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21-ORD-161

July 5, 2023

In re: Kentucky Innocence Project/Department of Corrections &
Blackburn Correctional Complex

Summary: The Department of Corrections ("the Department") violated the Open Records Act ("the Act") when it failed to state the exception authorizing the withholding of a record, but it did not violate the Act when it withheld a pending disciplinary violation under KRS 61.878(1)(j) because no final action had yet been taken. The Blackburn Correctional Complex ("the Complex") did not violate the Act when it denied inspection of records the disclosure of which would pose a security threat under KRS 197.025(1).

Open Records Decision

On May 31, 2023, the Kentucky Innocence Project ("Appellant") made a request to the Department for "any and all records and copies of audio recordings of phone calls pertaining to" a certain inmate at the Complex between May 9 and May 23, 2023. In a timely response, the Department stated the inmate had "a disciplinary violation on May 11, 2023," which was "still pending investigation" and could not be released "until it [was] finalized." The Department further stated it did not have access to the phone recordings and the Appellant should instead request those records from the Complex.

On June 1, 2023, the Appellant made a request to the Complex for the same records. In a timely response, the Complex denied the request because "the disclosure of recordings of phone calls would constitute a threat to the security of inmates, the institution, institutional staff, or others [under] KRS 197.025(1) and KRS 61.878(1)(l)." The Complex further explained that "[d]isclosing recorded phone calls would constitute a threat by providing a means by which inmates could learn which phone calls are monitored." In addition, the Complex "decline[d] to identify

which, if any, of the calls have been destroyed because it would also give away security information concerning the monitoring of inmate phone calls." Finally, the Complex stated that "the phone records cannot be provided pursuant to KRS 61.878(1)(a) since they contain information of a personal nature the public disclosure of which constitutes an unwarranted invasion of personal privacy." This appeal followed.

When a public agency denies a request for public records, it 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." KRS 61.880(1). Here, with regard to the initial request, the Department admits it failed to state the exception authorizing the withholding of the inmate's pending disciplinary violation. Thus, the Department violated the Act.

On appeal, the Department cites KRS 61.878(1)(h), (i), and (j), and explains "there has been no final disposition" of the inmate's disciplinary matter. KRS 61.878(1)(j) exempts from disclosure "[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended." Because the investigation is ongoing and no final agency action has been taken, the disciplinary violation remains a "preliminary recommendation" at this time. Accordingly, the Department did not violate the Act when it denied the request for that record.[1]

Under KRS 197.025(1), which is incorporated into the Act under KRS 61.878(1)(l), "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." 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 inmate telephone recordings. *See, e.g.,* 19-ORD-024; 17-ORD-111; 15-ORD-030; 11-ORD-170; 07-ORD-182. Recordings of inmate phone calls are created and maintained for the purpose of institutional security.[2] As the Complex explained in its initial response, disclosure of these recordings would constitute a threat to the security of the institution "by providing a means by which inmates could learn which phone calls are monitored." Under the facts of this appeal, this Office

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[1] Because KRS 61.878(1)(j) is dispositive of this issue, it is not necessary to address the Complex's denial under KRS 61.878(1)(h) or (i).

[2] *See* Corrections Policy and Procedure ("CPP") 16.3(II)(C), *available at* https://corrections.ky.gov/About/cpp/Documents/16/CPP%2016.3.pdf (last accessed July 5, 2023) ("An inmate telephone call may be monitored on a random basis or if there is reason to believe the telephone privilege is being abused in a manner that is in violation of law or detrimental to the security of the institution, employees, or other inmates.").

defers to the judgment of the Complex and the Department of Corrections to determine that the release of the recordings would pose a security threat under KRS 197.025(1). Accordingly, the Complex did not violate the Act when it denied the Appellant's request for the recordings.[3]

A party aggrieved by this decision may appeal it by initiating an 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 emailed to OAGAppeals@ky.gov.

Daniel Cameron
Attorney General

s/ James M. Herrick
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Distributed to:

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[3] Because KRS 197.025(1) is dispositive of this issue, it is not necessary to address the Complex's denial under KRS 61.878(1)(a).