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

20-ORD-061

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In re: Zachary Combest/Eastern Kentucky University

Summary: Eastern Kentucky University's ("University") initial response to a request for records failed to properly explain why a delay in retrieving records for inspection was justified under KRS 61.872(5), but subsequent correspondence provided an adequate justification. The University's final disposition of the request failed to adequately explain how the attorney-client privilege applied to a record it withheld, but the University justified its use of the exemption on appeal. The University's final disposition of the request explained in sufficient detail how other exceptions applied to specific redactions to records. The University discharged its duty under the Open Records Act ("Act") by searching in good faith and providing the requester with all existing responsive records.

Open Records Decision

On October 28, 2019, Zachery Combest ("Appellant") submitted an open records request to the University seeking, "all emails to and/or from" a list of 12 University staff members, "from October 1, 2019 until October 28, 2019 concerning the position of Director of Athletics at Eastern Kentucky University."

On October 31, 2010, the University responded that "[g]iven the extent and breadth of the request, the number of individual items which [Appellant is] requesting and the time . . . to review and conduct necessary redactions, [the University] will need more time to obtain, review, and determine which records

are responsive[.]" The University stated that the records would be made available on November 26, 2019. On November 18, 2019, the University further explained how Appellant's request was broad and the cause for delay.

On November 26, 2019, the University also provided Appellant 33 pages of responsive records, consisting of 14 emails and attachments. The University stated that the records were redacted or withheld under KRS 61.878(1)(a) to remove "information of a personal nature, such as personal email addresses," revisions "to a working draft" under KRS 61.878(1)(i), "correspondence and documents which are attorney work product and/or attorney/client privileged" under KRE 503 and KRS 61.878(1)(l).

On appeal, Appellant argues that the University's delay was not justified because "records should have been easy to locate and review[.]" Appellant also disputed the University's broad assertion of exceptions, arguing "it has not explained exactly what it is withholding or why[.]" Appellant also argued that the preliminary exemption is inapplicable because the employee to which the emails relate had resigned, and therefore the records were no longer preliminary. Finally, Appellant argued that the University's subsequent correspondence raised doubts that it had produced all existing responsive records because the University originally stated that the request implicated hundreds of records, yet it produced 33 pages of records. In response, the University explained in detail how the parameters of the email search contributed to the delay. Specifically, the University's search had resulted in 8,000 pages and 2,371 emails.

On appeal, the University also explained in detail which redactions were associated with certain preliminary records and attorney-client communications, and how the asserted exceptions applied. Finally, the University affirmatively stated that all potentially responsive pages were reviewed and no additional responsive records exist in its possession.

First, the University's initial response violated the Act when it delayed the final disposition of Appellant's request. KRS 61.880(1) requires a public agency to determine within three business days whether to comply with a request for records. KRS 61.872(5) authorizes a public agency to temporarily delay access to public records "[i]f the public record is in active use, in storage or not otherwise available[.]" But the agency must give "a detailed explanation of the cause" for the

delay and provide "the place, time, and earliest date on which the public record will be available for inspection." KRS 61.872(5).

Although not defined under the Act, "available" means "present or ready for immediate use" according to Merriam-Webster's Dictionary. The process of retrieving, reviewing, and redacting records is not an "unreasonable burden" under the Act sufficient to completely deny the request. KRS 61.872(6); *see also Commonwealth v. Chestnut*, 250 S.W.3d 655, 665 (Ky. 2005) (finding that consumption of time and manpower is not an unreasonable burden.). But, in some circumstances, the process may require such additional time that the records are not "ready for immediate use." Thus while denial of the request may be improper, a delay may be proper so long as the agency complies with KRS 61.872(5) and gives a detailed explanation for the cause of delay. *See*, *e.g.*, 12-ORD-097.

In its original response on October 31, 2019, the University claimed, without explanation, that Appellant's request was broad and asserted that it needed additional time to comply. This initial response was deficient because it failed to explain in detail how the request was so broad that it encompassed records "not otherwise available." KRS 61.872(5). However, the University's subsequent response on November 18, 2019 explained that Appellant's request produced 600 pages of potentially responsive records from just two of the twelve email accounts because a search for "Director of Athletics" produced hundreds of emails that included that term.[1] On appeal, the University explained that once all twelve email accounts were searched, 8,000 pages of potentially responsive records were discovered. The University was then required to review each email to determine whether its contents were responsive to the request.

In addition to reviewing each email for responsiveness, the University also had to ensure no confidential material was inadvertently released. As such, the University's subsequent response adequately explained why the requested records were "not otherwise available" under KRS 61.872(5). The University's subsequent response complied with KRS 61.878(5) by explaining why the records were not otherwise available, and stating records would be available on

[1] Some of the employees encompassed by the request had a variation of the term "Director of Athletics" as their job title, such as "Senior Associate Director of Athletics", and each of the employee emails concluded with their title as part of the electronic signature, resulting in numerous potentially responsive records.

November 26, 2019, less than thirty days after Appellant's request. But its subsequent explanation occurred more than three business days after Appellant's request. Therefore, its initial response violated the Act. KRS 61.880(1); KRS 61.872(5).

Second, the University's final disposition of Appellant's request did not adequately explain the University's reliance on the attorney-client privilege. Under the Act, an "agency response denying, in whole or in part, inspection of any record shall 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). The University's final disposition of the request stated that it was withholding "emails between University Counsel and various individuals" under the attorney-client privilege. The University correctly cited the specific exception, KRE 503 and KRS 61.878(1)(l). However, the University failed to explain how the attorney-client privilege applied to the records withheld. Under KRE 503(b), the privilege encompasses any confidential communication between a lawyer and a client or a representative of the client that is "made for the purpose of facilitating the rendition of professional legal services to the client." The University's description of the withheld emails failed to state that the emails contained communications "facilitating the rendition of professional legal services" and it failed to state that such communications were directed to or from "clients." On its face, "various individuals" provides no indication that those individuals were clients seeking legal advice.

On appeal, the University described the contents of the emails withheld and confirmed that the communication was solely between University counsel and employees for the rendition of legal advice. While the University eventually justified its reliance on the attorney-client privilege, and this Office agrees that it does apply to the records withheld, the University's failure to provide this explanation in its response to the Appellant constitutes a violation of KRS 61.880(1).

Third, the University's response did adequately explain the other exemptions it relied upon. Specifically, the University's response explained that "edits to a working draft" were withheld or redacted. KRS 61.878(1)(i) exempts, "preliminary drafts, notes, correspondence with private individuals other than correspondence which is intended to give notice of final action of a public agency."

The records the University produced contained an email chain with the subject line "drafts" and statements by employees indicating changes had been made and sought review of those changes. Another email contained the final press release that was issued. The University adequately explained that the subject draft was a "working draft," and the unredacted contents of the emails support this assertion. The revisions that were adopted by the University are contained in the final press release, a copy of which was provided to Appellant. Accordingly, the University did not violate the Act in its reliance on this exception.

Likewise, the University properly relied on the personal privacy exemption in KRS 61.878(1)(a) to redact personal email addresses. In *Kentucky New Era, Inc. v. City of Hopkinsville,* 415 S.W.3d 76, 83 (Ky. 2013), the Supreme Court upheld the categorical redaction of certain information, such as home addresses and telephone numbers and Social Security numbers, because it is not routinely pertinent to the public interest served by the Open Records Act. Personal email addresses are no different than personal telephone numbers, which this Office has previously found appropriate for redaction under this exemption. *See*, *e.g.*, 16-ORD-205. Accordingly, the University properly relied on KRS 61.878(1)(a) and did not violate the Act because it explained the redaction applied only to personal email addresses.

Finally, the University met its burden that no additional responsive records exist. A public agency cannot produce that which it does not have nor is a public agency required to "prove a negative" to refute a claim that certain records exist in the absence of a *prima facie* showing by the complainant. *See Bowling v. Lexington-Fayette Urban Cty. Gov't*, 172 S.W.3d 333, 341 (Ky. 2005). Only after the requester establishes a *prima facie* case that additional records exist is the public agency required to explain the adequacy of its search. *City of Ft. Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 848 n.3 (Ky. 2013). Here, Appellant only speculates additional responsive records should exist because the University previously explained that his broad request implicated 600 emails. But just because the initial search presents potentially responsive records does not mean that the records are actually responsive following review. Even though Appellant failed to establish a *prima facie* case, the University explained the adequacy of its search both in its subsequent correspondence to Appellant on November 18, 2019, and in its response on appeal. Accordingly, the University met its obligation under the Act.

A party aggrieved by this decision shall 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.

Daniel Cameron
Attorney General

/s/ John Marcus Jones

J. Marcus Jones
Assistant Attorney General

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Distributed to:

Zachary Combest
Dana D. Fohl, Esq.
Micah Farley Hunsucker