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26-ORD-179

April 24, 2026

In re: Larry Stambaugh/Southeast State Correctional Complex

Summary: The Southeast State Correctional Complex ("the Complex") did not violate the Open Records Act ("the Act") when it denied a request for records that are not "public records" within the meaning of KRS 61.870(2).

Open Records Decision

Inmate Larry Stambaugh ("the Appellant") submitted a request to the Complex for his "phone calls recorder [*sic*] from January 2021 to May 2021" and an "actual copy" of the conversation between the Appellant and his uncle. In a timely response, the Complex denied the request on the grounds that the Appellant's "phone call log [does] not exist because it is not retained by the" Kentucky Department of Corrections ("the Department"), but "if this record does exist Securus [Technologies] would be the custodian of those records." The Complex provided an address for Securus, a contract vendor that provides inmate communication and entertainment services for the Department. This appeal followed.

The Act defines "public record" as "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). On appeal, the Complex argues that the requested records are not prepared, owned, used, in the possession of, or retained by the Complex or the Department, although the Complex contractually "has access to [such] records in case they are needed for investigative purposes." As evidence, the Complex quotes Section 50.34 of the Department's agreement with Securus, which provides: "For the purpose of aiding in investigations, Securus must retain [inmate telephone system] account information pertaining to an inmate and end-user's pre-paid account, debit account, trust account, direct bill, and similar accounts for a period of two (2) years after the expiration/termination of the Contract. The [Department] shall have access to such account information upon request, to the extent permissible by law." The Complex argues the Appellant's phone account

information is not a "public record" under KRS 61.870(2) because the Department has never obtained that information from Securus for investigative purposes as authorized by the contract.

Once a public agency states affirmatively that it does not possess certain records, the burden shifts to the requester to make a *prima facie* case that it does possess them. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov't,* 172 S.W.3d 333, 341 (Ky. 2005). A requester's bare assertion that an agency possesses requested records is insufficient to make a *prima facie* case that the agency, in fact, possesses them. *See, e.g.,* 22-ORD-040. Rather, to make a *prima facie* case that the agency possesses or should possess the requested records, the requester must provide some statute, regulation, or factual support for his contention. *See, e.g.,* 21-ORD-177; 11-ORD-074.

The Appellant claims the Complex or the Department must "retain" the requested records, because the "Complex has issued over one hundred twenty (120) Disciplinary Reports for inmates" who have misused telephone accounts in some way. Additionally, the Appellant claims another inmate once "filed this same Open Records Request" for his own telephone records and "the request was granted." However, the fact that an agency obtained certain records from a contractor in one case is not *prima facie* evidence that it obtained similar records in an unrelated case. *See, e.g.*, 26-ORD-162. Nor is an agency's hypothetical "right to demand" certain records from a contractor the same as the agency possessing them. *Id.* An "agency's mere 'access' to electronic records, without more, does not make them 'public records' for purposes of the Act." 23-ORD-344. Rather, under KRS 61.870(2), the agency must in fact prepare, own, use, possess, or retain the requested records. *See generally* 20-ORD-109 (noting "a correctional facility may 'use' specific [inmate communications] for some administrative purpose," thereby making them public records under the Act). Here, the Appellant has not shown that to be the case. Accordingly, the Complex did not violate the Act when it denied the Appellant's request.[1]

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.

[1] Because the records at issue are not public records under the Act, it is unnecessary to address the Complex's alternative argument that the Appellant's recorded phone calls are exempt from disclosure as "purely personal" communications under KRS 61.878(1)(s).

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