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23-ORD-344

December 28, 2023

In re: Joshua Powell/Hardin County Detention Center

Summary: The Hardin County Detention Center ("the Jail") did not violate the Open Records Act ("the Act") when it denied a request for copies of inmate recordings that are purely personal communications under KRS 61.878(1)(s).

Open Records Decision

On October 12, 2023, Joshua Powell ("Appellant") requested "[a]ll jail call recordings and video visit recordings" for a specific inmate from "9/27/2023 to present." In its initial response, the Jail denied the request "pursuant to KRS 61.878(1)(h) as a record of law enforcement agency compiled in the process of an investigation which could harm the agency investigation by premature release of information to be used in a prospective law enforcement action." This appeal followed.

On appeal, the Jail no longer relies on KRS 61.878(1)(h). Instead, it claims the requested recordings are outside the scope of the Act because "[a]ny recordings of phone calls or video visits are compiled, maintained and under the exclusive control of Securus Technologies, a private vendor providing fee-based phone and video services to inmates." Thus, the Jail argues, recordings of personal communications between inmates and third parties are not "public records" within the meaning of the Act.

Opposing the Jail's new argument, the Appellant claims the recordings are "public records" because the Jail's "employees have access to these records." But an agency's mere "access" to electronic records, without more, does not make them "public records" for purposes of the Act. *See* 22-ORD-131. Rather, under KRS 61.870(2), "public record" includes "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."

Here, the Jail denies that any of the requested recordings are "prepared, owned, used, in the possession of or retained by" it because they remain stored in the vendor's system and have not been downloaded by the Jail. Pursuant to KRS 61.880(2)(c), the Office has reviewed a copy of the Master Services Agreement ("the Agreement") between the Jail and Securus Technologies, Inc. ("Securus"), under which Securus provides telecommunications services to the Jail. Section 8 of the Agreement states that the Jail "retain[s] custody *and ownership* of all recordings" (emphasis added). In contrast, the Agreement only grants Securus "a perpetual limited license to compile, store, and access recordings [of] inmate calls."[1] Likewise, the Securus Video Visitation Schedule, which is part of the Third Amendment to the Agreement, provides that "Customer [the Jail] retains custody and ownership of all recordings" of inmate video visits while providing Securus a similar limited license. Thus, according to the unambiguous terms of the Agreement, recordings of inmate phone calls and video visits are "owned" by the Jail, regardless of whether they have been downloaded to the Jail's computers or remain stored in the Securus system. Under KRS 61.870(2), which uses the disjunctive "or," records are "public records" if they are "owned . . . by a public agency," even if they are "in the possession of" a vendor. *See, e.g.*, 20-ORD-115 (holding that records in the possession of a private attorney relating to her representation of a public agency were "public records" because the file was "owned" by her client, the public agency). Accordingly, the recordings requested by the Appellant are "public records" under the Act.

Nevertheless, "while all government agency records are public records for the purpose of their management, not all these records are required to be open to public access, as defined in [the Act], some being exempt under KRS 61.878." KRS 61.8715. Here, the recordings the Appellant requested are not communications of public agencies or their employees, but personal communications between an inmate and third parties. As the Supreme Court of Kentucky has noted, "the policy of disclosure is purposed to subserve the public interest, not to satisfy the public's curiosity." *Ky. Bd. of Exam'rs of Psychologists v. Courier-Journal & Louisville Times Co.,* 826 S.W.2d 324, 328 (Ky. 1992). This public interest "focuses on the citizens' right to be informed as to what their government is doing." *Zink v. Commonwealth, Dep't of Workers' Claims,* 902 S.W.2d 825, 829 (Ky. App. 1994). Thus, under KRS 61.878(1)(s), "[c]ommunications of a purely personal nature unrelated to any governmental function" are exempt from public disclosure. Because the content of inmates' private communications is purely personal and unrelated to any governmental function, the recordings the Appellant seeks are exempt under KRS 61.878(1)(s), and the Jail did not violate the Act when it denied the Appellant's request.

[1] This limited license, however, excludes "inmate calls . . . with their attorneys" or calls subject to other privileges.

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.

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s/ James M. Herrick
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Distributed to:

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