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24-ORD-199

September 17, 2024

In re: Mark Alsip/Northern Kentucky Convention and Visitors Bureau

Summary: The Northern Kentucky Convention and Visitors Bureau (the "Bureau") violated the Open Records Act ("the Act") when it failed to respond to a request made under the Act within five business days. The Bureau violated the Act when it denied the first part of the request as unreasonably burdensome. But the Bureau did not violate the Act when it denied the second part of the request that did not sufficiently describe the public records sought.

Open Records Decision

On May 20, 2024, Mark Alsip ("Appellant") submitted a request to the Bureau for "copies of all correspondence, both email and paper, between" the Bureau and 13 named individuals. The Appellant also requested emails between the Bureau and all members of eleven "Faith Trail sites." On June 17, 2024, the Bureau confirmed receipt of his request and explained that it was "working on a response and will have that to [him] within the next week." On August 19, 2024, having received no further response from the Bureau, the Appellant initiated this appeal.

Upon receiving a request to inspect records, a public agency must decide within five business days whether to grant the request or deny the request and explain why. KRS 61.880(1). Here, the Bureau received a request from the Appellant on June 17, 2024, and its response did not grant the request or deny it and explain why.[1] The

[1] The Bureau's June 17 response stated it was "working on a response and will have that to [him] within the next week," but it did not invoke KRS 61.872(5) to delay the Appellant's access to the records he requested. A public agency may also delay access to responsive records beyond five business days if such records are "in active use, storage, or not otherwise available." KRS 61.872(5).

Bureau does not dispute it failed to issue a timely response to the Appellant's request. As a result, the Bureau violated the Act.

On appeal, the Bureau now denies the Appellant's request and asserts that it is "vague, overly broad, and does not provide enough key words or a specific time frame to narrow the results to a manageable amount of documents for [it] to properly review" since it "produced 8,576 potentially responsive documents." The Bureau argues the Appellant's request for "all correspondence, both email and paper" from 13 individuals did not precisely describe the records to be inspected or give a sufficient enough description to "yield a manageable result" as required under KRS 61.872(3)(b) and that "many of the requested records would be subject to KRS 61.878(1)(l)" and exempt from inspection.

Under KRS 61.872(3)(b), "[t]he public agency shall mail copies of the public records to a person . . . after he or she precisely describes the public records which are readily available within the public agency." A description is precise "if it describes the records in definite, specific, and unequivocal terms." 98-ORD-17 (internal quotation omitted). This standard may not be met when a request does not "describe records by type, origin, county, or any identifier other than relation to a subject." 20-ORD-017 (quoting 13-ORD-077). Requests for any and all records "related to a broad and ill-defined topic" generally fail to precisely describe the records. 22-ORD-182; *see, e.g.*, 21-ORD-034 (finding a request for any and all records relating to ""change of duties," "freedom of speech," or "usage of signs" did not precisely describe the records).

Here, regarding the first portion of the Appellant's request, he did not seek "any-and-all records" related to a broad and ill-defined topic. Rather, he sought communications between 13 individuals identified by email address and the bureau. "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." Further, the Office has previously found that a request for all emails sent to the agency's 30 employees from three individuals and eleven specific email addresses was not unduly vague. *See* 23-ORD-230. Here, the first portion of the request is sufficiently specific for the Bureau to conduct the search the Act requires. Thus, the Bureau violated the Act when it denied the first portion of the Appellant's request under KRS 61.872(3)(b).

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The second part of the Appellant's request must be analyzed differently. That part of the request sought emails and messages between the Bureau and all members of eleven "Faith Trail sites." Unlike the first part of the request, the Appellant has not specified any specific individuals whose correspondence he seeks. Rather, he identifies eleven entities and seeks any correspondence with any of their members. Further, this part of the request is not limited by temporal scope or by topic or keyword. Thus, the Bureau did not violate the Act when it denied the second part of the Appellant's request.

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). When a request does not "precisely describe" the records to be inspected, KRS 61.872(3)(b), chances are higher that the agency is incapable of searching its records using the broad and ill-defined keywords used in the request.

"The obvious fact that complying with an open records request will consume both time and manpower is, standing alone, not sufficiently clear and convincing evidence of an unreasonable burden." *Commonwealth v. Chestnut*, 205 S.W.3d 655, 665 (Ky. 2008). Rather, an agency relying on KRS 61.872(6) "must support its claim with the facts and evidence, such as the volume of responsive records, the difficulty in locating or accessing the records, the amount of time that complying with the request would require, or any other specific and relevant facts indicating that compliance with the request would actually impose an unreasonable burden." 20-ORD-008. Here, the Bureau states it located "8,576 potentially responsive documents" based on the Appellant's query. Although the number of records at issue is not the only factor the Office considers, it is the most important one. *See, e.g.*, 22-ORD-182. The Office has previously found that searching and sorting through 5,000 emails to separate exempt emails from nonexempt emails was not an unreasonable

burden, when it was not clear the emails contained information that was required to remain confidential by law. *See, e.g.*, 22-ORD-255; 24-ORD-008 (finding the agency had "not sustained by clear and convincing evidence that" reviewing 2,607 emails for exempt material placed "an unreasonable burden on the agency"). However, because the Office agrees that the second part of the Appellant's request did not precisely describe records to be inspected, it is not clear whether that number remains accurate.

Further, the only potential exemption the Bureau identifies is KRS 61.878(1)(l), which operates in tandem with KRE 503 to exclude from inspection public records protected by the attorney-client privilege. *Hahn v. Univ. of Louisville*, 80 S.W.3d 771 (Ky. App. 2001). However, when a party invokes the attorney-client privilege to shield documents in litigation, that party carries the burden of proof. That is because "broad claims of 'privilege' are disfavored when balanced against the need for litigants to have access to relevant or material evidence." *Haney v. Yates*, 40 S.W.3d 352, 355 (Ky. 2000) (quoting *Meenach v. Gen. Motors Corp.*, 891 S.W.2d 398, 402 (Ky. 1995)). So long as the public agency provides a sufficient description of the records it has withheld under the privilege in a manner that allows the requester to assess the propriety of the agency's claims, then the public agency will have discharged its duty. *See City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 848–49 (Ky. 2013) (providing that the agency's "proof may and often will include an outline, catalogue, or index of responsive records and an affidavit by a qualified person describing the contents of withheld records and explaining why they were withheld").

But here, the Bureau states only that the Appellant's request "includes [an] overwhelming amount of responsive communications made for the purposes of securing professional legal opinions and advice" because the Bureau has recently received threats of litigation. But seven of the eleven email addresses are employees in city tourism departments or the official tourism email address of the cities. Thus, it is not clear how an "overwhelming amount of responsive communications" are exempted by KRE 503 because the majority of identified email addresses are associated with city tourism departments. Therefore, the Bureau has not met its burden in invoking the attorney-client privilege.

Thus, because it is not clear that "8,576 potentially responsive documents" are implicated by the first part of the Appellant's request and because the Bureau has not met its burden in invoking the attorney-client privilege, the Bureau has not met its burden under KRS 61.872(6). While the Bureau may have been able to sustain the need to delay access to those records under KRS 61.872(5), it certainly has not

sustained by clear and convincing evidence that the task places such an unreasonable burden on the agency that the request could be fully denied under KRS 61.872(6). Accordingly, the Department has not sustained by clear and convincing evidence that the Appellant's request places an unreasonable burden on it.

A party aggrieved by this decision may appeal it by initiating an action in the appropriate circuit court under KRS 61.880(5) and KRS 61.882 within 30 days from the date of this decision. Under 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.

Russell Coleman
Attorney General

/s/ Zachary M. Zimmerer
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Distributed to:

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