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**20-ORD-062**

April 27, 2020

In re: Gerry L. Calvert/Commonwealth Office of Technology

**Summary:** The Commonwealth Office of Technology (“COT”) is not the “official custodian” of most of the public records that Appellant requested from it. Therefore, COT did not violate the Open Records Act (“Act”) by referring the requester to a different public agency in whose custody and control those records would most likely reside. KRS 61.872(4). However, COT is the “official custodian” of COT-F084 forms submitted to it, and violated the Act by failing to either produce those records or cite a statutory basis for denying inspection.

***Open Records Decision***

On February 27, 2020, Gerry L. Calvert (“Appellant”) requested a copy of the following public records:

- 1) Any e-mail sent or received, from September 20, 2019, through February 26, 2020 by 14 named state employees;
- 2) Any COT-F084 forms submitted to COT by any employee or agent of the Kentucky Department of Criminal Justice Training (“DOCJT”); and
- 3) Any word processing document created, edited, or deleted on any computer or other electronic device issued to DOCJT employee Joey Barnes (Joey.Barnes@ky.gov), from September 20, 2019, through January 28, 2020.

On March 26, 2020, Appellant initiated this appeal alleging that COT had not provided any response as of that date.<sup>1</sup>

Under the Act, each public agency must designate an official custodian of records and identify the “title and address of the official custodian of the public agency’s records.” KRS 61.876(1)(b). On appeal, COT argues that it “is not the Official Custodian of all agency client records” within the meaning of KRS 61.870(5). COT asserted that “[n]ot only would COT abuse its authority by disclosing client data without permission, but it [is] not well-equipped in a practical sense to make determinations about agency-specific laws prohibiting disclosure of certain data[.]” This Office agrees.

COT is not an officer or employee of DOCJT, the state agency to which Appellant should have directed his first and third requests. That is because COT is not “responsible for the maintenance” of DOCJT’s records, and it does not maintain “personal custody and control” of DOCJT’s records. *See* KRS 61.870(5); KRS 61.870(6). KRS 42.726 identifies the roles, duties, and permissible activities for COT. In short, COT provides “technical support and services to all executive agencies of state government in the application of information technology.” KRS 42.726(2)(a). Therefore, COT can provide technical support for agencies in fulfilling open records requests, but COT is not the custodian to which a requester should make a request for public records merely because the requester seeks electronic records. In 19-ORD-091, this Office exhaustively analyzed COT’s responsibilities and role regarding electronic records. The analysis contained therein applies equally in this appeal for Appellant’s first and third requests.

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<sup>1</sup> On appeal, Appellant contends that no public agency responded to his request. Although Appellant failed to direct his request to COT’s records custodian, the Finance and Administration Cabinet (“Cabinet”) processes open records requests for COT, received the request on February 28, 2020, and attempted to provide Appellant the contact information for the records custodian of the agency believed to possess the records. In doing so, the Cabinet discharged its duty under KRS 61.872(4). *See also Baker v. Jones*, 199 S.W.3d 749, 752 (Ky. App. 2006). Appellant’s additional objection, that he did not request a response via e-mail, is unpersuasive in light of his actions. Appellant transmitted his request via e-mail and requested responsive records be transmitted to him via the same e-mail address. He did not request the agency to deliver a written response by U.S. mail as he now claims it should have done, but the record on appeal confirms that the Cabinet responded via e-mail within three business days of its receipt of the request on March 3, 2020. KRS 61.880(1).

Quite simply, the fact that a public agency may have access to a particular record does not make that agency the custodian of the record. For example, the Kentucky Department for Libraries and Archives possesses court records for the purpose of providing archival services to Kentucky courts, but the Kentucky Supreme Court retains control of those records. *See, e.g.*, 20-ORD-009. And the Kentucky Department of Education has access to the e-mails of local school districts, but the local districts maintain the custody and control of those e-mails. *See, e.g.*, 15-ORD-190.

However, COT is a public agency subject to the Act. KRS 61.870(1). And it is axiomatic that there are records for which COT is the custodian. Here, Appellant requested to inspect “COT-F084 forms” submitted to COT. These are the forms that other public agencies submit to COT to invoke its services. In 19-ORD-091, COT compared itself to a “handyman” who may have access to a separate public agency’s digital home, but no right to open that digital home for others. That is an apt comparison. And here, if COT is a handyman, the COT-F084 forms are in the nature of “to-do lists” for the handyman. Without the forms, there is no reason for COT to have access to the agency’s electronic files in the first place. According to COT’s own policy, it “will log the [COT-F084] request and send it to the COT Chief Information Security Officer, or his designee for final approval.”<sup>2</sup> Thus, COT is not the custodian of all electronic records in the Commonwealth, but it is the custodian of the forms other public agencies may submit to it to request its services. From the record on appeal, COT did not provide the requested COT-F084 forms, state whether they did or did not exist, or, if they did exist, provide any explanation to justify its withholding of the forms.<sup>3</sup> KRS 61.880(1). In this regard, it violated the Act.

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 proceedings.

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<sup>2</sup> CIO-084 E-mail Review Request, Commonwealth Office of Technology, available at <https://technology.ky.gov/policy/Pages/CIO-084.aspx> (last visited April 27, 2020).

<sup>3</sup> This Office makes no finding as to whether COT-F084 forms are exempt from inspection under KRS 61.878(1) because COT did not invoke a statutory basis for denying access to such forms and the question is therefore not ripe for review.

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