COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

DANIEL CAMERON
ATTORNEY GENERAL

CAPITOL BUILDING, SUITE 118
700 CAPITAL AVENUE
FRANKFORT, KENTUCKY 40601
(502) 696-5300
FAX: (502) 564-2894

21-ORD-146

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In re: WEKU/City of Richmond

Summary: The City of Richmond ("City") did not violate the Open Records Act ("the Act") when it denied inspection of text messages on a city commissioner's private cell phone. The City discharged its duty under the Act to explain why certain records no longer existed, but the fact that such records have been destroyed requires further examination by the Department of Library and Archives to determine whether such destruction was proper. The Act did not require the city commissioner to personally respond to a request to inspect records that was delivered to her, but the City nevertheless violated the Act when it required the requester to resubmit a request that was already in the City's possession.

Open Records Decision

WEKU ("Appellant") submitted to the City three requests to obtain copies of public records. In its first request, it sought copies of all written communications, including text messages, exchanged between a city commissioner and other city officials regarding the city commissioner's presence in Washington D.C. on January 6, 2021. The Appellant specified that the scope of its request included all communications exchanged between January 1, 2021, and February 18, 2021, including communications exchanged on the city commissioner's personal cell phone and City-owned cell phone. In response, the City claimed that it "has no responsive documents within City control as Custodian of the Record [*sic*]. A search of [the City's] system shows no emails, faxes, or written communications" exchanged between the identified officials regarding the city commissioner's presence in Washington D.C. The City did provide, however, a copy of the cell phone bill for the city

commissioner's City-owned cell phone during the dates in question. That bill shows that text messages were sent to, and received by, the city-commissioner's City-owned cell phone. The City's response made no mention of the city-commissioner's personal cell phone.

Upon receiving the City's response, the Appellant sent a second request to the City, in which it sought copies of all communications sent from the city commissioner's City-owned cell phone; all communications sent and received by the city manager to either the city commissioner's City-owned or personal cell phone; and any communications sent from the city commissioner's City-owned cell phone to her personal cell phone between January 1, 2021, and February 28, 2021. The Appellant also sought a written explanation for why the City previously claimed that it did not possess text messages exchanged on the city commissioner's City-owned cell phone when the cell phone bill the City provided proved that such text messages should exist. In a timely response, the City stated that the city commissioner provided access to her City-owned cell phone, that it was inspected by IT staff, and that "there were no text messages stored on the device for this time period . . . the City has no other means to retrieve messages from the phone." Regarding the city commissioner's personal cell phone, and the city manager's cell phone, the City claimed that neither are a City-owned phone, "and thusly the City is not the custodian of record for these devices." In support of its claim, the City cited 15-ORD-226.

After receiving the City's second response, the Appellant submitted a third request, but this time, it sent the request directly to the city commissioner. For its third request, the Appellant asked the city commissioner to provide all text messages on her City-owned phone from January 1, 2021, to May 4, 2021. The Appellant further sought any text messages related to the city commissioner "in her capacity as a City of Richmond elected official or any texts related to [her] duties as an elected official" on her personal cell phone. Although the Appellant submitted the request directly to the city commissioner, the City's Record Custodian responded on behalf of the city commissioner and stated that the Appellant's request was improper. The Records Custodian stated that the Appellant should resubmit its request directly to the City's Record Custodian.

The Appellant now appeals, and claims that the city commissioner is herself a "public agency" under KRS 61.870(1)(a), and that she must "produce all responsive records in her possession—on her personal and city-issued phone." The Appellant further claims that the City failed to adequately explain

why text messages on City-owned cell phones were deleted. Finally, the Appellant claims that the city commissioner was required to personally respond to the request submitted to her, and that the City violated the Act when it responded to the Appellant's third request on behalf of the city commissioner.

"'Public record' means 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). In using the terms "owned, used, in the possession of or retained by," the Act defines "public records" in terms of property rights. If a public agency, as defined in KRS 61.870(1), "prepares, owns, uses, possesses, or retains" a record, that record is a "public record" because it is the agency's property. For example records prepared and retained by private attorneys representing public agencies are public records, because such records are "owned" by the public agency, the client of the private attorney. *See, e.g.*, 20-ORD-115.[1] And there is no doubt that communications exchanged on cell phones purchased with state or local funds are "public records," because such devices are "owned" by a public agency. *See e.g.*, 20-ORD-028 (recognizing that communications on state-owned devices are public records under KRS 61.870(2)).

The City does not dispute that text messages on City-owned devices are public records. However, the City claims that no responsive records exist on the city commissioner's City-owned cell phone. Once a public agency states affirmatively that requested records do not exist, the burden shifts to the requester to make a *prima facie* showing that the requested records do exist. *Bowling v. Lexington-Fayette Urban Cty. Gov't*, 172 S.W.3d 333, 341 (Ky. 2005). If the requester makes a *prima facie* showing that records should exist, the public agency is then required to explain the adequacy of its search. *Id.* Moreover, if it becomes clear that a record should but no longer does exist, the public agency is required to explain to the requester why the record no longer exists. *Eplion v. Burchett*, 354 S.W.3d 598, 603 (Ky. App. 2011).

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[1] As noted in 20-ORD-115, the agency did not claim that the public records were exempt from inspection under the attorney-client privilege. Whether a record is a "public record" under KRS 61.870(2) is a different question than whether such records are subject to public inspection. The exemptions provided under KRS 61.878 do not convert public records into nonpublic records. KRS 61.878 simply permits a public agency to deny inspection of what are otherwise defined as public records.

Here, the Appellant makes a *prima facie* showing that text messages were exchanged on the city commissioner's City-owned cell phone, because billing records confirm such communications were exchanged. The City conducted an adequate search for these communications because it searched the city commissioner's City-owned cell phone, which is where responsive records would be located if such records existed. When the Appellant asked the City to explain why the requested communications no longer exist, the City explained that the records custodian "has no knowledge of how or why messages were deleted from this phone" but that under the City's record retention policy, "non-business communication[s] can be destroyed immediately."

The records retention schedule upon which the City relies is the general records retention schedule for local governments.[2] That records retention schedule creates three categories of communications, and each category of communication must be retained for a different period of time. The first category is "official correspondence," which includes "major activities, functions, events, and programs of a local government" and is to be retained permanently. The second category is "routine correspondence," which includes "business related correspondence that is not crucial to the preservation of the administrative history of an agency" and is to be retained for two years. The third category is "nonbusiness related correspondence," which includes correspondence "of a purely personal nature, spam, and other unsolicited correspondence" and is to be immediately destroyed. Here, the City has claimed that the text messages contained on the city commissioner's City-owned cell phone all fall within the third category of "non-business communications." Therefore, the City implies that every communication exchanged on the city commissioner's City-owned cell phone during the relevant dates, approximately 323 text messages, were of a personal nature, spam, or other unsolicited correspondence which could be destroyed immediately.

Because the communications no longer exist, and because the cell phone bills reveal only the phone numbers with which messages were exchanged, this Office is unable to determine whether such correspondence was of a "purely personal nature" such that it would be exempt from inspection under KRS 61.878(1)(r). Nor can this Office determine which category of the records

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[2] *See* Local Agency Records Retention Schedule, Local Governments, Series L4954, L4955, and L5866, available at https://kdla.ky.gov/records/recretentionschedules/Documents/Local%20Records%20Schedules/LocalGovernmentGeneralRecordsRetentionSchedule.pdf (last accessed Aug. 6, 2021).

retention schedule applies to the destroyed text messages. Such a decision must be made by the Department of Library and Archives, which is the public agency tasked with enforcing Kentucky law requiring the preservation of public records. *See* KRS 171.530. This Office can only decide whether the City violated the Open Records Act. KRS 61.880(2). Once the Appellant established a *prima facie* case that records do exist, the Act required the City to explain why such records no longer exist. *Eplion*, 354 S.W. 3d at 603. The City has done so, by explaining that the text messages were destroyed. Therefore, it did not violate the Open Records Act, but the Department of Library and Archives must examine whether the City violated the provisions of KRS Chapter 171.

Turning to the Appellant's other claims, this Office has already examined whether text messages contained on personal cell phones are "public records" under KRS 61.870(2). Six years ago, in 15-ORD-226, this Office held that "[c]ell phone communications, including calls or text messages, made using a private cell phone that is paid for with private funds, are not prepared by or in the possession of a public agency." Consistent with this established precedent, in 21-ORD-127, this Office reaffirmed that holding, and found that text messages contained on private devices on which no public funds are spent are not "public records" within the meaning of KRS 61.870(2).

Here, the Appellant argues that the city commissioner is herself a public agency under KRS 61.870(1)(a), because she is a "local government officer," and thus her text messages are public records. But following that logic, it would mean that every single document in the city commissioner's possession, including purely personal documents, such as personal bills and emails with family, would be public records. Such an expansive interpretation of the meaning of "public record" would be untenable, and could not have been intended by the General Assembly. Moreover, there is no evidence in this record that the city commissioner was engaged in City business while in Washington D.C. on January 6. The city commissioner had no authority to take action on behalf of the City, and there is no evidence that City funds were spent to pay for her travel. Therefore, there is no evidence that the city commissioner was acting as a "public agency" under KRS 61.870(1) while she was present in Washington D.C.

Finally, the Appellant claims that the city commissioner was required to personally respond to its third request to inspect public records. According to the Appellant, the city commissioner must personally respond because she is a public agency under KRS 61.870(1)(a). As discussed above, this Office disagrees, because there is no evidence in the record that the city commissioner

was engaging in public business, or that she had any authority to act on behalf of the City, while she was present in Washington D.C. But even if this Office were to find that the city commissioner is herself a "public agency" under KRS 61.870(1), it does not follow that she would be required to personally respond to requests submitted to her. It is a public agency's official custodian of records who is required to respond to such requests. KRS 61.880(1) ("The response shall be issued by the official custodian or under his or her authority, and it shall constitute final agency action."). Thus, upon receiving the Appellant's request, the city commissioner had two options. The city commissioner could have personally responded and informed the Appellant that she was not the custodian of records, and provided the contact information of the City's record custodian, KRS 61.872(4), or the city commissioner could have forwarded the Appellant's request to the City's record custodian for the record custodian to issue the City's response.

Here, the city commissioner chose the second option, and directly forwarded the request to the City Clerk, who is the official custodian of City records. While not required, the city commissioner acted appropriately. However, the City Clerk did not issue a response to the Appellant notifying it that the City would either comply with the request or deny it, as required under KRS 61.880(1). Instead, the City Clerk demanded that the Appellant resubmit its third request directly to the City Clerk. That was unnecessary because the city commissioner had already forwarded the request to the City Clerk. Because the City required the Appellant to resubmit a request to its records custodian that the records custodian already possessed, it violated the Act.

In sum, the text messages on the city commissioner's City-owned phone are public records, but the text messages on her private phone are not. The distinction is that public funds are spent to procure the former, whereas public funds are not spent to procure the latter. As was the case when 15-ORD-226 was issued, this Office recognizes the gap that distinction leaves in the Open Records Act, and the potential it leaves for government officers to conduct governmental business on devices not subject to public inspection. But the inverse world is no more satisfying, in which every text message a governmental officer sends or receives on any device becomes a "public record" simply by virtue of being in his or her possession. KRS 61.870(2) as currently enacted does not provide for a middle ground. This Office notes that the conduct of government business has changed greatly since 1994, the last time the General Assembly meaningfully addressed the definition of "public record" in KRS 61.870(2) to address the digital age—by including "software" in the

definition of "public record." *See* 1994 Ky. Acts ch. 262 § 2. Six years have passed since this Office issued its decision in 15-ORD-226, and the General Assembly has amended KRS 61.870(2) twice in that time. *See, e.g.*, 2016 Ky. Acts ch. 101; 2021 Ky. Acts ch. 160. Because the General Assembly has not amended KRS 61.870(2) to overrule this Office's prior decision, we assume that the legislature has ratified this Office's interpretation of the statute. *See Univ. of Ky. v. Kernel Press, Inc.*, 620 S.W.3d 43, 62 (Ky. 2021) ("when the General Assembly revises and reenacts a statute it is well aware of the interpretation of the existing statute and has adopted that interpretation unless the new law contains language to the contrary.") (cleaned up).

Until the General Assembly provides further guidance on this question, public agencies and their employees are still admonished to refrain from using personal devices to conduct governmental work with the intent to shield their conduct from public inspection. *See* 15-ORD-226. Moreover, the conduct here raises serious questions about public records management. Although this Office holds that the City discharged its duty under the Act by explaining that text messages on City-owned phones were deleted, this Office makes no decision on whether the City has complied with the public records retention laws. *See* KRS 171.410 *et seq*. Such a decision is better left for the Kentucky Department of Library and Archives, which is the public agency tasked with enforcing public records retention provisions, and to which a courtesy copy of this decision has been sent.

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 proceeding.

Daniel Cameron
Attorney General

/s/Marc Manley
Marc Manley
Assistant Attorney General

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Distributed to:
Michael P. Abate
Tyler S. Frazier