



COMMONWEALTH OF KENTUCKY
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20-ORD-136

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In re: John Moberly/Office of Attorney General

Summary: The Office of Attorney General (“Office”) did not violate the Open Records Act (“the Act”) in responding to open records requests delivered to one current and to one former employee of the Office.

Open Records Decision

On May 28, 2020, John Moberly (“Appellant”) hand-delivered two open records requests to the Office of the Attorney General. The requests were directed to M. Stephen Pitt and S. Chad Meredith.¹ The requests sought “[c]opies of all records concerning applications for, and/or the granting of, pardons and/or commutations by former Governor Matthew Bevin.” Appellant also requested copies of all records pertaining to certain contracts between the Commonwealth and a specified law firm.

In a consolidated and timely response, the Office notified Appellant that it was not the official custodian of records for the Office of the Governor or the Finance and Administration Cabinet, and that those two agencies would likely possess responsive records. The Office provided Appellant the contact information for the records custodians of those agencies. Nevertheless, the Office searched for responsive records, and provided a brief explanation that some records were exempt from production under

¹ Mr. Pitt and Mr. Meredith were formerly employed by the Office of the Governor until December 9, 2020. On December 17, 2019, both men became employees of the Office of Attorney General. Mr. Pitt was no longer employed with this Office at the time the request was received. The hand-delivered request indicated copies had also been emailed directly to Mr. Pitt and Mr. Meredith.

KRS 61.878(1)(i) and (j). Citing KRS 61.872(5), the Office also informed Appellant that other records were unavailable at the time of the request and that the earliest date on which responsive public records would be available for inspection was June 22, 2020. This appeal followed.

On appeal, Appellant does not object to the Office's response insofar as it required additional time to produce records for inspection under KRS 61.872(5). He also does not object to the Office withholding certain records as exempt. Rather, Appellant objects to the Office's response on behalf of Mr. Pitt and Mr. Meredith. Appellant insists that Mr. Pitt and Mr. Meredith, individually, are public agencies under KRS 61.870(1)(a), that the Office had no authority to respond to requests submitted to those individuals, and that each individual must personally respond to his request. For the reasons that follow, the Office did not violate the Act.

Essentially, Appellant's chief complaint is that the wrong person responded to his request. According to Appellant, a requester may direct an open records request to an individual employed by any state agency, and demand that that individual personally respond to his or her request. He bases that assertion on the definition of "public agency" in KRS 61.870(1)(a), and on his assertion that Mr. Pitt and Mr. Meredith are "officers" under that provision. However, Appellant cites no authority, either prior decisions of this Office or case law, to suggest that unelected, unclassified employees are themselves "public agencies" within the meaning of KRS 61.870(1)(a). In fact, this Office has routinely recognized that KRS 61.870(1)(a) applies to elected officials. *See e.g.* 19-ORD-95, n.2 (finding that a city council member and local mayor are each "public agencies" under KRS 61.870(1)(a)); 11-ORD-078 (finding that a county jailer, an elected official, is a public agency under KRS 61.870(1)(a)); 10-ORD-181 (same as applied to a County Judge/Executive). Regardless, records created by employees of state or local government employees are subject to the Act under KRS 61.870(1)(b), so there is no basis to conclude that unelected, unclassified employees are themselves "public agencies" under KRS 61.870(1)(a).

Moreover, Appellant's assertion defies the Act's requirements. *See Cty. of Harlan v. Appalachian Reg'l Healthcare, Inc.*, 85 S.W.3d 607, 611 (Ky. 2002) ("General principles of statutory construction hold that a court must not be guided by a single sentence of a statute but must look to the provisions of the whole statute and its object and policy."). The Act requires each agency to designate an official custodian of records to respond to requests. *See, e.g.*, KRS 61.872(1); KRS 61.872(2); KRS 61.872(4); KRS 61.872(5); KRS 61.872(6); KRS 61.876(1)(b); KRS 61.880(1); *see also* 200 KAR 1:020 §§ 3, 5. Nothing in the Act requires that the Office's employees personally respond to a request. Indeed,

Appellant's interpretation of the Act would require each "state" and "local government officer" to adopt an open records policy and to appoint his or herself as the records custodian. *See* KRS 61.876. According to Appellant's proposed construction of the Act, the Governor would be required to respond personally to all requests submitted to him. So too would the Secretary of the Finance and Administration Cabinet if a request was submitted to the Secretary. Appellant endorses an interpretation of one provision of the Act in a manner that would fragment the public's access to public records, hinder agency work, and likely result in incomplete responses or, worse, no response at all. Instead, KRS 61.870(1) makes clear that records created by a broad array of officials, employees, and individuals are subject to the Act. For that reason, the Act requires that each employee of a public agency must "acknowledge the authority of" and defer to the agency's records custodian. OAG 92-031. Thus, an agency's records custodian provides the response to an open records request. KRS 61.880(1) ("The response shall be issued by the official custodian or under his authority, and it shall constitute final agency action.").

Here, as required by KRS 61.876(1), the Office has designated an official records custodian in its Open Records Policy. That policy requires that employees "date-stamp any request to inspect or otherwise receive records upon receipt, and deliver the request immediately to the Records Custodian." Policy at 2. The official custodian must then assign an identification number to the request and track it through its completion. *Id.* The Policy further provides that the official custodian "shall provide a response to the records request." *Id.* That is what happened here. The Office properly directed Appellant's requests to its records custodian for response, which was timely provided. For these reasons, the Office did not violate the Act in directing the request made on its employees to its records custodian for response.

Finally, the Office did not violate the Act simply because it was unable to produce records that are not within its possession. Rather, the Office's records custodian directed Appellant to submit his request to the Governor's Office and the Finance and Administration Cabinet because the records he sought related to the functions of those public agencies. In fact, Appellant asserts that "any such records are property of the Governor's Office and Finance and Administration Cabinet." The Office, therefore, properly referred Appellant to the records custodians for each of those agencies because those are the individuals "responsible for the maintenance, care and keeping of public records, regardless of whether such records are in his [or her] actual personal custody and control." KRS 61.870(5); *see also* 200 KAR 1:020 § 2(3). Thus, Appellant should have directed his request to the Finance and Administration Cabinet and the Office of the Governor, "the employing agencies [and the user agencies] of the [two] individuals" who created the records sought. 19-ORD-091 (holding that "data on state-issued devices, used

by employees of other agencies, constitutes records of the user agencies and not records of COT"). For these reasons, the Office did not violate 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.

Daniel Cameron
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/s/ Marc Manley
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Distributed to:

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