claims release of the incident reports will "create a risk of retaliation against inmate [*sic*] and even employees that provided information to facility personnel."

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 upheld the denial of incident reports based on a risk of retaliation against inmates or facility staff. *See, e.g.,* 16-ORD-247; 12-ORD-123. Therefore, under the facts of this appeal, this Office defers to the judgment of the Jail to determine that the release of incident reports would pose a security threat under KRS 197.025(1).

Next, the Jail invoked KRS 61.878(1)(a) to deny inspection of "medical reports, injury reports, visitor logs, and phone logs of [the inmate] because they are of a private nature and not outweighed by the public's interest in disclosure." KRS 61.878(1)(a) exempts from disclosure "[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." In reviewing an agency's denial of an open records request based on the personal privacy exemption, the courts and this Office balance the public's right to know what is happening within government against the personal privacy interest at stake in the record. *See Zink v. Commonwealth, Dep't of Workers' Claims,* 902 S.W.2d 825, 828 (Ky. App. 1994). The balancing of an asserted privacy interest against the public interest in disclosure of records is a "highly fact-dependent" inquiry. *See, e.g.,* 14-ORD-057. This Office has recognized a significant privacy interest in medical information that will typically outweigh the ordinary public interest in disclosure. *See, e.g.,* 19-ORD-207; 18-ORD-186; 03-ORD-208. Therefore, in the absence of any facts suggesting a heightened public interest in this

inmate's medical information, the Jail did not violate the Act when it withheld the inmate's medical reports and injury reports under KRS 61.878(1)(a).[2]

With regard to visitor logs, however, the Jail has not met its burden of proof under KRS 61.880(2)(c) to sustain its actions. In 93-ORD-102, this Office found that the privacy interest in the identities of visitors to a jail was "minimal."[3] Although the public interest in disclosure of the visitor log was found to be equally minimal, the Act requires a "general bias favoring disclosure." *Id.* Therefore, the Office found the log must be disclosed "in the absence of any direct evidence" that the invasion of personal privacy was "clearly unwarranted" under KRS 61.878(1)(a). *Id.* So too here, the Jail has not articulated any facts that would render the minimal invasion of personal privacy "clearly unwarranted." Therefore, the Jail violated the Act when it withheld visitor logs under KRS 61.878(1)(a).

Similarly, the Jail has not met its burden of proof that KRS 61.878(1)(a) applies to deny inspection of the inmate's phone logs. As with visitor logs, the public interest in disclosure of inmate phone logs will typically be *de minimis,* because such records are likely to reveal "little or nothing about an agency's own conduct." *Zink,* 902 S.W.2d at 829. However, the Jail has not explained what information is contained in the phone logs, or why that information implicates a substantial privacy interest such that its disclosure would constitute a "clearly unwarranted invasion of personal privacy." KRS 61.878(1)(a). Because the burden rests with the public agency to sustain its action, the Jail's mere assertion of a privacy interest, without more, is insufficient to justify its denial of inspection. KRS 61.880(2)(c). Therefore, the Jail violated the Act when it withheld the inmate's phone logs under KRS 61.878(1)(a).

Finally, the Jail denied inspection of "communications with any law enforcement personnel" under KRS 61.878(1)(h). KRS 61.878(1)(h) permits nondisclosure of "[r]ecords of law enforcement agencies or agencies involved in administrative adjudication that were compiled in the process of detecting and investigating statutory or regulatory violations if the disclosure of the information would harm the agency by revealing the identity of informants not otherwise known or by premature release of information to be used in a prospective law enforcement action or administrative adjudication." In support of its denial, the Jail claims that releasing the records "has the potential [to] adversely color witnesses' recollection of the events" and "would disclose information . . . to be used in a prospective law enforcement action, including further investigation by investigators, and the review

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[2] Because inmate medical information is exempt from disclosure under KRS 61.878(1)(a), it is unnecessary to consider the Jail's argument concerning the Health Insurance Portability and Accountability Act of 1996 ("HIPAA").

[3] However, personal information such as home addresses may be redacted from the visitor log under KRS 61.878(1)(a). *See* 06-ORD-120; *see also Ky. New Era, Inc. v. City of Hopkinsville,* 415 S.W.3d 76 (Ky. 2013).

and assessment of the evidence by prosecutors as they prepare the matter for final disposition and/or trial." The Jail further states that disclosure of the records would improperly permit "inspection beyond the scope of which such information may discovered [*sic*] under Kentucky's rules of criminal procedure."

KRS 61.878(1)(h) consists of three elements. First, the records must be "records of law enforcement agencies or agencies involved in administrative adjudication." Second, the agency must show the records were "compiled in the process of detecting and investigating statutory or regulatory violations." Finally, the agency must show release of the records "would harm the agency by revealing the identity of informants not otherwise known or by premature release of information to be used in a prospective law enforcement action or administrative adjudication." Although a jail may sometimes qualify as an agency able to invoke KRS 61.878(1)(h), it has the burden of showing that it is conducting a law enforcement investigation or an administrative adjudication. *See, e.g.,* 93-ORD-102. Here, the Jail has not attempted to make such a showing. Alternatively, an agency may invoke KRS 61.878(1)(h) on behalf of a separate law enforcement agency that has requested nondisclosure of records where disclosure would harm an ongoing investigation. *See, e.g.,* 17-ORD-213; 14-ORD-223; 09-ORD-143. Here, the Jail has attempted to show that disclosure of records in its possession would harm the prosecutors in conducting a pretrial investigation.

However, the Jail does not identify the type or form in which the "communications" were communicated to distinguish them from one another, *i.e.*, emails, notes, radio dispatches, reports, or other types of communications. When an agency relies on KRS 61.878(1)(h), it must also establish that the records "were compiled in the process of detecting and investing statutory or regulatory violations" and the release of those categories of records will cause harm to the investigation. In other words, the agency must "identify and review its responsive records, release any that are not exempt, and assign the remainder to meaningful categories. A category is 'meaningful' if it 'allows the court to trace a rational link between the nature of the document and the alleged [harm to the agency].'" *City of Ft. Thomas v. Cincinnati Enquirer,* 406 S.W.3d 842, 851 (Ky. 2013) (quoting *Bevis v. Dep't of State,* 801 F.2d 1386, 1389 (D.C. Cir. 1986)). Here, the Jail has not sufficiently identified or assigned to categories the "communications with . . . law enforcement personnel" in its possession to establish that they were compiled in the process of detecting statutory or regulatory violations, or that the release of such records would cause harm to that investigation. Thus, the Jail has not met its burden of proof under KRS 61.880(2)(c).

Alternatively, the Jail claims that these "communications" are exempt under KRS 17.150(2). Under KRS 17.150(2), "[i]ntelligence and investigative reports maintained by criminal justice agencies are subject to public inspection if prosecution is completed or a determination not to prosecute has been made. However, portions

of the records may be withheld from inspection if the inspection would disclose . . . [i]nformation contained in the records to be used in a prospective law enforcement action." KRS 17.150(2)(d). When an agency invokes KRS 17.150(2), "the burden shall be upon the custodian to justify the refusal of inspection with specificity." KRS 17.150(3). Here, the Jail has not sufficiently identified the withheld records in its possession to determine whether they are "[i]ntelligence and investigative reports" within the meaning of KRS 17.150(2). Nor has the Jail attempted to establish that it is a "criminal justice agenc[y]" within the meaning of KRS 17.150(2). Therefore, the Jail has failed to meet its burden of proof that KRS 17.150 applies to the specific records withheld. Accordingly, the Jail violated the Act when it withheld "communications with any law enforcement personnel."

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.

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Distributed to:

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