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21-ORD-067

April 6, 2021

In re: David Pennington/Big Sandy Regional Detention Center

Summary: The Big Sandy Regional Detention Center (the "Center") violated the Open Records Act ("the Act") when it failed to respond to an open records request, and when it denied a request for records under KRS 61.878(1)(a) without explaining how the exception applied to the records withheld.

Open Records Decision

On February 23, 2021, David Pennington ("Appellant") asked the Center to provide copies of records relating to a certain employee's employment. The Appellant also sought certain audio recordings. When the Center failed to respond to Appellant's requests, the Appellant initiated this appeal.

Normally, a public agency must respond to an open records request within three business days. KRS 61.880(1). To address the novel coronavirus public health emergency, however, the General Assembly modified that requirement when it enacted Senate Bill 150 ("SB 150"), which became law on March 30, 2020, following the Governor's signature. SB 150 provides, notwithstanding the provisions of the Act, "a public agency shall respond to the request to inspect or receive copies of public records within 10 days of its receipt." SB 150 § 1(8)(a). Under KRS 446.030(1)(a), the computation of a statutory time period does not exclude weekends unless "the period of time prescribed or allowed is less than seven (7) days." Accordingly, under SB 150, a public agency is required to respond to a request to inspect records within ten calendar days. Here, the Appellant submitted his request on February 23, 2021, but the Center did not respond until March 11, 2021, and only after this

appeal was initiated. Therefore, the Center violated the Act when it failed to issue a timely written response to the Appellant's request.

The Center violated the Act in another way. It asserts, without explanation, that the records relating to the employee's termination from the Center contain "information of a personal nature" and are therefore exempt under KRS 61.878(1)(a). The Center's bare assertion violates KRS 61.880(1), which requires public agencies to provide a brief explanation of how the exception applies to the records being withheld. Moreover, under KRS 61.878(4), the Center is required to "separate the excepted [material] and make the nonexcepted material available for examination." These requirements are important, because this Office must engage in a balancing test to determine whether KRS 61.878(1)(a) applies to certain records. That balancing test requires a comparative weighing of "the antagonistic interests" between an individual's right to privacy and the public interest in disclosure. *Kentucky Bd. of Examiners of Psychologists v. Courier-Journal & Louisville Times Co.*, 826 S.W.2d 324, 327 (Ky. 1992).

Here, the Center's bare assertion that the records are exempt under KRS 61.878(1)(a) fails to explain the privacy interest that is at stake. Certainly some information contained within the records, such as the former employee's address, phone number, and social security number, are of little public interest and may be redacted. *See Kentucky New Era, Inc. v. Cty. of Hopkinsville*, 415 S.W.3d 76, 89 (Ky. 2013). But the Center does not explain what other privacy interests are at stake and how those interests outweigh the public interest in why a public employee's employment was terminated. Nor does the Center explain why it is unable to separate exempt information from nonexempt information under KRS 61.878(4). For these reasons, the Center violated the Act.

However, the Center did not violate the Act when it denied the Appellant's request for audio recordings that do not exist. On appeal, the Center denies the existence of any audio recordings responsive to Appellant's request. Once a public agency states affirmatively that requested records do not exist, the burden shifts to the requester to present a *prima facie* case that the requested records do exist. *Bowling v. Lexington-Fayette Urban Cty. Gov't,* 172 S.W.3d 333, 341 (Ky. 2005). Here, the Appellant claims to have heard that recording devices exist at the Center. However, this is not a *prima facie* showing that specific audio recordings were made on specific dates. Therefore, the Center did not violate the Act in denying Appellant's request for records that do not exist.

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.[1]

Daniel Cameron
Attorney General

/s/Marc Manley
Marc Manley
Assistant Attorney General

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Distributed to:

David Pennington
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[1] In 21-ORD-013, this Office found that the Center violated the Act when it failed to explain how KRS 61.878(1)(a) permitted it to withhold certain employment records. The Appellant claims that the Center has still not provided him with the records that were the subject of that appeal, and he urges this Office to enforce its prior ruling. However, a party must follow the procedures established in KRS 61.880(5)(b) to enforce a prior decision by this Office.