COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

DANIEL CAMERON
ATTORNEY GENERAL

CAPITOL BUILDING, SUITE 118
700 CAPITAL AVENUE
FRANKFORT, KENTUCKY 40601
(502) 696-5300
FAX: (502) 564-2894

23-ORD-349

December 28, 2023

In re: Craig D. Miller/University of Kentucky

Summary: The University of Kentucky ("the University") did not violate the Open Records Act ("the Act") when it denied a request that failed to "precisely describe" public records to be inspected.

Open Records Decision

Craig D. Miller ("the Appellant") submitted a request to the University seeking copies of "[t]ext messages sent or received by [the Athletics Director] beginning on November 18, 2023 and ending December 3, 2023." The Appellant did not describe any governmental or "official business" in which he was interested, nor did he identify any person with whom the Athletic Director may have communicated.[1] In other

[1] Nor did the Appellant give a statement as to how he qualified as a "resident of the Commonwealth" under KRS 61.870(10). Rather, the signature block of his request suggests he resides in Austin, Texas, and his phone number contains the area code associated with Tampa Bay, Florida. *See* KRS 61.872(1) ("All public records shall be open for inspection by any *resident of the Commonwealth*" (emphasis added)). To ascertain whether the Office has jurisdiction to adjudicate this appeal, it requested that the Appellant provide a statement regarding his residency. The Appellant stated only that he "represents" a website (https://www.doublefriesnoslaw.com), which he claims is an "online-only newspaper or magazine that publishes news or opinion of interest to a general audience." *See* KRS 61.870(10)(g); KRS 189.635(8)(b)1.e. Although the University states it "does not concede" the Appellant qualifies as a resident of the Commonwealth under KRS 61.870(10), it also has presented no argument why the website does not qualify as an "online-only newspaper or magazine that publishes news or opinion of interest to a general audience." The website appears to be a fan website dedicated to the Florida State University Seminoles athletic teams, and it contains a link to a page titled "Noles News," which provides links to stories about that university's athletic teams. In the absence of any argument for why that content should not be considered "news or opinion of interest to a general audience," the Office is satisfied on this record that the website qualifies as a "news-gathering organization" under KRS 61.870(10)(g). The University also asks the Office to inquire further into how the Appellant "represents" the website. However, the Office has previously held that an agency's official custodian may only ask for a "statement" regarding the requester's residency qualifications, not actual proof of his qualifications. *See, e.g.*, 22-ORD-120.

words, he sought every text message sent or received by the Athletics Director to or from any person, on any device, about any subject, during a two-week period.

In a timely response, the University denied the request because it does not provide a cell phone to the Athletics Director. Accordingly, any text messages the Athletics Director sent or received would be on his personal cell phone. The University did not attempt to search the Athletics Director's personal cell phone for responsive records because, it says, it "cannot obtain messages that are outside its possession." The University stated any of the Athletics Director's messages that are "related to non-university business" "are outside the scope of" the Act. The University further stated, "to the extent that messages may exist and may be related to university business, they may be subject to multiple exemptions including, but not limited to, personal privacy pursuant to KRS 61.878(1)(a), preliminary pursuant to KRS 61.878(1)(i) and (j), and, in some instances, attorney-client privileged."

The Appellant replied and asked the University whether it had searched for records, and if it had not, how it could claim any exemption "may" apply. The University stated it conducted a search by "ascertaining whether [the Athletics Director] does not use a university owned device to send and receive text messages." The University further stated that searching for responsive records on the Athletics Director's personal cell phone would be "unduly burdensome" and "implicated communications of a purely personal nature unrelated to any government function exempt under KRS 61.878(1)(s)." The University also reaffirmed its previous response. The Appellant then directed the University to a recent decision of the Kentucky Court of Appeals, which held that text messages on cell phones personally owned by the members of the Kentucky Fish and Wildlife Commission and relating to Commission "business" are public records subject to the Act.[2] *See Ky. Open Gov't Coalition, Inc. v. Ky. Dep't of Fish & Wildlife Res.*, ___ S.W.3d ___, No. 2022-CA-0170-MR, 2023 WL 7095744, at *9 (Ky. App. Oct. 27, 2023), *mot. for disc. rev. pending*, No. 2023-SC-0524-D (Ky.). Having received no further response from the University, the Appellant initiated this appeal.

The Appellant relies almost exclusively on the *Kentucky Open Government Coalition* Court's analysis. But the Department of Fish and Wildlife Resources ("the Department") has sought discretionary review of that decision in the Supreme Court of Kentucky. *See Ky. Dep't of Fish & Wildlife Res. v. Ky. Open Gov't Coalition, Inc.*, No. 2023-SC-0524-D (Ky.) (motion for discretionary review filed Nov. 22, 2023). As of the date of this decision, the Supreme Court has not yet ruled on the Department's motion for discretionary review. Therefore, the decision of the Court of Appeals is not final and may not be cited as binding precedent. *See* RAP 40(H). However, even if the

[2] The Court of Appeals did not define what constitutes "business," which, as explained below, has the potential to lead to serious confusion and unintended consequences.

decision of the Court of Appeals were final and authoritative, this case is distinguishable.

Before considering the *Kentucky Open Government Coalition* Court's first-impression analysis of this novel issue, this Office turns to the text of the Act itself. Most crucial here are the definitions of "public agency" and "public records." Under KRS 61.870(1), for purposes of the Act, a public agency includes:

(a) Every state or local government officer;

(b) Every state or local government department, division, bureau, board, commission, and authority;

(c) Every state or local legislative board, commission, committee, and officer;

(d) Every county and city governing body, council, school district board, special district board, and municipal corporation; (e) Every state or local court or judicial agency;

(f) Every state or local government agency, including the policy-making board of an institution of education, created by or pursuant to state or local statute, executive order, ordinance, resolution, or other legislative act;

(g) Any body created by state or local authority in any branch of government;

(h) Any body which, within any fiscal year, derives at least twenty-five percent (25%) of its funds expended by it in the Commonwealth of Kentucky from state or local authority funds. However, any funds derived from a state or local authority in compensation for goods or services that are provided by a contract obtained through a public competitive procurement process shall not be included in the determination of whether a body is a public agency under this subsection;

(i) Any entity where the majority of its governing body is appointed by a public agency as defined in paragraph (a), (b), (c), (d), (e), (f), (g), (h), (j), or (k) of this subsection; by a member or employee of such a public agency; or by any combination thereof;

> (j) Any board, commission, committee, subcommittee, ad hoc committee, advisory committee, council, or agency, except for a committee of a hospital medical staff, established, created, and controlled by a public agency as defined in paragraph (a), (b), (c), (d), (e), (f), (g), (h), (i), or (k) of this subsection; and
>
> (k) Any interagency body of two (2) or more public agencies where each public agency is defined in paragraph (a), (b), (c), (d), (e), (f), (g), (h), (i), or (j) of this subsection[.]

No one disputes that the University qualifies as a "public agency" under the Act. But the question here is whether *the Athletics Director* is a "public agency," and if he is not, whether the text messages on his privately-owned device are nevertheless "public records" potentially subject to public inspection. That is because only records that "are prepared, owned, used, in the possession of or retained *by a public agency*" are "public records." KRS 61.870(2) (emphasis added).[3]

By using the terms "owned, used, in the possession of or retained by," the Act defines "public records" in terms of property rights. If a public agency, as defined in KRS 61.870(1), "prepares, owns, uses, possesses, or retains" a record, that record is a "public record" because it is the agency's property. For example, records prepared and retained by private attorneys representing public agencies are public records, even if those records are in the possession of the private attorney, because such records are "owned" by the public agency, the attorney's client. *See, e.g.*, 20-ORD-115. Therefore, such records are subject to inspection, unless an exemption under KRS 61.878(1) authorizes the public agency to deny inspection.

But not all documents in the possession of private persons performing work for public agencies come within the definition of "public record." For example, for a private entity to be subject to the Act, it must, "within any fiscal year, derive[ ] at least twenty-five percent (25%) of its funds expended by it in the Commonwealth of Kentucky from state or local authority funds." KRS 61.870(1)(h). But the records of such a private entity "that are not related to functions, activities, programs, or operations funded by state or local authority" are not public records. KRS 61.870(2).

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[3] Noticeably, the definition does not make any reference to "official business" or "governmental business." Read literally, any document in the possession of a state or local official is a "public record." Indeed, the phrases "official business" or "governmental business" appear nowhere in the Act and have not been defined. The closest the Act comes to using either phrase is in an exception to the right of public inspection for "[c]ommunications of a purely personal nature *unrelated to any governmental function*." KRS 61.878(1)(s) (emphasis added); *see also* KRS 61.878(5) (stating the exceptions in KRS 61.878(1) "shall in no way prohibit or limit the exchange of public records or the sharing of information between public agencies when the exchange is serving a legitimate governmental need or is necessary in the performance of a legitimate government function").

So, the private documents of a private company that are unrelated to any public work the company is performing remain the company's private property.

In *Kentucky Open Government Coalition*, the Court of Appeals held the Commissioners were themselves "public agencies" because they are "appointed by the Governor and confirmed by the Kentucky Senate." 2023 WL 7095744, at *9. They also must take the "constitutional oath of office." *Id*. Thus, the Court held, the members are "state officers" and the Commission itself is a "board, commission or [a] body created by state authority." *Id*. (citing KRS 61.870(1)). In contrast, here, the University argues the Athletics Director is not a "state or local officer" under KRS 61.870(1)(a). He is not appointed by the Governor or confirmed by the Senate; rather, he is a public employee serving under a contract with the University.

The University argues the text messages in the Athletics Director's possession are not within the possession of a "public agency," as defined by KRS 61.870(1), and therefore, are not "public records." However, the *Kentucky Open Government Coalition* Court noted that "possession" is not the only way records become "public records" subject to the Act. Records that are "prepared" or "used" by a public agency to carry out the business of that agency are also public records. *Id*.; *see also* 20-ORD-109; 23-ORD-057. And, as discussed previously, records in the possession of private persons performing work on behalf of a public agency also are "public records" potentially subject to inspection because they are "owned" by the public agency.

As merely an employee of a public agency, the Athletics Director is not a "state or local officer." The documents or communications he "prepares" are not automatically "prepared by" a public agency, and therefore, they are not public records simply by virtue of his having created them. *See, e.g.*, 15-ORD-266 (holding that emails sent and received by public employees on personal email accounts were not public records). For example, no one could seriously suggest that a Christmas card prepared by the Athletics Director and sent to his family would be a "public record" subject to inspection simply because he "prepared" it. Rather, records prepared by a public employee only become public records when the public employee *uses* them for an official purpose on behalf of the public agency. *See* KRS 61.870(2).

In the context of public agencies performing law enforcement or administrative enforcement duties, it can be obvious when a record is "used" for an official purpose. *See, e.g.*, 23-ORD-057 (holding that a picture stored on a police officer's personal cell phone became a public record when he used it to obtain a witness's identification and subsequently relied on the identification to obtain and execute a search warrant). In contrast, it is not clear when, if ever, text messages would be "used" for an official purpose, unless as evidence in some type of disciplinary proceeding. *See, e.g.*, 20-ORD-109 (private messages exchanged between inmates and other private parties may become public records if they are used by the correctional facility as evidence against

the inmate in a disciplinary proceeding). For example, a public agency's contract with a private person could not be completed by text message. *See generally* KRS Chapter 45A. Nor could a public agency promulgate an administrative regulation or implement public policy by text message. *See generally* KRS Chapter 13A. At most, text messages between public employees might constitute "routine correspondence," such as notifications of illness or that the employee is running late to a meeting, or a reminder to perform a job task. But it would be truly burdensome on employees of local government agencies to treat such correspondence in that manner.[4] And text messages between a public employee and a private individual, even if about public business, would be exempt under KRS 61.878(1)(i) if not intended to give notice of final action. As just discussed, a public agency would not execute its final action via text message.

The Office is forced to hypothesize the ways a public employee may "use" a text message for official purposes because, here, the Appellant has not even described the "official business" potentially contained in the Athletics Director's text messages he believes should be subject to inspection. *See* KRS 61.872(3)(b) (requiring requesters seeking copies of records by mail to "precisely describe[ ]" the records to be inspected). The request at issue in *Kentucky Open Government Coalition* was at least limited to communications between current and former commissioners and expressly excluded "communications of a purely personal nature unrelated to any government function." 2023 WL 7095744, at *1. But here, the Appellant's request was for every text message the Athletics Director sent to any person about any topic during a two-week period. The Act cannot be read so broadly as to subject public employees' private communications to constant scrutiny, or to prescribe how much discussion regarding work makes a text message "official business."[5] The line between "talking shop" and "talking *about* shop" can in some cases be impossible to determine. This is doubly so when, as here, the requester has not described the topics of "official business" in the text messages he wishes to inspect.

Nor, in the absence of the Athletics Director's express consent, can the University's official records custodian search his cell phone to determine whether any

[4] Under the retention schedule for local governments, "routine correspondence" must be retained for two years and then destroyed. *See* Series L4955 "Routine Correspondence," Local Agency Retention Schedule, available at https://kdla.ky.gov/records/RetentionSchedules/Documents/Local%20Records%20Schedules/LocalGovernmentGeneralRecordsRetentionSchedule.pdf (last accessed Dec. 28, 2023). It borders on the absurd to suggest that every local government employee has a duty to save for two years his or her text messages informing a superior that he or she is sick.

[5] The number of hypothetical "gray areas" caused by the Appellant's preferred, broad reading of the Act are legion. For example, does an employee's text message to his spouse complaining about his supervisor's attitude constitute "official business"? What about an employee's text message to his supervisor explaining that his child is sick and requesting permission to telecommute for the day? How about a text message from the Athletics Director to a coach to congratulate him on last night's win?

text messages relate to "official business" and therefore warrant inspection. Allowing such an intrusion into private communications by public employees would implicate the Fourth Amendment because individuals possess a personal privacy interest in the data stored on their privately-owned cell phones. *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 cell phone). The *Kentucky Open Government Coalition* Court somewhat skirted this concern by stating the Commission members can (indeed, must) perform their own search for responsive records. 2023 WL 7095744, at *9. But if public employees conduct their own search and claim no responsive records exist, the requester would then have a cause of action to dispute that claim in circuit court. *See* KRS 61.882. As a result, if the Appellant is correct, every public official or public employee's personal cell phone is potentially subject to discovery at any time, or at the very least, *in camera* review by a judge to determine whether the contents of their text messages are subject to public inspection under the vague and undefined term "official business."[6]

At bottom, the Appellant's request does not describe the governmental or "official business" about which the text messages may relate. As a result, the Athletics Director cannot conduct a meaningful search for responsive records. While it is safe to assume that all emails or text messages sent or received using government-owned accounts or devices relate to "official business," that assumption does not apply to privately-owned accounts or devices. The Act is a vehicle by which the public may monitor its government, but not permit vague fishing expeditions into the private communications of public employees. Because the Appellant did not "precisely describe" the subject matter of the text messages he seeks to inspect, the Athletics Director, who owns the cell phone and is the only person who could search for potentially responsive records, cannot reasonably determine whether those messages relate to "official [University] business." Thus, the University did not violate the Act by denying the Appellant's request.

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[6] Of course, if a public agency claims no responsive records exist, the burden shifts to the requester to make a *prima facie* case that the records do exist before the agency must explain the adequacy of its search. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov't*, 172 S.W.3d 333, 341 (Ky. 2005); *see also City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 848 n.3 (Ky. 2013). But the mere threat of one's personal communications being subject to scrutiny simply by virtue of his or her public employment could also cause a chilling effect on his or her speech, in violation of the First Amendment. The designation of a record as a "public record" makes it subject to Kentucky's record retention laws whether or not the public may inspect it. *See, e.g.,* KRS 61.8715 ("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 this chapter, some being exempt under KRS 61.878").Thus, this new risk to the personal privacy of governmental officials, when at any moment a public officer or employee's personal communications could be the subject of a lawsuit and discovery, is the world the *Kentucky Open Government Coalition* Court's holding would create if that decision became final.

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/ Marc Manley
Marc Manley
Assistant Attorney General

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Distribution:

Craig D. Miller
William E. Thro
Eric N. Monday