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21-ORD-063

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In re: Leonel Martinez/Kentucky State Penitentiary

Summary: Kentucky State Penitentiary ("Penitentiary") did not violate the Open Records Act ("the Act") when it denied an inmate's request for JPay emails because the requested emails are not public records.

Open Records Decision

On February 23, 2021, inmate Leonel Martinez ("Appellant") requested copies of certain messages and photographs he exchanged with a private party using the JPay communication system. In a timely response, the Penitentiary denied the Appellant's request and explained that JPay emails are a service provided by an outside vendor and inmates can only view them on kiosks located in the general population area. The Penitentiary further explained that the Appellant is currently in segregated housing. According to the Penitentiary, "[s]ince an inmate in segregation cannot inspect the record through a kiosk, a copy does not have to be provided." This appeal followed.

Public records are records that are "prepared, owned, used, in the possession of or retained by a public agency." KRS 61.870(2). In 20-ORD-109, this Office explained that JPay emails exchanged between inmates and private parties generally are not public records within the meaning of KRS 61.870(2). That is because the Penitentiary does not own or prepare such private communications. The emails are available to inmates through privately owned kiosks maintained within the facility. Because the email system is a service provided by a private entity, the emails are stored on privately owned

equipment, and the emails are exchanged between private parties, the Penitentiary does not generally possess, use, or retain such private emails.[1]

However, JPay emails exchanged between inmates and Penitentiary staff *are* public records because the Penitentiary possesses the emails sent to its employees' official email accounts. And the Penitentiary "prepares" emails that its staff members send to inmates. *See, e.g.,* 06-ORD-184 (finding that emails created or received by public agency *employees* are public records). This distinction is critical because it goes to the core purpose of the Act – public oversight of the *government's* activities. *Cf. Zink v. Commonwealth Dept. of Workers' Claims, Labor Cabinet*, 902 S.W.2d 825, 829 (Ky. App. 1994) (in determining whether the public interest outweighs the private interest in releasing certain records, the court found that the purpose of the Act is for citizens "to be informed as to what their government is doing"). The public has an interest in inspecting communications between correctional facility staff and inmates, because such communications may shed light on the correctional facility's actions. That interest is not served, however, by inspecting emails exchanged between inmates and private parties.[2]

This changes when a correctional facility uses a private email for a governmental purpose, such as when the Penitentiary confiscates certain emails as contraband or uses them as evidence in a disciplinary proceeding. Again, this recognizes that the public should have meaningful access to inspect public records that may reveal the actions taken by the correctional facility. And when the private email becomes relevant to the Penitentiary's execution of a governmental purpose, that email will then come into the possession of the Penitentiary to be used for that governmental purpose. Generally then, JPay emails exchanged between inmates and staff are public records, whereas JPay emails exchanged between inmates and private parties are not, unless the Penitentiary is specifically using those private emails for a governmental purpose.

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[1] Stated another way, no one would consider a private letter from an inmate to his spouse to be a public record just because it went through the correctional facility's mailroom. It is the *inmate's* letter, and the public has no right to inspect its contents. This does not change simply because the method of communication is an email instead of a physical letter.

[2] The public interest at stake does not define what is and is not a public record – KRS 61.870(2) does. But we mention all of this to explain *why* these emails are not prepared, owned, used, possessed, or retained by the Penitentiary. The Penitentiary has nothing to do with private correspondence between private individuals, so it makes sense that it would not prepare, own, use, possess, or retain such correspondence.

Here, the Appellant has requested emails and photographs that he exchanged with a private party.[3] These emails are stored on privately owned kiosks and there is no evidence that the Penitentiary has actual possession of the requested emails. There is also no evidence that the Penitentiary is using these emails for any governmental purpose. Accordingly, the Penitentiary did not violate the Act when it denied the Appellant's request for copies of these emails.

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court pursuant to 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 proceedings.

Daniel Cameron
Attorney General

/s/Marc Manley
Marc Manley
Assistant Attorney General

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Distributed to:

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[3] Specifically, a professor of civil rights law.