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24-ORD-118

May 10, 2024

In re: Brenda Rosen/University of Kentucky

Summary: The University of Kentucky ("the University") did not violate the Open Records Act ("the Act") when it denied a request to inspect text messages on privately-owned devices because the request did not seek records prepared, owned, used, in the possession of, or retained by the University.

Open Records Decision

Brenda Rosen ("the Appellant") submitted a request to the University seeking copies of, among other records which are not relevant here, emails, written correspondence, and text messages "regarding" her that were sent to, or received by, two University employees "from personal telephones if used for University business purposes and for telephones issued by the University."[1] She also sought similar communications "regarding" her that were sent by those employees to University human resources staff or other faculty of the College of Social Work. Finally, she sought any similar types of communications she sent to those two employees and their responses to the communications she sent them. The Appellant stated she sought these records because of her recent "separation" from the University, which she acknowledged had occurred because her contract had not been renewed, but that she believed was a decision made in "retaliation."

In response, the University explained that it did not provide the employees with a cell phone, and thus, if any responsive text messages existed, then they would be contained on the employees' privately-owned devices.[2] Accordingly, the University

[1] Although the Appellant's request sought nine categories of records, her appeal challenges only the University's denial of her request for text messages that may or may not exist on public employees' privately-owned devices.

[2] The Appellant's request was dated January 16, 2024, and the University's response was issued on February 21, 2024, well beyond the period to respond under KRS 61.880(1). However, the University did produce several records that were responsive to other parts of the request and the Appellant has not challenged the timeliness of the University's response.

denied these portions of the Appellant's request because any text messages on the employees' privately-owned devices were not "prepared, owned, used, in the possession, or retained by the University." Although the University explained it could not search for responsive text messages on the employees' privately-owned devices, it also stated that, if such text messages existed, then they "may" be exempt as "preliminary" under KRS 61.878(1)(j), exempt as records implicating a "personal privacy" interest under KRS 61.878(1)(a),[3] or exempt as attorney-client privileged communications. This appeal followed.

On appeal, the Appellant relies exclusively on a recent, and not yet final, decision by the Kentucky Court of Appeals for the proposition that the content of a record is what determines whether it is a "public record" under the Act. *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.).[4] It may be true that previous Attorneys General have said it is "the nature and purpose" of a document that determines its status as a public record in contexts other than requests for personal communications. *See, e.g.*, 00-ORD-207 (records pertaining to a city's settlement agreement that were in the possession of its attorney).[5] But even the not-yet-final decision in *Kentucky Open Government Coalition* did not reach so far. In fact, the principle that it is the "nature and purpose" of the record that determines its status as a "public record" ignores the actual statutory definition of "public record," which is "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*." KRS 61.870(2) (emphasis added); *see also Ky. Open Gov't Coalition*, 2023 WL 7095744, at *9 (observing that "text messages stored on personal cell phones are public records when

[3] The University erroneously cited the personal privacy exemption as "KRS 61.878(1)(k)," which is the exemption that incorporates any federal law or regulation requiring records to remain confidential. The "personal privacy" exemption is KRS 61.878(1)(a) (exempting from inspection "[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy").

[4] Because the Supreme Court of Kentucky has not yet ruled on the Department of Fish and Wildlife's motion for discretionary review, the Court of Appeals' decision is not final or binding authority. RAP 40(H).

[5] This principle originates from an unpublished decision of the Court of Appeals which also involved invoices for legal services billed to a public agency in the possession of the agency's attorney. *See City of Louisville v. Cullinan*, No. 1998-CA-1237-MR (Ky. App. Aug. 13, 1999) (unpublished). However, even the *Cullinan* court recognized that the billing records were in fact the agency's property. *See id.*, slip op. at 4 ("There is no doubt that the records requested were prepared, owned, and used at the instance of the City. The records are nothing more than the routine billing documents generated by a law firm in representation of a client. Here, they *are essentially the City's documents* supporting fees to be billed and paid by the City for legal services rendered" (emphasis added)). The Office reached the same result in 20-ORD-115 by relying on rules of property ownership and without reference to "the nature and purpose" of the document.

such messages are prepared by or used by the members of the Commission and relate to or concern Commission business").

Nowhere in the definition of "public record" is there any reference to the record's content—whether that content be related to vague terms such a "public business" or otherwise.[6] To the contrary, by using the terms "prepared, owned, used, in the possession of or retained by," the General Assembly used much more definitive guidelines to establish the boundaries between public and private records: the principles of property. Records that are the *property* of a "public agency" are, in effect, the public's property. And just as the public has a right to use public real property subject to time, place, and manner restrictions, the public also has a right under the Act to inspect a public agency's property in the form of records, but also subject to time, place, and manner restrictions.

Because public records are records, regardless of form or characteristic, in which a *public agency* has some form of property stake or right, the first stage of analysis under the Act is to determine whether the person or entity having custody of the records meets the definition of public agency under KRS 61.870(1). If the person or entity does not meet the definition of public agency, the records may still be "public records" if a public agency not having actual custody of the records nevertheless has a property stake in them. *See, e.g.*, 20-ORD-115. Accordingly, the Office first looks to the definition of "public agency" before turning to the definition of "public record."

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

[6] Although the Court of Appeals held that text messages on the privately-owned devices of Fish and Wildlife Commission members relating to "Commission business" are public records, it did not define what constitutes "business," which, as explained below, has the potential to lead to serious confusion.

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. However, the question here is whether the two individuals whose text messages the Appellant wants to inspect qualify as a "public agency," and if not, whether the text messages on their privately-owned devices are nevertheless "public records" potentially subject to public inspection.

In *Kentucky Open Government Coalition*, the Court of Appeals held the Fish and Wildlife Commission members 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)).[7] In contrast, here, the University argues the two individuals are not "state or local officers" under KRS 61.870(1)(a). One employee is an associate dean and the other is dean of the University's College of Social Work. Neither is appointed by the Governor or confirmed by the Senate; rather, they are public employees hired by the University.

As mere employees of a public agency, the two individuals are not "state or local officers." Thus, the records on their private devices can only become public records if a public agency, such as the University, obtains a property interest in them. But here, the University clearly does not own, possess, or retain the text messages that are stored on its employees' privately-owned devices. Further, because the employees themselves are not public agencies, the documents or communications they "prepare" are not automatically prepared *by* a public agency, and therefore, they are not public records simply because the employees 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 birthday cards signed by the employees and sent to their family members would be a "public record" subject to inspection simply because the employees "prepared" them. Rather, records prepared by a public employee only become the public agency's property, thus converting them into "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

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[7] As the Court of Appeals recognized, the Act defines "public agency" to include "state or local officers." KRS 61.870(1)(a). In such cases, a "state or local officer" is simultaneously a private citizen and a "public agency." Only in this context is it reasonable to consider the record's content and whether it relates to so-called "public business." Not because the record's content has bearing on whether it meets the definition of "public record" under KRS 61.870(2), but because its content is relevant to determine *in which capacity* the state or local officer was acting when the record was prepared or received—in an official or private capacity. If the former, then the record was "prepared by" or is "in the possession" of a "public agency." If the latter, then the record was "prepared by" or is "in the possession of" a private citizen. For example, no one could seriously argue that a state officer's electric or water bill is a "public record" just because he or she is a "public agency" and possesses the utility bill. While this does not ultimately solve the question of what constitutes "public business," a term not used or defined in the Act, using the concept in connection with the definition of "public agency," and not the definition of "public record," more closely adheres to the Act's text.

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.

Even if the mere exchange of text messages between public employees constitutes "use" by a public agency, then at most, such text messages would be considered "routine correspondence," such as notifications that a public employee is ill or 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.[8] 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. 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 "public business." The line between "talking shop" and "talking *about* shop" can in some cases be impossible to determine. *See* 23-ORD-349. Rather, a much clearer path is to determine whether the requested text messages were *actually used* by the University for an official purpose, rather than reviewing every text message sent by an employee to determine if it relates to "public business."[9] After all, if the text messages were "used" by the University, then the University presumably would have already obtained them from the public employee *for that use*, and therefore, possess its own copies of them.

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[8] 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 May 10, 2024). 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.

[9] Neither the judicial branch nor the executive branch of government is at liberty to add words to a statute, including the Act. *See Beckham v. Bd. of Educ. of Jefferson Cnty.*, 873 S.W.2d 575, 578 (Ky. 1992). But where the meaning of a statute or a term used therein is unclear, similar statutes touching on related matters may be consulted. *See, e.g., Util. Mgmt. Grp., LLC v. Pike Cnty. Fiscal Court*, 531 S.W.3d 3, 8 (Ky. 2017). Unlike the Open Records Act, the Open Meetings Act *does* use the term "public business." *See* KRS 61.810 ("All meetings of a quorum of the members of any public agency at which *any public business is discussed* or at which any action is taken by the agency, shall be public meetings, open to the public at all times" (emphasis added)). And the Supreme Court of Kentucky has defined "public business," in the context of the Open Meetings Act, as "the discussion of the various alternatives to a given issue about which the [public agency] has the option to take action." *Yeoman v. Commonwealth, Health Policy Bd.*, 983 S.W.2d 459, 474 (Ky. 1998). If the courts eventually hold that text messages on public employees' personal devices pertaining to "public business," are "public records," despite the absence of the phrase "public business" in KRS 61.870(2), then perhaps the best definition for that term is the one established by *Yeoman*. But it is unnecessary to decide on such a definition here.

Putting aside the difficult question of what even constitutes "public business," there are other legal issues that arise when subjecting individuals' personal communications to constant scrutiny. For example, in the absence of these employees' express consent, the University's official records custodian cannot search their cell phones to determine whether any text messages relate to "public business" and therefore warrant inspection. Allowing such an intrusion into private communications by public employees would implicate Section 10 of the Kentucky Constitution and the Fourth Amendment to the U.S. Constitution 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 Court of Appeals somewhat skirted this concern by stating the Commission members can (indeed, must) perform their own search for responsive records. *Ky. Open Gov't Coalition*, 2023 WL 7095744, at *9.[10] But if public employees conduct their own search and claim no responsive records exist, the requester would have a cause of action to dispute that claim in circuit court. *See* KRS 61.882. As a result, if the Appellant is correct that text messages on public employees' private devices are "public records," then every 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.[11]

In the digital age that has developed since the Act was enacted in 1976, there is increasing tension between the public's right to know what its government is doing and public employees' right to privacy as private citizens. The Act cannot become a

[10] *Kentucky Open Government Coalition* involved individual commission members who *themselves* met the definition of "public agencies." *Ky. Open Gov't Coalition,* 2023 WL 7095744, at *9. But here, the two employees whose text messages the Appellant seeks are merely employees of a public agency, not public agencies themselves.

[11] 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 Section 8 of the Kentucky Constitution and the First Amendment to the U.S. Constitution. The designation of a record as a "public record" makes it subject to Kentucky's record retention laws, regardless of whether the public has a right to inspect it under the Act. *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 created by the *Kentucky Open Government Coalition* decision if it were to become final.

vehicle for the public to engage in general fishing expeditions through public employees' personal communications. Until this tension is resolved, the only practical recourse is for public officials and employees to refrain from using private communication channels to conduct official business. But as the Act is currently written, communications in which a public agency has no property interest are not public records subject to inspection. Thus, the University did not violate the Act by denying 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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