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24-ORD-206

September 24, 2024

In re: James Gentry/Christian County Jail

Summary: The Christian County Jail (“the Jail”) did not violate the Open Record Act (“the Act”) when it did not provide records that are not in its possession.

Open Records Decision

Inmate James Gentry (“Appellant”) submitted a request to the Jail for emails between his attorney and him between November 2018 and November 2022. In response, the Jail stated it does not have access to the records and cannot provide them. This appeal followed.

On appeal, the Jail explains that its inmates can correspond with legal counsel through a kiosk system. The Jail and its employees do not have access to communications in the kiosk system because they are protected by the attorney-client privilege. Thus, the Jail claims that it does not possess any responsive emails.¹ Once a public agency states affirmatively that a record does not exist, the burden shifts to the requester to present a *prima facie* case that the requested record does or should exist. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov’t*, 172 S.W.3d 333, 341 (Ky. 2005). If the requester makes a *prima facie* case that the records do or should exist, then the public 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).

¹ The Jail states that TechFriends is the entity that operated the kiosk system and therefore possesses the requested records. *See* KRS 61.872(4), (“If the person to whom the application is directed does not have custody or control of the public record requested, that person shall notify the applicant and shall furnish the name and location of the official custodian of the agency's public records.”) The Jail further states that TechFriends is not a public agency subject to the Act.

Here, the Appellant asserts only that the Jail must possess the emails because he viewed them on the Jail's kiosk system before he was transferred to a different facility. But the Jail has already explained that it does not have access to those emails. Thus, the Appellant has not made a *prima facie* case that the Jail possesses the emails, and the Jail did not violate the Act when it did not provide them.

A party aggrieved by this decision may appeal it by initiating an action in the appropriate circuit court under KRS 61.880(5) and KRS 61.882 within 30 days from the date of this decision. Under 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 emailed to OAGAppeals@ky.gov.

Russell Coleman
Attorney General

/s/ Zachary M. Zimmerer
Zachary M. Zimmerer
Assistant Attorney General

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Distributed to:

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