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24-ORD-152

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In re: Jewish Student Center/University of Kentucky

Summary: The University of Kentucky ("the University") violated the Open Records Act ("the Act") when it denied a request for records as unreasonably burdensome.

Open Records Decision

On April 10, 2024, the Jewish Student Center[1] ("the Appellant") submitted a request to the University to inspect "all emails, documents, and correspondence containing the word 'Chabad' from" the University's Director of Religious and Spiritual Life, from January 11, 2022, to the date of the request. In a timely response, the University denied the request as "unduly burdensome pursuant to KRS 61.872(6), as an attempt to search for the records under such vague information has returned over 2,500 pages of documents [and] without more specific information, [the University] cannot narrow the production to determine what documents are responsive to this request." This appeal followed.

A person may inspect public records by receiving copies in the mail "after he or she *precisely* describes the public records which are readily available with the public agency." KRS 61.872(3)(b) (emphasis added). But if, as here, the requester seeks to inspect records in person, he need only "describ[e] the records to be inspected." KRS 61.872(2)(a). As such, the description is sufficient if it is "adequate for a reasonable person to ascertain the nature and scope of [the] request." *Commonwealth v. Chestnut,* 250 S.W.3d 655, 661 (Ky. 2008).

[1] The email containing the Appellant's request was not signed by anyone, nor did it contain the requesting individual's name or a statement that demonstrated how the Appellant qualified as a resident of the Commonwealth of Kentucky. Under KRS 61.872(2)(a), a public agency may require a written request for inspection that contains the name and signature of the person making the request, as well as "a statement . . . of the manner in which the applicant is a resident of the Commonwealth under KRS 61.870(10)(a) to (f)." Here, however, the University has waived those requirements.

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Here, the Appellant described the records as "all emails, documents, and correspondence" from an identified University employee during a 27-month period that contain the word "Chabad." On appeal, the University claims the request would require it to search "incalculable numbers of widely dispersed and ill-defined records." However, the Appellant's request is limited in temporal scope, limited to records originated by one individual, and limited by a specific keyword. The University has already conducted a search of the Appellant's emails, which has yielded approximately 2,500 responsive records, but claims it cannot determine which records are implicated by the terms "documents" and "correspondence."

"Correspondence" is not an excessively vague description, as "the common and ordinary meaning of 'correspondence' is 'communication by letters or email,' or 'the letters or emails exchanged.'" 22-ORD-255. Thus, a reasonable person can determine the nature of a request for "correspondence." "Documents," by contrast, is potentially a much broader term that could encompass many types of records. But here, the request is limited to documents "from" a specific employee during a specific time period. Thus, this is not an "any and all records" type of request, and the description of the records is sufficient for a reasonable person to ascertain the nature and scope of the Appellant's request.

The University further claims it would be unreasonably burdensome to fulfill the Appellant's request. Under KRS 61.872(6), a public agency may deny a request to inspect records "[i]f the application places an unreasonable burden in producing public records or if the custodian has reason to believe that repeated requests are intended to disrupt other essential functions of the public agency." However, an agency must substantiate its denial "by clear and convincing evidence." *Id*. When determining whether a particular request places an unreasonable burden on an agency, the Office considers the number of records implicated, whether the records are in a physical or electronic format, and whether the records contain exempt material requiring redaction. *See, e.g.*, 97-ORD-088 (finding that a request implicating thousands of physical files pertaining to nursing facilities was unreasonably burdensome, where the files were maintained in physical form in several locations throughout the state, and each file was subject to confidentiality provisions under state and federal law). In addition to these factors, the Office has found that a public agency may demonstrate an unreasonable burden if it does not catalog its records in a manner that will permit it to query keywords mentioned in the request. *See, e.g.*, 96-ORD-042 (finding that it would place an unreasonable burden on the agency to manually review thousands of files for the requested keyword to determine whether such records were responsive).

Here, the University claims the request is unreasonably burdensome for four reasons. First, it claims the description is excessively vague because it requires a search of records "that may be found throughout the University." But this is not the

case. A public agency discharges its duty under the Act "by searching in the location where responsive [records] would likely exist." 24-ORD-112. Here, that location would likely be the named employee's computer or email account. *See* 20-ORD-094 (finding that an agency conducted an adequate search for emails to and from four named employees by searching their individual email accounts). Because the Appellant has provided a searchable keyword and a limited time period for the request, the University's duty to search the sender's computer or email account is not an unreasonable burden.

Second, the University claims the request is unreasonably burdensome because it "implicates the constitutional rights" of its employee. As the Office has consistently noted, "[i]ssues unrelated to the Open Records Act are beyond the Attorney General's review powers under KRS 61.880," including constitutional issues. 09-ORD-057 (citing 08-ORD-142; 99-ORD-121); *see also* 17-ORD-086; 06-ORD-161; 05-ORD-183 n.5. Here, in support of its claimed First Amendment violation, the University cites a footnote in 23-ORD-349, a decision concerning a request for text messages on privately-owned devices. But the Appellant did not request messages from a University employee's privately-owned device, nor are such messages presumptively "public records" under the Act. *See* 24-ORD-118. Rather, a public agency "is responsible only for those records within its own custody or control." *City of Fort Thomas v. Cincinnati Enquirer,* 406 S.W.3d 842, 856 (Ky. 2013) (citing *Kissinger v. Reporters Comm. for Freedom of the Press,* 445 U.S. 136 (1980)). Here, the University has custody and control of its employee's public email account. Accordingly, the request is not unreasonably burdensome by reason of the types of records it encompasses or any purported constitutional implications.

Third, the University argues it is unreasonably burdensome to review and redact the records responsive to the request. Under the Act, if a record contains both exempt and nonexempt portions, "the public agency shall separate the excepted and make the nonexempt material available for examination." KRS 61.878(4). "[T]he obvious fact that [redaction] will consume both time and manpower is, standing alone, not sufficiently clear and convincing evidence of an unreasonable burden." *Chestnut,* 250 S.W.3d at 664. Thus, "[n]either the number of records at issue nor the fact they must be redacted, in isolation, is dispositive of whether a request is unreasonably burdensome." 24-ORD-008. Here, the University's search of its employee's email account has resulted in approximately 2,500 responsive emails.[2] The University represents that it would take an employee approximately 40 hours to review and redact those records. Although the University may have been able to sustain the need to delay access to records under KRS 61.872(5) on that basis, *see* 21-ORD-045, it has not sustained by clear and convincing evidence that the task places

[2] It is not clear whether the University's search included attachments to emails that include the search term, or only the text of the emails themselves.

such an unreasonable burden on the agency that the request could be fully denied under KRS 61.872(6).

Finally, the University argues the request is unreasonably burdensome due to the "triviality" of the Appellant's motive for making the request, which the University claims is "to pursue personal grudges." In general, however, the "motive or purpose of [a] request is irrelevant" under the Act. 95-ORD-27. More specifically, the requester's motive is only relevant under KRS 61.872(6) if the agency can prove by clear and convincing evidence "that repeated requests are intended to disrupt other essential functions of the public agency." The University has offered no such proof here. Accordingly, the University violated the Act when it denied the Appellant's request as unreasonably burdensome under KRS 61.872(6).[3]

A party aggrieved by this decision may appeal it by initiating an action in the appropriate circuit court pursuant to KRS 61.880(5) and KRS 61.882 within 30 days from the date of this decision. 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. The Attorney General will accept notice of the complaint emailed to OAGAppeals@ky.gov.

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/s/ James M. Herrick
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[3] Alternatively, the University claims the Appellant's request may be partially denied under KRS 61.878(1)(a), KRS 61.878(1)(i), KRS 61.878(1)(j), KRS 61.878(1)(k), KRS 61.878(1)(s), 20 U.S.C. § 1232g, and the attorney-client privilege. However, because the University has not yet denied inspection of any specific records on those grounds, those arguments are not ripe for review.