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24-ORD-235

November 8, 2024

In re: John Fritz/University of Kentucky

Summary: The University of Kentucky ("the University") did not violate the Open Records Act ("the Act") when it could not provide records that do not exist, when it denied requests for information, or when it denied requests for copies of records that did not precisely describe the public records requested. However, the University violated the Act when it failed to make specific responses to requests that precisely described the records, stating whether the records existed and, if so, explaining its reasons for denying those requests.

Open Records Decision

On September 6, 2024, John Fritz ("the Appellant"), a former patient of the University's College of Dentistry student clinic, submitted a complex nine-part request to the University for records and information related to the clinic. In the first part of his request, the Appellant sought copies of communications between September 1 and 6, 2024, "giving notice of final action of the [dental clinic] regarding status of [certain] insurance programs." The University responded that there were no records responsive to that portion or any other portion of the request giving notice of final action. The University denied the remaining eight parts of the request as "unreasonably burdensome under" KRS 61.872(6) because they were "broad and imprecise." Additionally, the University denied the request under KRS 61.878(1)(i) and (j) to the extent it sought "preliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency," or "preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended." Finally, the University denied the request due to attorney-client privilege under KRE 503 "to the extent [it] seeks communications between the University's attorneys and other University officials seeking professional services from the attorneys, including requests for advice and providing information necessary for the attorneys to formulate legal advice." This appeal followed.

The Appellant claims the University improperly "lumped" the parts of his request together into one denial instead of responding to each part separately. Here, each part of the Appellant's request will be analyzed independently.

In part 1 of his request, the Appellant requested certain communications giving notice of final action "regarding status of" Medicare, Cigna, Delta Dental, and Medicaid insurance. The University has denied that any such records exist. Once a public agency states affirmatively that a record does not exist, the burden shifts to the requester to present a *prima facie* case that the requested record does exist. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov't,* 172 S.W.3d 333, 341 (Ky. 2005). A requester's bare assertion that an agency must possess requested records is insufficient to establish a *prima facie* case that the agency actually possesses those records. *See, e.g.*, 22-ORD-040. Rather, to present a *prima facie* case that the agency possesses or should possess the requested records, the requester must provide some statute, regulation, or factual support for that contention. *See, e.g.,* 21-ORD-177; 11-ORD-074. Here, the Appellant provides no foundation for his belief that responsive records exist. Because the Appellant has not established a *prima facie* case that these records exist, the University did not violate the Act with regard to part 1 of the request.

In parts 2 and 3 of his request, the Appellant requested certain "statistical information" regarding "the total number of dental patients seen" during specific time periods and how many patients used Medicare or Medicaid. The Act, however, does not require public agencies to fulfill requests for information, but only requests for records. *See* KRS 61.872(2)(a) (a request to inspect records must include, among other things, a description of "the records to be inspected"); *see also Dep't of Revenue v. Eifler,* 436 S.W.3d 530, 534 (Ky. App. 2013) ("The [Act] does not dictate that public agencies must gather and supply information not regularly kept as part of [their] records."). Here, the Appellant requested only "information" regarding numbers of dental patients. On appeal, the University asserts it "does not have records with that information." Furthermore, these parts of the Appellant's request did not describe any public records he wished to inspect. Accordingly, the University did not violate the Act when it did not provide the information requested in parts 2 and 3. *See, e.g.,* 24-ORD-195.

In parts 4 and 5 of his request, the Appellant requested copies of certain communications "by and between" certain persons "and their agents and assigns including but not limited to other employees and third-party contractors." Those persons include five named University employees; "UK Healthcare's agents and assigns (including but not limited to the employee(s) serving as Manager of the dental practices) involved in the decision [to] terminate Medicare insurance"; "[e]lected officials including but not limited to" the Governor, state legislators, and members of Kentucky's congressional delegation; and "[s]takeholders affected and stakeholders

interested in termination of Medicare insurance programs in [the University's] dental services," such as "employees, students and patients invited to give feedback." For September 1, 2023, through September 1, 2024, the Appellant requested communications "regarding termination of Medicare insurance effective on or about August of 2024." For May 1, 2024, through September 6, 2024, he requested communications regarding the Appellant himself, "Journal Kentucky.com," and "articles published on "Journal Kentucky.com."

The University argues that this request is unduly burdensome because it does not precisely describe the records sought and would require the University to search not only its emails and electronic records but innumerable physical records to determine whether any responsive documents existed. Furthermore, the University points out that the Appellant's request expressly defines "communications" to include "preliminary drafts" and "notes," which are exempt from disclosure under KRS 61.878(1)(i), as well as "preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended," which are exempt under KRS 61.878(1)(j). Finally, the University notes that any confidential communications between an attorney and client to facilitate the rendition of professional legal services would be privileged under KRE 503.

When a person requests copies of public records under the Act, "[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." KRS 61.872(3)(b). A description is precise "if it describes the records in definite, specific, and unequivocal terms." 98-ORD-17 (internal quotation marks 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 also* 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); *but see Univ. of Ky. v. Kernel Press, Inc.,* 620 S.W.3d 43, 48 n.2 (Ky. 2021) (holding a request was proper when it sought "all records detailing [the] resignation" of a specific employee). A request that does not precisely describe the records "places an unreasonable burden on the agency to produce often incalculable numbers of widely dispersed and ill-defined public records." 99-ORD-14.

Here, parts 4 and 5 of the Appellant's request describe the records by various types ("communications . . . including, but not limited to email, letters, notice of final action, request for proposals, request for information, invitation for stakeholder participation/feedback, messages, preliminary drafts, notes, memoranda, and correspondence"). Moreover, the Appellant limited his request to specific time frames, and the request does not relate to ill-defined topics. However, the class of persons

whose communications the Appellant seeks is ill-defined. For example, it encompasses not only five University employees, but a vague class of "agents and assigns," which could include but is "not limited to" any "other employees and third-party contractors." The definition of "UK Healthcare's agents and assigns" is similarly vague, as are the unlimited class of "elected officials" and the undefined class described as "stakeholders." Under the Act, a "requester is required to describe the records he or she seeks so as to make locating them reasonably possible." *City of Fort Thomas v. Cincinnati Enquirer,* 406 S.W.3d 842, 855 (Ky. 2013). According to its website, the University employs "more than 12,000 staff and 2,000 faculty."[1] Given the size of the University and the broad scope of his request, the Appellant has not "precisely describe[d] the public records which are readily available within the public agency," as required by KRS 61.872(3)(b). Accordingly, the University did not violate the Act when it denied parts 4 and 5 of the request.

In part 6 of his request, the Appellant sought "UK Healthcare College of Dentistry Student Clinic policies, procedures, regulations and rules including but not limited to 'Governing Regulations,' 'Administrative Regulations,' and 'Kentucky Administrative Regulations (KAR)' regarding dismissal of a patient [from] the practice clinic and denial of access to care" between May 1 and September 6, 2024. The University has not specifically addressed this part of the request, either in its initial response or in its response to the appeal. A public agency cannot simply ignore portions of a request. *See, e.g.,* 21-ORD-090. Furthermore, this portion of the request precisely describes the records the Appellant is seeking as "policies, procedures, regulations and rules . . . regarding dismissal of a patient" from the student clinic. "Either the [University] has [such records] or it does not." 23-ORD-335. If no such records exist, the University must affirmatively so state in its response to the request. *See Univ. of Ky. v. Hatemi,* 636 S.W.3d 857, 867 (Ky. App. 2021); *see also* 20-ORD-041 (finding a public agency has a "duty to inform the requester in clear terms that it [does] not have the records"). Otherwise, the University has five business days to provide the record or to deny the request and explain why. KRS 61.880(1). Moreover, if the University has the records described, they are clearly neither preliminary documents under KRS 61.878(1)(i) or (j) nor privileged attorney-client communications under KRE 503. Therefore, the University violated the Act when it failed to explain its denial of part 6 of the Appellant's request.

In part 7 of his request, the Appellant sought "communications" between May 1 and September 6, 2024, "(including but not limited to email, letters, notice of final action and correspondence) regarding dismissing" the Appellant as a patient of the dental clinic "by and between" certain persons "and their agents and assigns." Here, the Appellant has precisely described the requested records by type, date, and a clearly-defined subject matter to which they relate. Moreover, the class of persons is limited to two named University employees and the "UK Healthcare College of

[1] *See* https://www.uky.edu/faculty-staff/ (last accessed November 8, 2024).

Dentistry Student Dental Clinic's agents and assigns including but not limited to the employee(s) serving at [*sic*] Manager of that dental practice."[2] Under the Act, the public agency "is the party responsible for ascertaining the location of responsive records or the personnel who may possess them." 24-ORD-089. Here, to fulfill its duty under the Act, the University only needs to make an inquiry to the two named employees and staff members of the dental clinic who would have been involved in a decision to dismiss the Appellant as a patient. However, the University admits it still "has not determined what records are potentially responsive" to the Appellant's request. Because part 7 of the request precisely described the records as required by KRS 61.872(3)(b), the University was required to conduct a reasonable search for responsive records. Only after the responsive records are identified can it be determined whether any potential exemptions apply to those records. *See, e.g.,* 24-ORD-180. Therefore, the University violated the Act when it denied part 7 of the request without ascertaining what responsive records existed.

In part 8 of his request, the Appellant sought a "UK Information Technology list of" internet protocol ("IP") addresses used by the dental clinic, two named university employees, the University's Media Relations personnel, the University's Office of Legal Counsel, "and their agents and assigns." This request "precisely describes" the requested record as required by KRS 61.872(3)(b). But the University failed to address this specific portion of the request by stating whether such a list exists and, if so, on what basis it is specifically exempt from disclosure. Thus, the University violated the Act.

Finally, in part 9 of his request, the Appellant sought "a copy of the authorization, directive, order, and communication directing that" the Appellant be dismissed as a patient of the dental clinic, along with "a copy of the certified letter [containing] a notice of final action [to that effect] addressed to" the Appellant and the "postal receipt and log and ledger recording the existence and mailing of the items." Because the University has denied that any "notice of final action" exists with regard to any part of the Appellant's request, it has implicitly denied that any certified letter exists containing such a notice. The Appellant admits he "received no such notice" but states he was told of its existence by an unidentified person. This assertion is insufficient to establish a *prima facie* case that the notice exists. However, the University failed to respond specifically to the Appellant's request for an "authorization, directive, order [or] communication directing" that he be dismissed as a patient. By failing to state whether such a record exists and, if so, on what basis it withheld that specific record, the University violated the Act.

As to the Appellant's request considered as a whole, the University claims the Appellant's request "places an unreasonable burden" under KRS 61.872(6) because of

[2] The Appellant does not include an all-encompassing definition of "agents and assigns" as he does in parts 4 and 5 of the request.

its broad scope and lack of a precise description. "However, refusal under this section shall be sustained by clear and convincing evidence." KRS 61.872(6). Here, the University properly denied parts 4 and 5 of the request because they did not precisely describe the records sought. As to parts 6, 7, and 9 of the request, however, the University must meet the standard of clear and convincing evidence to show unreasonable burden.

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.,* 24-ORD-152. Here, the University states it "has not determined what records are potentially responsive." Thus, the number and nature of the records implicated by parts 6, 7, and 9 of the Appellant's request are unknown. Nevertheless, the University argues it is unduly burdensome to redact the records, as required by KRS 61.878(4), because they may contain material that is exempt from disclosure under the Family Educational Rights and Privacy Act ("FERPA"), preliminary drafts and notes that are exempt under KRS 61.878(1)(i), preliminary recommendations and policy memoranda that are exempt under KRS 61.878(1)(j), and attorney-client communications that are privileged under KRE 503. However, because the University has not yet determined what records exist that are potentially responsive to the Appellant's request, the Office is unable to determine whether any potential exemptions apply to the requested records. As to the University's argument under KRS 61.872(6), the University has not shown by clear and convincing evidence that parts 6, 7, and 9 of the Appellant's request impose an unreasonable burden on the University.

In sum, the University did not violate the Act when it denied parts 1 through 5 of the Appellant's request. The University violated the Act when it failed to make specific responses to parts 6 through 9 of the request.

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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