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-177

September 22, 2021

In re: Aaron Kidd/Madison County Detention Center

Summary: The Madison County Detention Center ("Center") violated the Open Records Act ("the Act") when its response to a request to inspect records failed to comply with KRS 61.880(1). The Center carried its burden on appeal that it adequately searched for some responsive records, but failed to carry its burden that other aspects of the request were unreasonably burdensome.

Open Records Decision

Aaron Kidd ("Appellant") asked the Center to inspect fifteen categories of records related to the arrest and detention of a specific inmate. Within five business days, the Center emailed the Appellant and stated it received the request and that it was "gathering all information requested" as well as that it "will email or call when all documents are ready." This appeal followed.

Under KRS 61.880(1), upon receiving a request for records under the Act, a public agency "shall determine within five (5) [business] days . . . after the receipt of any such request whether to comply with the request and shall notify in writing the person making the request, within the five (5) day period, of its decision." If an agency denies in whole or in part the inspection of any record its response must 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." KRS 61.880(1). Alternatively, if requested records are "in active use, in storage or not otherwise available," a public agency may delay inspection of the requested records if it provides the requester a "detailed explanation of the cause" of delay and the "earliest date on which the public record[s] will be available for inspection." KRS 61.872(5).

Thus, there are only three types of responses a public agency may issue within the five business-day period—approve the request, deny the request by providing citations to exemptions and explaining how such exemptions apply to records that have been identified as responsive, or invoke properly KRS 61.872(5) to delay inspection of the records.

Here, the Center issued a response to the Appellant within five business days, but the response failed to comply with KRS 61.880(1) because it did not approve the request, deny it and explain why, or notify the Appellant that requested records were "in active use, in storage or not otherwise available" and provide the earliest date on which such records would be available. Therefore, the Center's deficient response violated KRS 61.880(1).[1]

After the appeal was initiated, the Center provided the Appellant with several records. Now having received a response and responsive records from the Center, the Appellant raises new objections to the Center's disposition of the request. As an initial matter, this Office will note that under KRS 61.880(2)(a), if "a complaining party wishes the Attorney General to review a public agency's denial of a request to inspect a public record, the complaining party shall forward to the Attorney General a copy of the written request and a copy of the written response denying inspection." Upon receipt of the request and the agency's denial, the "Attorney General shall review *the request and denial* and issue . . . a written decision stating whether the agency violated provisions of KRS 61.870 to 61.884." *Id*. (emphasis added). As discussed above, this Office has reviewed the request, the Center's response, and has decided that it violated the Act. Thus, this Office has discharged its duty under KRS 61.880(2)(a). Once an appellant presents to this Office his or her request and a public agency's disposition of it, that process triggers a statutory deadline for this Office's review. *See id*. The addition of new issues and continuous motion practice once an appeal has been submitted constrains this Office's ability to meet its statutory obligations, and this Office could rightfully decline to consider new issues raised on appeal. Nevertheless, because these new issues have been caused by the Center's actions on appeal, and because this Office has had sufficient time to consider the parties' arguments related to these

[1] The Appellant alleged that the Center violated the Act when it issued an email response as well as that it responded on appeal through its attorney. This Office has recognized that a response through email satisfies the written response requirement under the Act. *See, e.g.,*18-ORD-188. This Office has found that responding to a request through counsel is not a violation of the Act. *See, e.g.*, 16-ORD-133.

issues, and to promote efficiency, this Office will adjudicate the Appellant's new claims.

First, the Appellant claims that the Center failed to provide him with copies of requested daily logs. Specifically, the Appellant had asked for a "copy of any Jail logs, incident reports, use of force reports, charging documents . . . photographs, videos, and case jacket or file pertaining to the above arrest and detention of" a specific inmate. The Center claims on appeal to have provided all incident reports, use of force reports, charging documents, and the case jacket for the specified inmate. However, the Center claims it maintains daily logs based on the dates of the logs, not by references to inmates. Therefore, the Center claims it is unable to search for daily logs that refer to specific inmates and it has invited the Appellant to specify which logs he seeks by date.

Once a public agency states affirmatively that it does not possess responsive records, the burden shifts to the requester to present a *prima facie* case that the requested records do exist in the agency's possession. *See Bowling v. Lexington-Fayette Urb. Cty. Gov.*, 172 S.W.3d 333, 341 (Ky. 2005). This Office has found that a requester can make a *prima facie* case that records should exist by citing a statute, regulation, or other legal authority that requires the creation of the requested record. *See, e.g.*, 21-ORD-114; 20-ORD-038; 11-ORD-074. If the requester can make a *prima facie* case that records do or should exist, then the agency "may also be called upon to prove that its search was adequate." *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 848 n.3 (Ky. 2013) (citing *Bowling*, 172 S.W.3d at 341).

Here, to establish his *prima facie* case, the Appellant cites to several of the Center's policies requiring it to create the types of logs he requested. However, the policies do not specify that such logs shall be maintained in an inmate's personal file. Rather, 501 KAR 3:060 § 4, upon which the Appellant relies, requires the Center to keep daily logs that reflects "significant occurrences within the jail," without specifying *how* such daily logs are to be maintained. The Center maintains its daily logs by the dates of the logs, not by the inmates mentioned in such logs. The Appellant did not specify by date which daily logs he seeks. This Office cannot find that the Center failed to conduct an adequate search for daily logs related to the specific inmate when the Appellant did not provide the Center with sufficient information to assist it in locating responsive records.

The Appellant's second new issue on appeal is the Center's denial of subparts 14 and 15 of the request, which the Center claims were unreasonably burdensome. For subpart 14, the Appellant sought a "copy of any outside

agency's communication or inquiries regarding use of force or excessive use of force, violation of KY Jail Standards, or Jail Staff misconduct since October 01, 2018, to present," including such correspondence from the "Kentucky State Police, Federal Bureau of Investigation, Kentucky Department of Corrections, and Kentucky Attorney General." For subpart 15, the Appellant sought similar communications sent to the Center by the Madison County Fiscal Court.

The Center provides two arguments for not providing records responsive to these requests. First, the Center claims that these requests are "directed at the wrong agency" and that "[a]ny communication from an outside agency would need to be directed to such agency[.]" However, any communication that the Center has received and is in its possession is a public record of the Center. *See* KRS 61.870(2). The Appellant does not seek the communications of other agencies, but rather, seeks the communications the Center has received from other agencies. Thus, the Center's first argument is no basis to deny these subparts of the Appellant's request.

Second, the Center claims these subparts, as currently written, are "overly burdensome" because the Center would be required to search "every inmate file" of inmates held since October 2018, including records in paper format. The Center also states that it does not maintain a searchable "log or database of such communications," and therefore searching its electronic records for responsive records would be "near impossible" in the absence of more specific information from the Appellant.

Under KRS 61.872(6), "[i]f the application places an unreasonable burden in producing public records . . . the official custodian may refuse to permit inspection of the public records or mail copies thereof. However, refusal under this section shall be sustained by clear and convincing evidence." In considering whether an agency has met that burden, this Office considers the number of records implicated, whether the records are in a physical or electronic format, and whether the records contain otherwise exempt material requiring redaction. *See, e.g.*, 97-ORD-088 (finding that a request implicating thousands of physical files pertaining to nursing facilities was unreasonably burdensome, where the files were maintained in physical form in several locations throughout the state, and each file was subject to confidentiality provisions under state and federal law). In addition to these factors, this Office has found that a public agency may demonstrate an unreasonable burden if it does not catalogue its records in a manner that will permit it to query keywords mentioned in the request. *See, e.g.*, 96-ORD-042 (finding that it would place an

unreasonable burden on the agency to manually review thousands of files for the requested keyword to determine whether such records were responsive).

Here, the Center states there are two methods of search that it could conduct to locate responsive records. First, to locate any responsive communications contained within an inmate's file, the Center would be required to search thousands of physical files for potentially responsive records. The Appellant has not narrowed his request to communications contained within any specific inmate's file, and it would indeed place an unreasonable burden on the Center to search every inmate file for potentially responsive communications. Thus, the Center has carried its burden that this aspect of the Appellant's request would place an unreasonable burden upon it. However, the Center has failed to explain how the second method of searching for responsive records would be unreasonably burdensome.

The Center acknowledges that it may have received emails from "outside agencies" that are responsive to the request.[2] To search for such emails, however, the Center claims it can only search by date and for the keyword "force." The Center does not explain how many email accounts it would have to search using those parameters, or how many responsive emails it located using those search parameters. In 19-ORD-207, this Office found that a correctional complex failed to carry its burden that a request for all emails between staff that related to an inmate was unreasonably burdensome. Significant to that decision was the correctional facility's failure to conduct a search in the first instance and provide actual evidence that its search produced so many responsive records that the request was unreasonably burdensome. The same is true here. On its face, searching email accounts by date and keyword is not unreasonably burdensome. If an unreasonably large amount of responsive records were generated in response to the parameters of such a search, then maybe the Center could have provided evidence in support of its claim. But here, the Center provides no evidence that it has attempted to conduct this search, and therefore it violated the Act. *See, e.g.*, 19-ORD-207.

Finally, the Appellant's third new issue on appeal is his claim that the Center failed to provide records responsive to his request for all disciplinary administrative actions, including disciplinary reports issued, for *any* employee since October of 2018. The Center claims it has provided responsive records for

---

[2] Although the Center claims the Appellant was too broad in seeking communications from "other agencies," the Appellant had specified the "other agencies" to which he was referring: the Kentucky State Police, the FBI, the Department of Corrections, and the Attorney General.

disciplinary action taken against an employee for an alleged assault that employee committed against the inmate who was the subject of the Appellant's request. The Center claims on appeal that all 15 subparts of the request were connected to the specified inmate and the employee that allegedly assaulted him. Therefore, the Center claims that the Appellant never asked for disciplinary actions taken against other employees. While there is some merit to the Center's position that a request for *any* employee disciplinary action is broader in scope than the Appellant's other requests, on its face the original request sought disciplinary actions taken against *any* employee during the requested period. The Center's failure to provide responsive records, or explain how an exception applies to deny inspection of such records, violated the Act.[3]

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/Matthew Ray
Matthew Ray
Assistant Attorney General

#268

Distributed to:

Aaron Kidd
Kristen Wallace
Jennie Y. Haymond

[3] The Center also denied some records under KRS 61.878(1)(h). Based on the Center's final response on appeal, received September 19, 2021, it appears as though it has provided the records it withheld under this exemption. Accordingly, this issue is moot. 40 KAR 1:030 § 6.