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COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

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17-ORD-272

December 21, 2017

In re: Andrew Seidel/Laurel County Jailer

Summary: Laurel County Jailer violated the Open Records Act in responding to request for records regarding "Night of Prayer" at Laurel County Correctional Center. Laurel County Jailer commingled nonresponsive records with responsive records, and failed to meet its burden of proof to justify withholding records under the personal privacy and homeland security exemptions. Laurel County Jailer did not explain why producing certain records would be unreasonably burdensome, and violated the Act by requiring out-of-county requester to inspect records at Laurel County Correctional Center.

Open Records Decision

The issue presented in this appeal is whether the Laurel County Jailer violated the Open Records Act in the disposition of a request for records relating to a "Night of Prayer" at the jail, and various other records. For the reasons stated below, we find that the Laurel County Jailer violated the Act.

Background. The Laurel County Correctional Center (LCCC) hosted a "Night of Prayer" on Tuesday, August 29, 2017. The event was announced on LCCC's Facebook page with the stated purpose of forming "a prayer chain around each floor, and around the entire jail." The reason for the event, as reported in news articles, was to "battle the drug issues in the community" and to recognize the overcrowding problem at the jail. News articles estimated that hundreds of people attended the event in and around LCCC.

By letter dated October 6, 2017, Andrew Seidel, Freedom From Religion Foundation, requested records from LCCC relating to the "Night of Prayer;" contracts, communications, and policies relating to substance abuse programming at LCCC, and contracts, communications, and policies relating to religious programming at LCCC. LCCC responded to the request on October 23, 2017,¹ by providing the 2015, 2016, and 2017 "Policy and Procedure Guidelines" for LCCC, and substance abuse program contracts, but otherwise denying the requests.²

The requests and responses, and our analysis of those responses follows:

Request No. 1 and Response.

1. All records related to organization and/or planning of the Night of Prayer. This request includes: (a) any LCCC policies regarding jail events involving the public, and (b) any communications between LCCC employees or between LCCC employees and persons not employed by LCCC regarding the Night of Prayer including, but not limited to: memos, emails, fliers, signs, social media posts, notes and meeting minutes.

Response: "Enclosed are the 2017 Policy and Procedure Guidelines for the Laurel County Correctional Center.

This request is denied in part as overly burdensome and exempt pursuant to KRS 61.878(1)(a) wherein communications between LCCC employees and/or LCCC employees and private citizens are not subject to public disclosure and would constitute a clearly unwarranted invasion of personal privacy. The Laurel County

¹ We note that LCCC failed to comply with the procedural requirement for timely responses to open records requests. KRS 61.880(1) states, in pertinent part: "Each public agency, upon any request for records made under KRS 61.870 to 61.884, shall determine within three (3) days, excepting Saturdays, Sundays, and legal holidays, 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 three (3) day period, of its decision." There is no explanation in the record as to why LCCC did not respond in a timely manner.

² Neither the Laurel County Jailer nor the Laurel County Attorney responded to this Office after receipt of notice of the appeal. Our decision is thus based on the request and LCCC's response to Appellant.

Correctional Center is not in custody or control of records related to the organization and/or planning of the Night of Prayer.”

Analysis of Request No. 1 and Response.

Policies regarding jail events involving the public. LCCC’s response to the request for “policies regarding LCCC events involving the public,” was to provide a copy of LCCC’s 2017 Policy and Procedure Guidelines without further explanation. It is not reasonable that the entirety of the 2017 Policy and Procedure Guidelines would apply to the request for policies regarding LCCC events involving the public, and there is no explanation of which portion(s) of the 2017 Guidelines are responsive to the request. Without further explanation from LCCC, we must conclude that any responsive record(s) in the 2017 Guidelines are commingled with nonresponsive portions of the Guidelines.

In prior decisions, where this Office has found that an agency has commingled nonresponsive records with responsive records in a manner that precluded meaningful review of the responsive records, we have found that “the [agency’s] efforts fell short of the statutory requirements codified at KRS 61.880(1).” 02-ORD-150, p. 7; 07-ORD-150 (other citations omitted).

As in those prior decisions, the facts giving rise to this appeal do not conclusively establish intent on the part of LCCC to impede Appellant’s inspection of the records identified in his request. However, the language of the statute governing agency action is unambiguous. It requires the agency to produce records responsive to an open records request formulated with sufficient specificity to enable the agency’s custodian of records to locate and retrieve those records. In this case, Appellant’s request was formulated with sufficient specificity for LCCC to identify and locate the records requested, and LCCC should have responded only with the responsive records or explained which policies and procedures in the 2017 Policy and Procedure Guidelines were responsive to this particular request. We find that LCCC subverted the intent of the Open Records Act, short of denial of inspection, by commingling nonresponsive records with responsive records so as to create an unnecessary impediment to effective inspection. 07-ORD-105.

All records related to organization and/or planning the Night of Prayer, and Communications regarding the Night of Prayer

LCCC denied the request regarding communications on three different bases: 1. The request was overly burdensome; 2. The records are exempt pursuant to KRS 61.878(1)(a) which exempts "Public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy[;]" and 3. LCCC is not in custody or control of records related to the organization and/or planning of the Night of Prayer.

Unreasonably Burdensome. KRS 61.872(6) authorizes public agencies to deny open records requests if the requests "place[] an unreasonable burden in producing public records" or if the agency "has reason to believe that repeated requests are intended to disrupt other essential functions of the public agency." Denial of the right of inspection under this provision must be supported by clear and convincing evidence, and the public agency that attempts to do so "faces a high proof threshold." *Commonwealth v. Chestnut*, 250 S.W.3d 655, 664 (Ky. 2008). "[T]he obvious fact that complying with an open records request will consume both time and manpower is, standing alone, not sufficiently clear and convincing evidence of an unreasonable burden." *Id.* at 665. Moreover, the fact that the responsive records "are voluminous does not mean that it would necessarily be unreasonable [for an agency] to comply with an otherwise valid open records request." *Id.* at 666. LCCC presents no evidence, clear and convincing or otherwise, that Appellant's requests are unreasonably burdensome or intended to disrupt its essential functions. "A bare allegation that a request is unreasonably burdensome or intended to disrupt essential functions does not satisfy the requirements of the statute." 10-ORD-203, p. 3 (citing 06-ORD-177). LCCC's denial, on the basis that the request is overly burdensome, fails as LCCC provided no evidence or argument that complying with the request was overly burdensome.

Personal Privacy Exemption. Regarding LCCC's claim that the records are not subject to disclosure due to personal privacy concerns, KRS 61.878(1)(a) excludes from the application of the Open Records Act "[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." This

language acknowledges “that personal privacy is of legitimate concern and worthy of protection from invasion by unwarranted public scrutiny,” while the Open Records Act as a whole “exhibits a general bias favoring disclosure” and places the burden of establishing an exemption on the public agency. *Kentucky Bd. of Examiners of Psychologists v. Courier-Journal and Louisville Times Co.*, 826 S.W.2d 324, 327 (Ky. 1992). This necessitates a “comparative weighing of the antagonistic interests. Necessarily, the circumstances of a particular case will affect the balance. [T]he question of whether an invasion of privacy is ‘clearly unwarranted’ is intrinsically situational, and can only be determined within a specific context.” *Id.* at 327-28. LCCC has provided no hint as to what privacy interests would be at risk by the release of the requested records. Without some explanation of the privacy interests implicated by release of the records, the public’s interest in the records must prevail in the comparative weighing of the antagonistic interests.

LCCC also argues that it is not in custody of records relating to the organization and/or planning of the night of Prayer. This claim is directly contradictory to its claim that the records are protected from release due to privacy concerns and the claim that production would be unreasonably burdensome. This self-contradiction, when taken in light of the Act’s basic policy that “free and open examination of public records is in the public interest and the exceptions provided for by KRS 61.878 or otherwise provided by law shall be strictly construed[,]”³ leads to the conclusion that LCCC has failed to comply with that basic policy and violated the Act.

Pursuant to KRS 61.880(2)(c), the burden of proof in sustaining an agency’s action (in withholding public records) lies with the agency. LCCC has made disparate claims regarding whether responsive records exist, whether they contain personal information, and that disclosure would be “overly burdensome.” LCCC has provided no credible basis in fact for withholding the records, nor explained how these claims apply to the records, if they exist or not. LCCC has not sustained its burden of proof in withholding the requested records.

³ KRS 61.871 states: “The General Assembly finds and declares that the basic policy of KRS 61.870 to 61.884 is that free and open examination of public records is in the public interest and the exceptions provided for by KRS 61.878 or otherwise provided by law shall be strictly construed, even though such examination may cause inconvenience or embarrassment to public officials or others.”

Request No. 2. And Response.

2. All records related to employee staffing at LCCC during the "Night of Prayer." This request includes: (a) any LCCC policy regarding staffing during jail events involving the public, and (b) logbooks, timecards, staff assignments, payment receipts, expense reports, invoices, and any communications related to employee staffing including, but not limited to: memos, emails, fliers, signs, social media posts, notes and meeting minutes.

Response: Enclosed are the 2017 Policy and Procedure Guidelines for the Laurel County Correctional Center. Please be advised that non-exempt public records of the Laurel County Correctional Center may be inspected and copied upon request at 204 W. 4th Street, London, Kentucky between the hours of 9:00 a.m. and 3:00 p.m. EST.

The request is denied in part as overly burdensome as the request places an unreasonable burden on the agency in producing all staffing records for August 29, 2017. The request is further denied pursuant to KRS 61.878(1)(a) as records containing information of a personal nature if disclosure would constitute a clearly unwarranted invasion of personal privacy. The request for staff assignments and communications related to employee staffing is further denied pursuant to KRS 61.878(1)(m) as the disclosure of which would have a reasonable likelihood of threatening the public safety by exposing a vulnerability in preventing, protecting against, mitigating, or responding to a terrorist act.

No public funds were expended by the Laurel County Correctional Center for the Night of Prayer event held on August 29, 2017.

Analysis of Request No. 2 and Response.

Records related to staffing at LCCC during the "Night of Prayer."

As in response to Request No. 1, LCCC provided the 2017 Policy and Procedure Guidelines without explaining which portions of the Guidelines are responsive to the request. For the same reasons as we explained in our analysis of LCCC's response to Request No. 1, LCCC subverted the intent of the Act by failing to separate nonresponsive records from responsive records.

LCCC further responded that "non-exempt public records of the Laurel County Correctional Center may be inspected and copied upon request at 204 W. 4th Street, London, Kentucky between the hours of 9:00 a.m. and 3:00 p.m. EST." However, a public agency cannot require all persons to inspect records at the physical address of the agency. Pursuant to KRS 61.872(3), there are two methods by which a requester may inspect public agency records:

(3) A person may inspect the public records:

(a) During the regular office hours of the public agency; or

(b) By receiving copies of the public records from the public agency through the mail. The public agency shall mail copies of the public records to a person whose residence or principal place of business is outside the county in which the public records are located after he precisely describes the public records which are readily available within the public agency. If the person requesting the public records requests that copies of the records be mailed, the official custodian shall mail the copies upon receipt of all fees and the cost of mailing.

Appellant and his requests meet the requirements of KRS 61.872(3)(b),⁴ and LCCC must mail the requested records to Appellant after receipt all fees and cost of mailing.

⁴ Appellant's address is Madison, Wisconsin, and so he has his residence and workplace outside Laurel County, and his requests "precisely describe" the records requested. KRS 61.872(3)(b).

LCCC denied this request on the basis that it placed an unreasonable burden on the agency, but also invoked KRS 61.878(1)(a). The response again failed to provide any explanation for the exemptions claimed and we reject these denials on the same bases as we explained above regarding the request for records relating to the organization and/or planning of the Night of Prayer.

Analysis of exemption pursuant to KRS 61.878(1)(m).

LCCC also asserted that the request for “staff assignments and communications related to employee staffing is further denied pursuant to KRS 61.878(1)(m) as the disclosure of which would have a reasonable likelihood of threatening the public safety by exposing a vulnerability in preventing, protecting against, mitigating, or responding to a terrorist act.”

In 17-ORD-179, the Lexington Police Department (LPD) denied a request for certain records pertaining to surveillance technologies owned or used by the LPD on the basis of KRS 61.878(1)(m). In deciding that LPD did not meet its burden in justifying its reliance on KRS 61.878(1)(m), we cited, in part, to LPD’s failure to specify which subparagraph of KRS 61.878(1)(m), if any, was applicable to the denial. By its own terms, KRS 61.878(1)(m) is “limited to” the types of records listed in subparagraphs KRS 61.878(1)(m)1.(a) through 1.(h) of that statute.⁵ In this appeal, LCCC also failed to cite the subparagraph on which it

⁵ KRS 61.878(1)(m) authorizes the withholding of:

1. Public records the disclosure of which would have a reasonable likelihood of threatening the public safety by exposing a vulnerability in preventing, protecting against, mitigating, or responding to a terroristic act and limited to:
 - a. Criticality lists resulting from consequence assessments;
 - b. Vulnerability assessments;
 - c. Antiterrorism protective measures and plans;
 - d. Counterterrorism measures and plans;
 - e. Security and response needs assessments;
 - f. Infrastructure records that expose a vulnerability referred to in this subparagraph through the disclosure of the location, configuration, or security of critical systems, including public utility critical systems. These critical systems shall include but not be limited to information technology, communication, electrical, fire suppression, ventilation, water, wastewater, sewage, and gas systems;
 - g. The following records when their disclosure will expose a vulnerability referred to in this subparagraph: detailed drawings, schematics, maps, or specifications of structural elements, floor plans, and operating, utility, or security systems of any building or facility owned, occupied, leased, or maintained by a public agency; and

relied in denying the request. A reasonable explanation of the application of KRS 61.878(1)(m) would necessarily have to explain which particular subparagraph of KRS 61.878(1)(m)1 applies to the requested records. LCCC made no attempt to explain how releasing the requested records relating to "staff assignments and communications related to employee staffing" would have a "reasonable likelihood of threatening the public safety by exposing a vulnerability in preventing, protecting against, mitigating, or responding to a terrorist act[.]"

We adopt the reasoning set forth in 17-ORD-179, both as to the requirement that an agency must identify which subsection of KRS 61.878(1)(m)1.(a) through 1.(h) applies to the records withheld, and to that decision's more substantive analysis explaining that the agency must establish how disclosure would create a "reasonable likelihood of threatening the public safety by exposing a vulnerability" in the manner described. LCCC's failure to cite to the specific subsection of KRS 61.878(1)(m)1. that applies to its denial, and failure to provide an explanation of how the "homeland security" exemption applies to the requested records, are violations of the Act.

Request No. 3 and Response.

All records related to inmate attendance at the "Night of Prayer," including but not limited to: (a) any LCCC policies regarding releasing inmates from their cells, (b) any communications regarding inmate attendance at the "Night of Prayer," including, but not limited to: memos, emails, social media posts, notes, and meeting minutes.

Response: Enclosed are the 2017 Policy and Procedure Guidelines for the Laurel County Correctional Center. Please be advised that non-exempt public records of the Laurel County Correctional Center may be inspected and copied upon request at 204 W. 4th Street, London, Kentucky between the hours of 9:00 a.m. and 3:00 p.m. EST.

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- h. Records when their disclosure will expose a vulnerability referred to in this subparagraph and that describe the exact location of hazardous chemical, radiological, or biological materials.

The request is denied in part as overly burdensome and exempt pursuant to KRS 61.878(1)(a) wherein the public disclosure of an inmate's free and voluntary religious practice, including worship and/or prayer would constitute a clearly unwarranted invasion of personal privacy.

Analysis of Request No. 3 and Response. As in response to Requests No. 1, and No. 2, LCCC provided the 2017 Policy and Procedure Guidelines without explaining which portions of the Guidelines are responsive to the request. For the same reasons as we explained in our analyses of those responses, LCCC subverted the intent of the Act by failing to separate nonresponsive records from responsive records. LCCC also conflated the exemption for personal privacy (KRS 61.878(1)(a)) with KRS 61.872(6), which allows an agency to refuse unreasonably burdensome requests. LCCC's refusal did not satisfy the burden of proof for either of those sections of the Act.⁶ LCCC's response to this request also constitutes a violation of the Act.

LCCC's response that "non-exempt public records of the Laurel County Correctional Center may be inspected and copied upon request at 204 W. 4th Street, London, Kentucky between the hours of 9:00 a.m. and 3:00 p.m. EST," is also rejected by the same analysis as we set forth in response to Request No. 2. Appellant and his requests meet the requirements of KRS 61.872(3)(b), and LCCC must mail the requested records to Appellant after receipt all fees and cost of mailing.

Request No. 4 and Response.

4. All advertisements or promotional material related to the "Night of Prayer," including drafts of the materials.

Response: The Laurel County Correctional Center is not in custody or control of advertisements, promotional material and/or or drafts thereof related to the "Night of Prayer."

⁶ As explained in our analysis of Request No. 1, the personal privacy exemption requires the agency to explain how public disclosure of the agency's records "would constitute a clearly unwarranted invasion of personal privacy;" and that denying the request on the basis that it constitutes an "unreasonable burden" requires the agency to sustain the refusal "by clear and convincing evidence."

Analysis of Request No. 4 and Response.

A public agency cannot afford a requester access to a record that it does not have or that does not exist. 99-ORD-98. The agency discharges its duty under the Open Records Act by affirmatively so stating. 99-ORD-150. In the absence of legal authority requiring the creation of the records, or facts indicating the records were created, we see no need to require further explanation of the requested documents' nonexistence. See 11-ORD-091. Accordingly, we find no violation of the Open Records Act in LCCC's response to this request.

Two Additional Requests and Responses. Appellant made two additional records requests, each with three subparts:

Additional Request No. 1 and Response.

I further request copies of the following records for the period of January 1, 2015 to the present:

1. (a) any contracts or other agreements with any persons or organizations to provide substance abuse programming at LCCC;
- (b) any communications, including emails, to or from LCCC employees regarding persons or organizations providing substance abuse programming at LCCC;
- (c) any LCCC policies or procedures for creation or dissolution of any substance abuse program.

Response: Enclosed are the 2015, 2016 and 2017 Policy and Procedure Guidelines for the Laurel County Correctional Center. Please be advised that non-exempt public records of the Laurel County Correctional Center may be inspected and copied upon request at 204 W. 4th Street, London, Kentucky between the hours of 9:00 a.m. and 3:00 p.m. EST.

The Laurel County Correctional Center exclusively contracts with the Kentucky Department of Corrections to provide substance abuse programming ("SAP) for inmates. Enclosed are the SAP contracts for 2015, 2016 and 2017.

Analysis of Additional Request No. 1 and Response.

LCCC appears to have responded appropriately to the request for contracts by providing the requested records, but did not respond at all to the request for communications regarding persons or organizations providing substance abuse at LCCC. KRS 61.880(1), in relevant part, states:

Each public agency, upon any request for records made under KRS 61.870 to 61.884, shall determine within three (3) days, excepting Saturdays, Sundays, and legal holidays, 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 three (3) day period, of its decision.

LCCC's failure to respond to the request for communications is a violation of the Act. The response to the request for policies regarding creation or dissolution of any substance abuse program violated the Act by again failing to except out the nonresponsive portions of the records provided, or to explain which parts of the Guidelines are responsive.

Additional Request No. 2 and Response.

The second part of the request for records for the period of January 1, 2015, to the present was:

2. (a) any contracts or other agreements with any persons or organizations to provide religious programming at LCCC;
- (b) any communications, including emails, to or from LCCC employees regarding persons or organizations providing religious programming at LCCC;
- (c) any LCCC policies or procedures for creation or dissolution of any religious program.

Response: No contracts or agreements exist at the Laurel County Correctional Center for religious programming.

Analysis of Additional Request No. 2 and Response.

We again cite to 99-ORD-98 and 99-ORD-150 for the proposition that a public agency cannot afford a requester access to a record that it does not have or that does not exist, and that the agency discharges its duty under the Open Records Act by affirmatively so stating. Accordingly, we find no violation of the Open Records Act by LCCC in responding to this request.

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.

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