*This unofficial version of this decision was altered on June 4, 2021, to redact the name of the Appellant, at her request. Since this decision was rendered, the Appellant has had her criminal record expunged. No other changes have been made to this document. The official and unaltered version of this decision remains in the Office's possession and is subject to public inspection under the Act.

18-ORD-156

August 9, 2018

In re: [redacted]/Graves County Jail

Summary: Graves County Jail did not violate the Open Records Act in denying a request for a video recording that was properly destroyed in the normal course of business per the applicable records retention schedule prior to receipt of the request. However, the Jail violated KRS 61.880(1) in failing to either confirm or deny the existence of any records also responsive to request.

Open Records Decision

The question presented in this appeal is whether the Graves County Jail violated the Open Records Act in denying [redacted]'s June 26, 2018, request for "all documents and video footage from 06/12/2017, at the time of when I entered the Graves Co. [J]ail [until I was] discharged." Ms. [redacted] also requested a copy of the Graves County Jail Policies and Procedures, "rules and protocols of when a person enters the [J]ail, and who ordered any strip/cavity search, and a shower that consists of being sprayed with lice prevention [sic]." In a timely written response per KRS 61.880(1), Jailer Randy Haley acknowledged receipt of Ms. [redacted]'s request. However, in his June 29, 2018, letter, Jailer Haley stated that Ms. [redacted]'s request "does not meet the requirements of the Freedom of Information Act ["FOIA"]. Video is only kept 30 days. [Therefore,] your request will not be honored. Your incident was on 06/12/2017, way over the time limits."[1] Ms. [redacted] initiated this appeal by letter date July 9, 2018.

[1] FOIA governs only those records in the custody or control of federal agencies "while the Open Records Act (KRS 61.870 to KRS 61.884) pertains to records in the custody or control of agencies of the state and local governments." 96-ORD-118, p. 1; 14-ORD-201. In other words, FOIA "has

Upon receiving notification of Ms. [redacted]'s appeal from this office, Jailer Haley reiterated the Jail only maintains video recordings for a period of thirty (30) days but cited no legal authority for this policy. For the first time, Jailer Haley noted that Ms. [redacted]'s request was not signed (implicitly relying upon KRS 61.872).[2] It was Jailer Haley's opinion that Ms. [redacted]'s request does "not meet the requirements of the Open Records Act." By letter dated July 25, 2018, Ms. [redacted] stated that she had not received a copy of any response from Jailer Haley following his June 29, 2018, denial, which Ms. [redacted] apparently received on July 3, 2018. Ms. [redacted] emphasized that in addition to a copy of the video recording from June 12, 2017, she had also requested "all documents of my charges, video footage, the time and dates of when I entered the [J]ail and was released . . . [and] a copy of their policy and protocols for when a person is incarcerated, and who ordered a strip/cavity search and a shower which consists of being sprayed with lice prevention." Jailer Haley failed to address whether any of the remaining documents requested exist and, if so, any reason the Jail withheld those records.

However, the Jailer cannot provide Ms. [redacted] with a nonexistent video recording. A public agency cannot provide a requester with access to nonexistent records or those which it does not possess. 07-ORD-190, p. 6; 06-ORD-040. The right to inspect attaches only if the records being sought are "prepared, owned, used, in the possession of or retained by a public agency." KRS 61.870(2); 02-ORD-120, p. 10. *See Bowling v. Lexington-Fayette Urban Cnty. Gov't*, 172 S.W.3d 333, 341 (Ky. 2005); 11-ORD-037 (denial of request for nonexistent records upheld in the "absence of any facts or law importing the records' existence"); 11-ORD-091 (appellant did not cite, nor was the Attorney

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no force as to state [or local] records, only the records of a federal agency." 96-ORD-244 (citing OAG 91-56); 12-ORD-038.

[2] In relevant part, KRS 61.872(2) provides that "[a]ny person shall have the right to inspect public records. The official custodian may require written application, signed by the applicant and with his name printed legibly on the application, describing the records to be inspected." Jailer Haley did not cite this provision, either initially or in responding to Ms. [redacted]'s appeal, nor did he specify in what manner the request failed to comply with the (inapplicable) "Freedom of Information Act." Because Jailer Haley did not raise this argument until after Ms. [redacted] filed the instant appeal challenging his denial, and he denied the request for the recording, this office will proceed accordingly.

General aware of, "any legal authority requiring KSR to create or maintain" the records being sought from which their existence could be presumed under 11-ORD-074). *Compare Eplion v. Burchett*, 354 S.W.3d 598, 604 (Ky. App. 2011) (declaring that "when it is determined that an agency's records do not exist, the person requesting the records is entitled to a written explanation for their nonexistence"); 11-ORD-074 ("existence of a statute, regulation, or case law directing the creation of the requested record creates a presumption of the record's existence, but this presumption is rebuttable").

Loss or destruction of a public record creates a *rebuttable* presumption of records mismanagement. Here, the Jail failed to reference any legal authority to justify the agency's destruction of the requested video recording. *See* 13-ORD-038. However, a review of the County Jailer Records Retention Schedule, above, validates the agency's position that any such recording would have been properly destroyed in the normal course of business prior to Ms. [redacted]'s request. *See* Records Series L5220, Video/Audio Recordings ("documents any incident that may cause conflict between an inmate and an employee of the jail" and, in some jails, also records the booking of all inmates rather than only those which might foreseeably involve conflict). The Jail must retain any non-evidentiary recordings for thirty (30) days and then destroy those recordings. Accordingly, the Jailer was presumably relying upon Records Series L5220, albeit implicitly, in denying Ms. [redacted]'s request for the June 2017 recording of when she was booked into the Jail based on its nonexistence. The Jail's denial is affirmed in this regard.

However, the Jail's initial and supplemental responses lacked the specificity required under KRS 61.880(1), pursuant to which a "response denying, in whole or in part, inspection of any record shall include a statement of the specific exception authorizing the withholding of the record and a brief explanation of how the exception applies to the record withheld." In construing the mandatory language of KRS 61.880(1), the Kentucky Court of Appeals observed that the "language of [KRS 61.880(1)] directing agency action is exact. It requires the custodian of records to provide *particular and detailed information* in response to a request for documents. . . . [A] limited and perfunctory response [does not] even remotely comply with the requirements of the Act-much less amount [ ] to substantial compliance." *Edmondson v. Alig*, 926 S.W.2d 856, 858 (Ky. App. 1996); 04-ORD-208. These requirements must be satisfied for a public

agency to satisfy its burden of justifying the denial of a request per KRS 61.880(1) and (2)(c). 04-ORD-106, p. 6; 13-ORD-051; 17-ORD-179.

The Jail did not initially advise whether additional responsive documents existed such as the requested Policies and Procedures. However, according to Records Series L6922 (Policy and Procedures and Organization File) on the County Jailer Records Retention Schedule, which governs "jail policy, procedures and organization," 501 KAR 3:020(1) provides that "for jails that house state prisoners, jail administration must develop and maintain an organizational chart and a policy and procedures manual that has been adopted by the governing authority and filed with the State Department of Corrections (DOC)." Policies and procedures "must include certain aspects of the jail's operations including, but not limited to: Administration, fiscal management, personnel, security and control, sanitation and management, medical services, food services, emergency and safety procedures, classification prisoner programs, prisoner services, admission and release and training." One copy of the approved policy and procedures and organizational chart must be retained permanently. The Jail made no reference to any policies or procedures initially nor did the Jail opt to confirm or deny that such policies or procedures exist in the possession of the agency when responding to Ms. [redacted]'s appeal. If the Jail never created or maintained responsive policies or procedures, or if those records no longer exist for some reason, the Jail was required, at a minimum, to specifically indicate as much in a timely written response to Ms. [redacted]. *See* 16-ORD-018. Assuming the Jail does maintain a responsive policy and procedures manual but decides to deny access, it must cite the relevant statutory exception per KRS 61.880(1) and explain how it applies in a written response to Ms. [redacted]. *See* 15-ORD-088.

In addressing the obligations of a public agency when denying access to public records based on their nonexistence or the agency's lack of possession, the Attorney General has observed that a public agency's "inability to produce records due to their apparent nonexistence is tantamount to a denial and . . . *it is incumbent on the agency to so state in clear and direct terms*." 01-ORD-38, p. 9 (other citations omitted). While it is obvious that a public agency "cannot furnish that which it does not have or which does not exist, *a written response that does not clearly so state is deficient.*" 02-ORD-144, p. 3 (emphasis added); 03-ORD-212; 09-ORD-145. In other words, "[i]f a record of which inspection is sought does not

exist, the agency should specifically so indicate." OAG 90-26, p. 4; 14-ORD-225. Thus, a public agency violates KRS 61.880(1) "if it fails to advise the requesting party whether the requested record exists," with the necessary implication being that a public agency discharges its duty under the Open Records Act in affirmatively indicating that records being sought do not exist following a reasonable search, and explaining why. 98-ORD-154, p. 2 (citing 97-ORD-161, p. 3; 99-ORD-98; 03-ORD-205; 04-ORD-205; 09-ORD-145; 14-ORD-204.

It was "therefore incumbent on the [Jail] to ascertain whether records exist[ed] that [were] responsive to [Ms. [redacted]'s] request, to promptly advise [her] of [his] findings, and to release to [her] all existing [nonexempt] records identified in [her] request." 03-ORD-207, p. 3; 12-ORD-162; 15-ORD-018; 16-ORD-018. The Jail violated the Open Records Act in failing to specify whether any of the remaining documents responsive to Ms. [redacted]'s request existed and explain why if not. *See* 09-ORD-150 (agency violated the Act in failing to provide a "sufficiently detailed response affirmatively indicating whether [it] possesses any responsive [documents] and specifying which of those records, if any, to which access is being denied"); 07-ORD-141; 14-ORD-225; 15-ORD-140; 17-ORD-190. Based upon the foregoing, this office affirms the Jail's disposition of Ms. [redacted]'s request for the specified video recording, but finds that its responses were deficient under KRS 61.880(1).

Either party may appeal this decision may appeal it by initiating action in the appropriate circuit court per KRS 61.880(5) and KRS 61.882. 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 proceeding.

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Distributed to:

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