



COMMONWEALTH OF KENTUCKY
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21-ORD-210

November 9, 2021

In re: Aaron Kidd/Whitley County Detention Center

Summary: The Whitley County Detention Center (the “Center”) did not violate the Open Records Act (“the Act”) when it denied inspection of records on the Center’s premises during a public health emergency that has been recognized by the General Assembly and offered an alternative location to inspect the requested records.

Open Records Decision

On August 12, 2021, Aaron Kidd (“Appellant”) requested “an onsite inspection” of certain records of the Center, including use of force reports, critical incident reports, staff training and certification files, employee discipline files, and trustee records. In response, the Center stated that the records were “in active use, in storage or not otherwise available” under KRS 61.872(5). For that reason, instead of allowing inspection at the Center’s premises, the Center made the records available for inspection at the law offices of its privately retained attorney in Laurel County. This appeal followed.

The Appellant claims an absolute right to inspect records on the Center’s premises under KRS 61.872. Under KRS 61.872(1), a public agency shall provide “suitable facilities” for inspection of public records. This Office has previously found that, in ordinary circumstances, the term “suitable facilities” refers to a government premises. *See, e.g.*, 10-ORD-042. Although this Office has generally found that a private law office does not ordinarily constitute “suitable facilities” for inspection of public records, *see, e.g.*, 04-ORD-123; 09-ORD-048, this Office has found that an attorney’s office is not “inherently unsuitable” in certain circumstances, *see* 15-ORD-195. Moreover, facilities that

are suitable in ordinary times may not be suitable in extraordinary times, such as those experienced in the Commonwealth and the United States in 2020 and 2021.

Here, the Center initially relied on KRS 61.872(5) to justify its offer to arrange the Appellant's inspection at its attorney's office instead of at the Center. Specifically, the Center argues that KRS 61.872(5) requires the agency's records custodian to "designate a place . . . for inspection of the public records" and therefore the designated place can be anywhere the custodian chooses. But the fact that some records may be "in active use, in storage or not otherwise available" does not relieve a public agency of its obligation under KRS 61.872(1) to provide "suitable facilities" for inspection when the records become available. *See, e.g., Combs v. Hubb Coal Corp.*, 934 S.W.2d 250, 253 (Ky. 1996) ("each section [of a statute] is to be construed in accord with the statute as a whole"). Thus, a place designated by a custodian under KRS 61.872(5) for inspection of records must be a "suitable facility" under KRS 61.872(1).

On appeal, however, the Center further explains that at the time of the request the Department of Corrections had suspended visitation at all detention facilities due to the public health emergency resulting from the coronavirus pandemic. That order remains in effect. Given the unique challenges associated with the spread of a contagious virus in a confined and often vulnerable inmate population, and the Department's order suspending visitation at such facilities for any purpose, the Center was not itself a "suitable facility" to permit inspection in-person under KRS 61.872(1).

As an alternative, the Center offered to let the Appellant inspect the records at its attorney's office. Although this Office reaffirms that, in ordinary circumstances, a public agency must permit in-person inspection on government premises under KRS 61.872(1), given the unique circumstances presented here in the context of a correction facility amid a public health emergency, and the current state of Kentucky law at the time this decision is rendered,¹ the Center's offer was a reasonable solution to discharging its duty

¹ While this matter was pending on appeal, the Governor called the General Assembly into an extraordinary session under Section 80 of the Kentucky Constitution. During the extraordinary session, the General Assembly passed House Joint Resolution 1 ("HJR 1"). In pertinent part, HJR 1 "[e]xtend[s] 2020 RS SB 150, 2020 Ky. Acts ch. 73, until January 15, 2022, to the extent the provisions are not superseded by statute or administrative regulation." HJR 1 § 2(1)(c). SB 150, originally passed during the 2020 Regular Session, suspended the public's right to in-person inspection under the Act during the state of emergency. Those

under the Act. If the Appellant wishes to obtain copies of the records by mail, he may request to do so under KRS 61.872(3)(b). However, the Center did not violate the Act when it denied the Appellant's request to inspect records at the Center's premises because that premises was not a "suitable facility" at the time the request was made.

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 within 30 days from the date of this decision. 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. The Attorney General will accept notice of the complaint e-mailed to OAGAppeals@ky.gov.

Daniel Cameron
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/s/ James M. Herrick

James M. Herrick
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Distribution:

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provisions remain in effect until January 15, 2022. Thus, even if this Office found that the Center violated the Act at the time the Appellant submitted his request, under current Kentucky law, the Appellant does not presently have the right to inspect the Center's records in person at the Center.