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22-ORD-278

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In re: Leslie Haun/Luther Luckett Correctional Complex

Summary: The Luther Luckett Correctional Complex (the "Complex") did not violate the Open Records Act ("the Act") when it denied a request for JPay emails exchanged between private parties because they are not public records, or when it could not provide a copy of an email that is not in its custody or control.

Open Records Decision

Inmate Leslie Haun ("Appellant") submitted a request to the Complex for a copy of three emails he sent on specific dates and times. The Appellant claims he sent one email to "the Education Department" and the other two emails he sent to a specific person. In a timely response, the Complex denied the Appellant's request because the requested emails are maintained by an outside vendor, and thus, are not "public records" under KRS 61.870(2).[1] This appeal followed.

On appeal, the Complex reiterates that two of the requested emails are not public records because the specific person to whom the Appellant sent them is a private individual. This Office has previously found that JPay emails and their attachments exchanged between private parties are not "public records" under KRS 61.870(2). *See, e.g.,* 22-ORD-111; 22-ORD-021; 20-ORD-109. Only emails sent to or from employees of the correctional facility using the JPay system are "public records," because such records would have been "prepared by" or "in the possession of" the correctional facility. *See* KRS 61.870(2). Additionally, JPay emails that have

[1] The Complex also stated that "JPay emails are only available to an inmate who has access to the [JPay] kiosks" and "an inmate in segregation cannot inspect the record through a kiosk."

been seized and are being "used" by a correctional facility for some official purpose are "public records." *Id.*; *see also* 22-ORD-021; 21-ORD-124.

Here, the Complex claims that two of the requested JPay emails are not public records, and the Appellant does not provide any proof that the specific person to whom he sent the emails is a Complex employee or that the emails are being used by the Complex for some official purpose.[2] Consequently, there is nothing in the record to indicate that the requested pictures are "prepared, owned, used, in the possession of or retained by a public agency" within the meaning of KRS 61.870(2). Accordingly, the Complex did not violate the Act when it denied the Appellant's request for these two emails because they are not "public records."[3]

The Complex also denied the Appellant's request for the email he sent to the "Education Department." The Complex now explains that this record does not exist. The Complex explains that the inmate JPay email system only permits inmates to send emails to recipients from a "predefined list of contacts." The Complex further explains that the "Education Department" is not on the Appellant's predefined list of contacts on his JPay account. The Complex invites the Appellant to resubmit his request if he can determine "more precisely what agency he is referring to" and that "if the agency is a state agency and if the record is in [its] possession, then [it] will produce it."

Once a public agency states affirmatively that a record does not exist, the burden shifts to the requester to present a *prima facie* case that the requested record does or should exist. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov't*, 172 S.W.3d 333, 341 (Ky. 2005). If the requester is able to make a *prima facie* case that the records do or should exist, then the public agency "may also be called upon to prove that its search was adequate." *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 848 n.3 (Ky. 2013) (citing *Bowling*, 172 S.W.3d at 341).

Here, the Appellant has not made a *prima facie* case. The Appellant merely requested a copy of an email he claims to have sent to "the Education Department," but the Complex asserts that no email could have been sent to the "Education

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[2] The Appellant does claim the Complex has previously granted similar requests. However, the Complex explains that these requests were for "logs," not emails which, unlike the current request, were in the Complex's possession and responsive to that request.

[3] Because these two emails are not "public records," it is unnecessary to consider the Complex's alternative argument that the requested pictures are "[c]ommunications of a purely personal nature unrelated to any governmental function," and therefore exempt from inspection under KRS 61.878(1)(r).

Department" from the Appellant's JPay account. Moreover, if the Appellant sent an email to the Kentucky Department of Education, then perhaps *that* public agency may have a copy of the requested email. But a public agency "is responsible only for those records within its own custody or control." *City of Ft. Thomas v. Cincinnati Enquirer,* 406 S.W.3d 842, 856 (Ky. 2013) (citing *Kissinger v. Reporters Committee for Freedom of the Press,* 445 U.S. 136 (1980)). The Appellant provides no evidence the Complex should possess a copy of the email he sent to a different public agency. Thus, the Complex did not violate the Act when it could not provide a record that does not exist within its possession.

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court under KRS 61.880(5) and KRS 61.882 within 30 days from the date of this decision. Under 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 emailed to OAGAppeals@ky.gov.

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s/ Matthew Ray
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Distributed to:

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