

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-001900-MR

JAMES NICK HARRISON

APPELLANT

v. APPEAL FROM FLOYD CIRCUIT COURT  
HONORABLE JOHN DAVID CAUDILL, JUDGE  
ACTION NO. 98-CI-00003

ROGER WEBB, JAILER

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BUCKINGHAM, JOHNSON AND TACKETT, JUDGES.

JOHNSON, JUDGE: James Nick Harrison, pro se, appeals from an order of the Floyd Circuit Court entered on June 29, 1999, which denied his pro se motion for a hearing on his request for copies of medical records from the Floyd County Jail pursuant to the Kentucky Open Records Act.<sup>1</sup> Having concluded that Harrison is not entitled to judicial relief due to his failure to exhaust his administrative remedies, we affirm.

In November 1997, Harrison was an inmate at the Kentucky State Penitentiary in Eddyville, Kentucky, where he

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<sup>1</sup>Kentucky Revised Statues (KRS) 61.870 to 61.884.

worked as a legal aide to fellow inmates. On November 11, 1997, he mailed two requests pursuant to the Kentucky Open Records Act to Roger Webb, the Floyd County Jailer. The requests sought medical records from the Floyd County Jail pertaining to Herbert Gene Salisbury, Jr., who was incarcerated at Eddyville for a murder conviction from Floyd County. The first request sought a copy of the medical records or the logs of the medical records indicating the medication taken by Salisbury between November 12-19, 1994, and December 14-16, 1994.<sup>2</sup> The second request sought documents showing the name and address of the treating physician under contract to the jail in the month of November 1994. Harrison included with the two requests a "GENERAL RELEASE AUTHORIZATION" with Salisbury's notarized signature. This document stated that Salisbury authorized "the release of any and all RECORDS, REPORTS, or other INFORMATION pertaining to me [as] listed on the reverse side hereof" to Harrison, a resident legal aide. Harrison did not receive a response to his requests.

On December 3, 1997, Harrison sent a follow-up letter, which inquired about the lack of a response. That letter included copies of the two previous requests. When Harrison did not receive a response to his letter, he sent a second follow-up letter on December 18, 1997. Again, he received no response from Webb.

On January 5, 1998, Harrison filed a civil complaint in the Floyd Circuit Court pursuant to the Kentucky Open Records

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<sup>2</sup>These dates apparently cover a period when Salisbury was in the Floyd County Jail during his murder trial.

Act. Harrison alleged that Webb had violated his statutory responsibility to respond in good faith to the two open record requests.<sup>3</sup> He asserted that the documents he had requested were public records and that they were subject to disclosure under the Act. Harrison sought injunctive and monetary relief. Webb answered the complaint by denying most of Harrison's factual allegations. He stated that Salisbury's medical records were not subject to disclosure because they were confidential; and that Harrison had no authority to obtain medical records on behalf of Salisbury. Webb sought dismissal of the complaint for its failure to state a claim.

On June 18, 1999, Webb filed a memorandum of law in support of his motion to dismiss, or alternatively, motion for summary judgment. He argued that medical records are not a "public record" within the Kentucky Open Records Act, KRS 61.870(1)(h)(2), because they are not related to the functioning of a state agency. He also claimed that Harrison lacked standing to bring the action, since he had failed as required by KRS 61.872(3)(b) to include with his requests the fees for the copying and the cost of mailing.

On June 29, 1999, the circuit court entered an order dismissing the complaint and striking the pleadings. The circuit court stated that Harrison was improperly practicing law without a license and that he had no connection with Salisbury because he (Harrison) had not been incarcerated at the Floyd County Jail.

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<sup>3</sup>KRS 61.880.

Harrison filed a CR<sup>4</sup> 59.05 motion to amend the judgment. Harrison argued that the circuit court had misconstrued his complaint and that the Kentucky Open Records Act provided any person the right to inspect public records. On July 27, 1999, the circuit court summarily denied the motion to amend. This appeal followed.

Harrison argues that he has the right to receive a copy of Salisbury's medical records from the jail regardless of his reason for requesting the records because the records constitute a "public record" under the Kentucky Open Records Act.<sup>5</sup> He further notes that a "public agency" subject to the provisions of the Open Records Act includes "[e]very state or local government officer[.]"<sup>6</sup> We agree that a county jailer is clearly a local government officer covered by the Act;<sup>7</sup> and generally, a prison inmate has the same right to inspect a public record as any other person.<sup>8</sup>

KRS 61.870(2) provides as follows:

"Public record" means all books, papers, maps, photographs, cards, tapes, discs, diskettes, recordings, software, or other

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<sup>4</sup>Kentucky Rules of Civil Procedure.

<sup>5</sup>KRS 61.870(2).

<sup>6</sup>KRS 61.870(1)(a).

<sup>7</sup>See, e.g., Opinions of the Attorney General (OAG) 79-575 (indicating Perry County Jailer is local officer under the Open Records Act).

<sup>8</sup>KRS 61.872(1) states: "All public records shall be open for inspection by any person . . . ." and KRS 61.872(2) states: "Any person shall have right to inspect . . ." [emphasis added]. See also OAG 92-94. But see KRS 197.025, which limits an inmate's rights regarding an Open Records request.

documentation regardless of physical form or characteristics, which are prepared, owned, used, in possession of or retained by a public agency. "Public record" shall not include any records owned or maintained by or for a body referred to in subsection (1) (h)<sup>9</sup> of this section that are not related to functions, activities, programs or operations funded by state or local authority[.]

Webb argued before the circuit court, and he continues to argue in this appeal, that the medical records requested by Harrison are not a "public record." He relies upon Hardin County v. Valentine,<sup>10</sup> which held the medical records of a patient of a public hospital were not a "public record" under KRS 61.870(2). This Court's holding in Valentine was based on the exclusion contained in the second sentence of KRS 61.870(2),<sup>11</sup> since "the medical records of those patients in a public hospital are not related to the functioning of the hospital, the activities carried on by the hospital, its programs, or its operations."<sup>12</sup> This Court further stated that "patients of a publicly-owned hospital have as great an expectation that their medical records will not be subject to public scrutiny as do the patients of

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<sup>9</sup>KRS 61.870(1) (h) includes within the definition of "public agency," "[a]ny body which derives at least twenty-five percent (25%) of its funds expended by it in the Commonwealth of Kentucky from state or local authority funds[.]"

<sup>10</sup>Ky.App., 894 S.W.2d 151 (1995).

<sup>11</sup>"'Public record' shall not include any records owned or maintained by or for a body referred to in subsection (1) (h) of this section that are not related to functions, activities, programs or operations funded by state or local authority[.]"

<sup>12</sup>Id. at 152.

private hospitals.”<sup>13</sup>

We believe Webb’s reliance on Valentine is misplaced. First, Valentine involved the payment of the costs associated with the production of individual medical records from a public hospital in the course of a personal injury action. The case sub judice concerns medical records in the possession of a local jailer, who is constitutionally and statutorily required to provide medical treatment to inmates.<sup>14</sup> In addition, jailers are required to maintain medical records as a part of each inmate’s jail record.<sup>15</sup> Finally, we do not believe that the exclusion referred to by the Valentine Court applies to county jailers, who fall within subsection (1)(a) of KRS 61.870, rather than subsection (1)(h).

By enacting the Kentucky Open Records Act, our Legislature clearly demonstrated its intention that the Act be applied liberally. KRS 61.871 declares that the basic policy of the Act “is that free and open examination of public records is in the public interest” and that “the exceptions . . . provided by law shall be strictly construed, even though such examination may cause inconvenience or embarrassment to public officials or others.” Accordingly, we believe the issue of another person inspecting an inmate’s medical records is more appropriately

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<sup>13</sup>Id.

<sup>14</sup>Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976); Langley v. Coughlin, 888 F.2d 252, 254 (2d. Cir. 1989); KRS 441.045; 501 Kentucky Administrative Regulations (KAR) 3:090.

<sup>15</sup>501 KAR 3:020(5); KRS 441.055.

analyzed under the privacy exclusion contained in KRS 61.878.<sup>16</sup> However, we also note that under KRS 61.884, “[a]ny person shall have access to any public record relating to him or in which he is mentioned by name, upon presentation of appropriate identification, subject to the provisions of KRS 61.878.” Apparently, Harrison attempted, at least indirectly, to invoke KRS 61.884, by including with his requests the “GENERAL RELEASE AUTHORIZATION” from Salisbury.<sup>17</sup> Thus, we do not agree with Webb that he was entitled to have Harrison’s complaint dismissed by the circuit court based on Valentine.

In the alternative, Webb argues that Harrison’s complaint was properly dismissed by the circuit court because he failed to comply with the exhaustion of remedy provisions of KRS 197.025(3).<sup>18</sup> Under KRS 61.880(1), a public agency is required

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<sup>16</sup>For example, KRS 61.878(1)(a) includes “[p]ublic records containing information of a personal nature where public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy[.]” See generally Kentucky Board of Examiners of Psychologists & Division of Occupants & Professors, Department for Administration v. The Courier-Journal & Louisville Times Co., Ky., 826 S.W.2d 324 (1992); Lexington-Fayette Urban County Government v. Lexington Herald-Leader Co., Ky., 941 S.W.2d 469 (1997); and Zink v. Commonwealth of Kentucky, Department of Workers’ Claims, Labor Cabinet, Ky.App., 902 S.W.2d 825 (1994).

<sup>17</sup>It is unclear why Salisbury did not file the Open Records requests himself. This perhaps would have prevented much of the confusion and problems generated in this case.

<sup>18</sup>Webb has also raised as a defense KRS 197.025(2), which states:

KRS 61.872 to the contrary notwithstanding, the department shall not be required to comply with a request for any record from any inmate confined in a jail or any facility or any individual on active supervision under the jurisdiction of the department, unless

(continued...)

to respond to an open records request in writing within 30 days after receipt of the request. When an agency responds by denying inspection, in whole or in part, it must include a statement of the specific exception that it is relying upon to authorize withholding of access to the record and it must provide an explanation of its application to the record requested. The Legislature created an administrative review procedure for addressing disputes involving open records requests through the Attorney General's Office. KRS 61.880 allows a person who has been denied access to a record the right to a review of that denial in a written decision by the Attorney General. If the Attorney General's decision is not appealed within 30 days, it becomes legally binding and enforceable in circuit court.<sup>19</sup> KRS 61.880(4) also allows a person to file a written complaint with the Attorney General if he feels the intent of the Kentucky Open Records Act "is being subverted by an agency short of denial of inspection[;]" "and the complaint shall be subject to the same adjudicatory process as if the record had been denied."

While a person generally is not required to exhaust the remedy provided by KRS 61.880 before filing suit in circuit

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<sup>18</sup> (...continued)  
the request is for a record which pertains to that individual.

However, that provision did not become effective until July 15, 1998, after Harrison had submitted his requests and after he had filed the civil lawsuit.

<sup>19</sup>KRS 61.880(5)(b).

court,<sup>20</sup> the Legislature has imposed such a requirement for inmates. KRS 197.025(3) provides:

KRS 61.880 to the contrary notwithstanding, all persons confined in a penal facility shall challenge any denial of an open record with the Attorney General pursuant to the procedures set out in KRS 61.880(2) before an appeal can be filed in a Circuit Court.

In the case at bar, it appears that Webb's failure to respond to Harrison's initial two open records requests and to his follow-up requests may have constituted a violation of KRS 61.880(1).<sup>21</sup> This issue was presented to the circuit court by Harrison, but it was not addressed.<sup>22</sup> Moreover, the remedy for a violation based on the failure to provide an adequate response to an open records request is not necessarily the automatic release of the records. In Edmondson v. Aliq,<sup>23</sup> this Court held that review and analysis of the substantive issue of the entitlement to disclosure under the Kentucky Open Records Act is required, even if there has been a violation in the adequacy of the response.

In Aliq, this Court remanded the case for further review by the circuit court. However, since Harrison has not exhausted the remedy requirement of KRS 197.025(3), we must

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<sup>20</sup>KRS 61.882(2).

<sup>21</sup>See OAG 79-575 (finding failure of Perry County Jailer to respond to open records request constituted violation of KRS 61.880(1)).

<sup>22</sup>Similarly, Webb may be subject to monetary damages pursuant to KRS 61.882(5), but the issue has not yet been properly presented to the circuit court.

<sup>23</sup>Ky.App., 926 S.W.2d 856 (1996).

affirm the circuit court in this case - although we do so for a reason different from the one relied upon by the circuit court. We believe the circuit court was mistaken in ruling that Harrison's lack of personal connection with Salisbury's medical records or the Floyd County Jail precluded him from having standing to bring the civil suit to enforce the Kentucky Open Records Act. Consequently, there has not been an adequate review and determination of the substantive merit of Harrison's requests. We hold that Webb's failure to respond to Harrison's requests constituted a denial on both requests for purposes of KRS 197.025(3); and before seeking relief in circuit court, Harrison must exhaust his administrative remedies by seeking review of both requests by the Attorney General.

For the foregoing reasons, the order of the Floyd Circuit Court is affirmed.

ALL CONCUR.

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BRIEF FOR APPELLEE:

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