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24-ORD-099

April 15, 2024

In re: Joel Peyton/Simpson County Judge/Executive

Summary: The Simpson County Judge/Executive ("the Judge/Executive") violated the Open Records Act ("the Act") when he denied a request as unreasonably burdensome under KRS 61.872(6). However, the Judge/Executive did not violate the Act when he denied a request that did not precisely describe the records sought.

Open Records Decision

On March 10, 2024, Joel Peyton ("Appellant") requested copies of all direct messages sent between January 1, 2023, and March 10, 2024, from the Judge/Executive's official and personal Facebook accounts. In a timely response, the Judge/Executive denied the request "for being vague and overly broad" under KRS 61.872(3)(b)[1] and KRS 61.872(6). He also denied the request because it sought "information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy" under KRS 61.878(1)(a). This appeal followed.

Under KRS 61.872(6), "[i]f the application places an unreasonable burden in producing public records or if the custodian has reason to believe that repeated requests are intended to disrupt other essential functions of the public agency, the official custodian may refuse to permit inspection of the public records or mail copies thereof. However, refusal under this section shall be sustained by clear and convincing evidence." Here, the Judge/Executive says the Appellant has submitted four open records requests to him within "the last several months," and has submitted nine requests to other local agencies that "require[e] copious amounts of information." However, clear and convincing evidence is "a high proof threshold." *Commonwealth v. Chestnut,* 205 S.W.3d 655, 664 (Ky. 2008). "The obvious fact that complying with

[1] Although the Judge/Executive cited KRS 61.872(2)(a) for this principle, it is KRS 61.872(3)(b) that requires a requester seeking copies of public records by mail to "precisely describe" the records sought.

an open records request will consume both time and manpower is, standing alone, not sufficiently clear and convincing evidence of an unreasonable burden." *Id.* at 665. Rather, an agency relying on KRS 61.872(6) "must support its claim with the facts and evidence, such as the volume of responsive records, the difficulty in locating or accessing the records, the amount of time that complying with the request would require, or any other specific and relevant facts indicating that compliance with the request would actually impose an unreasonable burden." 20-ORD-008. Likewise, the mere fact that a person has submitted multiple requests in a short period of time is not, by itself, clear and convincing evidence of an intent to disrupt essential functions of a public agency. *See, e.g.,* 23-ORD-315; 15-ORD-015; 96-ORD-193. Therefore, the Judge/Executive has not sustained his denial of the Appellant's request under KRS 61.872(6).

The Judge/Executive also claims the Appellant has not precisely described the records requested. Under KRS 61.872(3)(b), "[t]he public agency shall mail copies of the public records to a person . . . after he or she precisely describes the public records which are readily available within the public agency." A description is precise "if it describes the records in definite, specific, and unequivocal terms." 98-ORD-17 (internal quotation marks omitted). This standard may not be met when a request does not "describe records by type, origin, county, or any identifier other than relation to a subject." 20-ORD-017 (quoting 13-ORD-077). In particular, requests for any and all records "related to a broad and ill-defined topic" generally fail to precisely describe the records. 22-ORD-182; *see, e.g.*, 21-ORD-034 (finding a request for any and all records relating to "change of duties," "freedom of speech," or "usage of signs" did not precisely describe the records).

On appeal, the Judge/Executive searched for, and provided to the Appellant, responsive records from the Judge/Executive's official Facebook account. Accordingly, any dispute regarding the account the Judge/Executive uses for official business is moot. *See* 40 KAR 1:030 § 6. Further, the Judge/Executive did not violate the Act when he denied the Appellant's request for messages sent or received from his personal Facebook account in the previous 14 months because a request for any communications exchanged using personal devices or accounts "relating to county business" does not precisely describe public records to be inspected.

The controlling law is KRS 61.870(2), which defines "public record" to include "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." The phrase "public business"—or "county business"—appears nowhere in the definition of public record under KRS 61.870(2). Rather a record is a "public record" if it is the property of a public agency. A record is the property of a public agency, and is therefore a "public record," if the agency owns, possesses, or retains it. Further, a

record can become the property of a public agency if it is used or prepared by the public agency for an official purpose. *See, e.g.*, 23-ORD-057 (a picture on a police officer's personal cell phone became a public record when he used it to obtain a witness's identification of a suspect that was later used to secure a search warrant). Because communications on web-based social media accounts are stored on the provider's website, and are merely accessed by its users through a web browser or mobile application, they are not clearly "owned" or "possessed" by a user.[2] *See, e.g.,* 15-ORD-190 (finding the Kentucky Department of Education did not own or possess emails stored on local school district-owned serves even though the Department had an administrative password that permitted the Department to access the local district's emails). Nevertheless, social media communications may be "prepared," "used," or "retained by a public agency" within the meaning of KRS 61.870(2). *See* 22-ORD-184.

The definition of "public agency" under the Act includes "[e]very state or local government officer." KRS 61.870(1)(a). Thus, the Judge/Executive is a "public agency" by virtue of his office. But whether a social media account belonging to a government officer is the account of a "public agency" can be a fact-intensive inquiry. *See* 22-ORD-184 n.3. "[M]any public officials use both a 'personal' account and an 'official' account[, and] accounts not in the possession of a [public] agency or for the work [of] government, including personal accounts, are just that: personal accounts not subject to the Act." *Id.*

In 22-ORD-184, the social media account at issue was a Twitter account titled "KY Secretary of State Michael Adams," which was embedded on the homepage of the Secretary's official website. Because the account bore the Secretary's official title and was embedded on a government website, the Office found that the Secretary "prepared," "used," and "retained" the posts "in his official capacity as a state officer," making them public records. *Id.* Here, by contrast, the Judge/Executive's personal Facebook account bears his individual name and there is no evidence that it is embedded in or otherwise linked to any government website. Thus, it is less clear in this case whether the Judge/Executive uses that account in his official capacity.

Regardless, even if the Office assumed, without deciding, that the Judge/Executive's mere use of a communications platform automatically converts every communication into a public record simply by virtue of his being a "local officer"

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[2] The Appellant quotes from a document allegedly titled "Simpson County Social Media Policy," which purportedly states, "County officials . . . can maintain a personal presence on social media. However, to be considered personal, there can be no mention of their status as a county official. Any mention of their status as a county official potentially changes the nature of the page, requiring record keeping in accordance with the Kentucky Department of Library and Archives retention schedule and subjecting the entire page to Open Records requests." But the Appellant does not provide a copy of this document, nor does he explain what it is, where it comes from, or why he believes it has the force of law. Accordingly, this "policy" cannot be considered relevant authority.

under KRS 61.870(2)(a), it is the requester's duty to "precisely describe" the records he wants to inspect if he is seeking copies of records by mail. KRS 61.872(3)(b). Asking to inspect every communication about "county business" is not a precise description. That is because, in the absence of any definition of "public agency business" or "county business," it becomes near impossible to draw the line "between 'talking shop' and 'talking *about* shop.'" 23-ORD-349. As with personal text messages, "it is not clear when, if ever, [private messages on a personal Facebook account] would be 'used' for an official purpose." 23-ORD-349.[3] Further, on appeal, the Judge/Executive states he has "over 100 private messages on [his] personal Facebook account for the time period [the Appellant] is requesting, none of which concern County business."[4] Thus, because the Judge/Executive claims none of his messages concern county business, and the Appellant's request is also too imprecise to comply with KRS 61.872(3)(b), the Office cannot find that the Judge/Executive violated the Act when he 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.

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/s/ Marc Manley
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[3] In *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.), the Court of Appeals held that all text messages "prepared by or used by" state government officers that "relate to or concern [agency] business" are public records. As of the date of this decision, the Supreme Court has not ruled on the pending motion for discretionary review in that case. Therefore, the decision of the Court of Appeals is not final and may not be cited as binding precedent. *See* RAP 40(H).

[4] In contrast, a request for all emails or other communications sent or received using public-agency owned equipment or accounts during a specific period is precise because it can be assumed all such records are "public records." It cannot be assumed that every communication exchanged using personal accounts or devices is a public record, and therefore, the requester must precisely describe the official business for which he believes a personal record was prepared for or used so the agency can determine whether the record even qualifies as a "public record."

#165

Distributed to:

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