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23-ORD-057

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In re: Phillip Hamm/McCracken County Sheriff's Office

Summary: The McCracken County Sheriff's Office ("Sheriff's Office") did not violate the Open Records Act ("the Act") when it denied a request to inspect in-person an employee's privately-owned cellphone. However, to the extent photographs stored on the privately-owned cellphone were "used" for an official government purpose, such photographs are "public records" subject to inspection. The Sheriff's Office also did not violate the Act when it denied a request for records that do not exist.

Open Records Decision

Phillip Hamm ("the Appellant") submitted to the Sheriff's Office a request to inspect public records containing multiple subparts. Subparts one and two sought photographs and "typed reports" regarding the use of force to enter a specific property and execute a search warrant on February 16, 2022. Subpart three sought "documentation regarding" supervisory staff's review of body-worn camera footage of the execution of the search warrant. Subpart four sought "documentation showing" supervisory staff approved of the search warrant before submitting it to the authorizing judge. Subpart five sought any "documentation approving" the Sheriff Office's "use of out dated [*sic*] forms that do not comply with current" Department of Justice standards for supplying affidavits in support of search warrants. Finally, in subpart seven,[1] the Appellant requested "an on-sight inspection of the cell phones used by" two specific deputies "during the interview of" a specific person on February 14, 2022, and the same cellphones used during execution of the search warrant two days later. The Appellant alleged the cellphones were used to take photographs or videos of the search.

[1] The Appellant does not challenge the Sheriff's Office's denial of subparts six or eight of the request.

In a timely response, the Sheriff's Office denied subparts one through five because records responsive to those subparts "either never existed or no longer exist, therefore making it impossible to produce" them for inspection. In response to subpart seven, the Sheriff's Office admitted the deputies used "their personal mobile devices" during execution of the search warrant and the February 14, 2022, interview. However, citing previous decisions of this Office, the Sheriff's Office denied the Appellant's request because "stored data on private cell phones of a public agency's employees are not within the possession of the public agency" and is therefore not subject to inspection. This appeal followed.

The Sheriff's Office denied subparts one through five of the Appellant's request by stating affirmatively the records responsive to those subparts do not exist. 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).

The Appellant has not attempted to make a *prima facie* case that records responsive to subparts one through five exist. Rather, he argues the Sheriff's Office's response is deficient because it does not specify whether the records once existed and now they no longer do, or if they never existed. But the Sheriff's Office affirmatively stated the records "do not exist."[2] The burden shifts to the Appellant to show the records do or should exist before the Sheriff's Office is required to explain the adequacy of its search, or explain why records that should exist no longer do. *See Bowling*, 172 S.W.3d at 341; *see also Eplion v. Burchett*, 354 S.W.3d 598, 602–03 (Ky. App. 2011) (because the requester made a *prima facie* case records should have existed, he was entitled to an explanation that such records were destroyed). The Appellant's mere assertion that responsive records should exist is insufficient to make a *prima facie* case.[3] *See, e.g.*, 22-ORD-169; 21-ORD-250; 21-ORD-174.

[2] The Office also notes the McCracken County Sheriff was newly elected, and was not the Sheriff at the time the search warrant was executed. Thus, while the Sheriff could not affirmatively conclude that the records never existed, because he was not Sheriff when they would have allegedly been created, he did affirmatively state that such records did not exist at the time of the request.

[3] Although the Sheriff's Office admits deputies "used" their personal cellphones during execution of the search warrant, it did not state how the personal cellphones were used, and its statement does not constitute an admission that the cellphones were used to take pictures of "the use of force" when entering the property to execute the warrant. As such, the Sheriff Office's admission does not constitute a *prima facie* case that photographs "of the use of force," as requested in subpart one, exist.

Accordingly, he has not put forth sufficient evidence to require the Sheriff's Office to explain why no responsive records were located.

Finally, the Sheriff's Office did not violate the Act when it denied the Appellant's request to conduct an in-person inspection of the deputies' personal cellphones. KRS 61.870(2) broadly defines "public records" as "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 possession of or retained by a public agency." Cellphones, however, are different in kind from "books, papers, maps, photographs, cards, tapes, discs, diskettes, recordings, [and] software." *Id*. A cellphone, like public offices and computers, may *contain* some of these things, but the cellphone is not itself one of these things. Nor is a cellphone "other *documentation* regardless of physical form or characteristics." KRS 61.870(2) (emphasis added). The Act does not permit general inspection of a public official's office or computer. Rather, it permits inspection of "public records" *contained within* a public official's office or computer. The same is true of cellphones. The Act does not permit general inspection of a public officer's privately-owned cellphone.[4]

Moreover, this Office has previously found that emails and text messages contained on privately-owned devices are not public records under KRS 61.870(2). *See, e.g.*, 15-ORD-226; 21-ORD-127; 21-ORD-146.[5] That is because a public agency does not prepare, own, possess, or retain records that are the property of its employees. Moreover, text messages and emails generally are not "used" by a public agency to take official action. Rather, public agencies communicate official action through more formal means, such as issuing formal notices, letters, pleadings, or other administrative documents. Nevertheless, there may be some circumstances in which privately-owned records are "used" for an official government purpose. In 20-ORD-109, the Office found that emails exchanged between inmates of correctional facilities and other private individuals were not "public records" simply because the

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[4] Allowing such intrusion would implicate concerns under the Fourth Amendment, because individuals possess a personal privacy interest in data stored on their privately-owned cellphones. *Cf. Commonwealth v. Reed*, 647 S.W.3d 237, 250 (Ky. 2022) (recognizing "individuals have a reasonable expectation of privacy in their cell phone's cell-site location information"); *Riley v. California*, 573 U.S. 373, 401 (2014) (holding "a warrant is generally required before" searching a person's cellphone).

[5] The Franklin Circuit Court has also examined this question and determined that emails exchanged on private email accounts, which were themselves advertised as the only method for emailing a public official, are public records subject to inspection. *See Ky. Open Gov't Coalition, Inc. v. Ky. Dept. of Fish & Wildlife*, No. 21-CI-00680 (Franklin Cir. Ct. Jan. 25, 2021). However, the Court "firmly [held] that subjecting text messages and other forms of private communications contained on privately-owned devices to the Open Records Act would create an unreasonable burden on state agencies in producing records and would grossly encroach on the private lives of state employees, officials, and volunteers." *Id*. at 20. The Franklin Circuit Court's ruling is not final and is currently on appeal. *See Ky. Dept. of Fish & Wildlife Res. Comm'n v. Ky. Open Gov't Coalition, Inc.*, No. 2022-CA-0192 (Ky. App.).

privately-owned kiosk from which the emails were exchanged was located in the correctional facility. This Office found that such private communications could only become public records if they were "used" for an official purpose, *i.e.*, as evidence in a disciplinary proceeding.[6]

Here, the Sheriff's Office properly denied the Appellant's request to inspect the deputies' privately-owned cellphones because cellphones are not themselves public records. However, the Appellant alleges the deputies "used" their cellphones during an interview to show photographs to a person, who then identified a suspect from those photographs. His identification allegedly served as the basis for seeking a search warrant of that person's residence two days later. The Sheriff's Office does not deny this, and admits the cellphones were "used" in the interview. To the extent photographs were used during the official act of a police interview for the purpose of identifying a suspect and to seek a search warrant, then the *photographs* were "used" by the Sheriff's Office while carrying out its governmental function of investigating crime. That would make the *photographs* public records subject to inspection, unless an exemption under KRS 61.878(1) applies.[7] But here, the Appellant did not request to inspect the photographs used during the interview.[8] He asked to inspect the deputies' *cellphones*, which are not "public records" under KRS 61.870(2). Accordingly, the Sheriff's Office did not violate the Act when it denied this subpart of the Appellant's request.

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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[6] Emails exchanged between inmates and the official government email accounts of employees of correctional facilities would also be "public records," because the emails sent to inmates would be "prepared" by the correctional facility, and emails the employees receive at their official government email address would be "in the possession of" the correctional facility. *See* KRS 61.870(2).

[7] It is for this reason that a public agency should print such photographs and use the printed copies, as opposed to using a device to show such photographs to a person. An officer testifying in a criminal trial would likely not want his or her cellphone or camera to be provided to a jury to show them pictures. Rather, the pictures would be printed and entered into evidence as separate exhibits.

[8] Rather, he did so by a separate request, which the Sheriff's Office denied and which was the subject of 23-ORD-039. In response to this later request, the Sheriff's Office explained to the Appellant that the photographs had been destroyed.

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Distributed to:

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