COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

RUSSELL COLEMAN
ATTORNEY GENERAL

1024 CAPITAL CENTER DRIVE
SUITE 200
FRANKFORT, KY 40601
(502) 696-5300

24-ORD-055

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In re: Timothy Arnold/Lee Adjustment Center

Summary: The Lee Adjustment Center ("the Center") did not violate the Open Records Act ("the Act") when it denied a request for records that, if released, could pose a security threat to the safety of a correctional facility.

Open Records Decision

Timothy Arnold ("the Appellant") is an attorney for the Department of Public Advocacy. During his more recent visits to the Center to provide legal services to his clients, the Center has required him to walk through a full body scanner, like the technology used in airports by the Transportation Security Administration ("TSA") before travelers may board a flight. Unlike a metal detector, the scanning equipment can allegedly detect any object carried on a person's body. After passing through the scanner a few times, the Appellant submitted a request to the Center for documents related to his being scanned. Specifically, he sought "any images" taken of him during the scans and "any documents generated during or in conjunction with the scanning process."

The Center provided the Appellant with a few documents that identified him by name, the dates and times he was scanned, and a few other unintelligible data points. However, the Center denied the Appellant's request for images of the scans themselves under KRS 197.025(1), which is incorporated into the Act by KRS 61.878(1)(l). The Center also cited Department of Corrections Policy and Procedures ("CPP") 9.23, which states that "[e]mployees, visitors, and offenders may only view scanned images of themselves, if positive results for contraband are detected and used for criminal or administrative procedures, and as approved for release by a court order or the facility Warden." Aside from this exception, no one is permitted to view the scans. This appeal followed.

The Appellant raises two arguments on appeal. First, he argues CPP 9.23, which is a policy document, cannot overcome the statutory right of inspection the Act

provides residents of the Commonwealth. Second, he argues KRS 197.025(1) applies only to requests made by inmates of correctional facilities, not the general public. For the reasons described below, KRS 197.025(1) does apply to requests made by the general public, and CPP 9.23 is a proper exercise of the discretion afforded the Commissioner of the Department of Corrections to determine which records would pose security threats to correctional facilities if they are released.

To determine the scope of KRS 197.025(1) and to whom it applies, one need look no further than the text of the statute itself. "KRS 61.870 to 61.884 to the contrary notwithstanding, *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." KRS 197.025(1) (emphasis added). Thus, despite the Appellant's argument to the contrary, the statute explicitly states that "no person" shall have access to records deemed by the Commissioner to be a security threat. It is not limited to requests made by inmates. *See, e.g.*, 23-ORD-338 (a civilian's request for phone calls between her and an inmate); 22-ORD-210 (an attorney's request for personnel records of a correctional facility employee); 22-ORD-038 (an attorney's request for video footage); 21-ORD-197 (a constable's request for surveillance footage); 19-ORD-089 (an attorney's request for various records related to her inmate client); 07-ORD-049 (a request by an employee of another correctional facility for records of her "pat-down" search). KRS 197.025(1) is incorporated into the Act's exceptions under KRS 61.878(1)(l), which exempts from inspection public records the disclosure of which is prohibited by an enactment of the General Assembly.

The purpose of KRS 197.025(1) is to protect the safety of inmates, employees, and any other person inside the correctional facility. A correctional facility cannot control the dissemination of records after their release. While no one suspects the Appellant would disseminate the records he receives in response to a request, the same may not be true of everyone else. If the Appellant's interpretation were correct, and "no person" really means just inmates, then a close friend or relative could request records that the inmate could not and mail or otherwise deliver them to the inmate. Correctional facilities cannot engage in arbitrary determinations about which requesters are trustworthy and which are not, nor does KRS 197.025(1) grant them such discretion. Simply put, "no person," including the Appellant, "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." KRS 197.025(1).

While KRS 197.025(1) applies to any person, it does not necessarily apply to every record in the possession of correctional facilities. The question is whether the Commissioner has "deemed" that release of the records would "constitute a threat to the security of the inmate, any other inmate, correctional staff, the institution, or any

other person." *Id*. Here, there is no doubt the Commissioner has determined that release of these specific records would constitute a security threat because that determination has been incorporated into CPP 9.23. However, the records are not exempt simply because CPP 9.23, an administrative policy, says they are. Rather, the records are exempt because KRS 197.025(1) gives the Commissioner the authority to determine which records would pose a security threat if released and which would not. CPP 9.23, therefore, is *proof* of the Commissioner's determination under KRS 197.025(1), and not independent legal authority on which the Center relies to deny inspection. Historically, the Office has granted the Commissioner broad authority under KRS 197.025(1) to determine which records would pose a security threat if released. *See, e.g.*, 22-ORD-052 (security camera footage and logbooks); 18-ORD-065 (video or audio recordings of a prisoner transfer); 15-ORD-030 (recordings of telephone calls); 03-ORD-190 (incident reports); 96-ORD-222 (employee personnel records); 94-ORD-010 (facility canteen records). The Center explains that release of the body scan images could reveal weaknesses in the technology, such as where one could hide contraband to escape detection. In this way, release of the images would pose the same type of risk as releasing security camera footage, *i.e.*, revealing "blind spots" in the technology. *See, e.g.*, 22-ORD-099; 19-ORD-089; 16-ORD-042; 15-ORD-121; 13-ORD-022.

The Office finds no reason to second guess the Commissioner's determination that the release of these records would pose a security threat to the most dangerous point of a correctional facility—its connection to the outside world, and all the contraband that could flow into the facility from there. Accordingly, the Center did not violate the Act when it denied the Appellant's request.

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.

Russell Coleman
Attorney General

/s/ Marc Manley
Marc Manley
Assistant Attorney General

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Distributed to:

Timothy G. Arnold
G. Edward Henry, II