COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

DANIEL CAMERON
ATTORNEY GENERAL

CAPITOL BUILDING, SUITE 118
700 CAPITAL AVENUE
FRANKFORT, KENTUCKY 40601
(502) 696-5300
FAX: (502) 564-2894

22-ORD-054

April 6, 2022

In re: David Pennington/Department of Agriculture

Summary: The Department of Agriculture ("the Department") violated the Open Records Act ("the Act") when it denied portions of a request for records without explanation. However, the Department was not obligated to fulfill a request for information or a request that did not sufficiently describe the records sought.

Open Records Decision

On January 14, 2022, David Pennington ("Appellant") made a three-part request to the Department. First, the Appellant requested "all documents, emails, texts, letters, transcripts etc[.] dealing with delta 8 and delta 10 in [Kentucky] that has been through [the Department]." Second, he requested "any opinion letters written, what was paid for those letters to be written, who wrote them and ordered them wrote [*sic*]." Finally, the Appellant requested "the Information that circulated and approved [*sic*] when the last opinion letter was written by a private attorney and why an opinion letter was circulated."

That same day, the Department responded by providing the Appellant a copy of an April 2021 opinion letter written by the Department's general counsel, which had been distributed by e-mail in response to inquiries from individuals licensed to grow or process hemp as to whether the manufacture and distribution of Delta-8 THC products was lawful. The Department stated that "there was no outside attorney involvement" in writing the opinion letter. However, the Department did not address the Appellant's request for e-mails, texts, transcripts, or other documents concerning Delta-8 and Delta-10 THC. This appeal followed.

When a public agency receives a request to inspect records, that agency must decide within five business days "whether to comply with the request" and notify the requester "of its decision." KRS 61.880(1). An agency response denying inspection of public records must "include a statement of the specific exception authorizing the withholding of the record and a brief explanation of how the exception applies to the record withheld." *Id.* A public agency cannot simply ignore portions of a request. *See, e.g.,* 21-ORD-090. If the requested records exist and an exception applies to deny inspection, the agency must cite the exception and explain how it applies. Conversely, if the records do not exist, then the agency must affirmatively state that such records do not exist. *See Bowling v. Lexington-Fayette Urb. Cnty. Gov.,* 172 S.W.3d 333, 341 (Ky. 2005).

The Department responded to the Appellant's request only in part, by providing a copy of the April 2021 opinion letter. However, it failed to respond at all to the Appellant's request for e-mails, texts, transcripts, or other documents concerning Delta-8 or Delta-10 THC. By omitting any response to that portion of the Appellant's request, the Department violated the Act.

But whether the Appellant's request was sufficiently clear is another matter. Under the Act, a request to inspect public records must describe those records in a manner "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). If the request is for copies of public records, it must "precisely describe[ ] the public records which are readily available within the public agency." KRS 61.872(3)(b). The Appellant's request does not meet this standard. Rather, the Appellant's request for "all documents . . . dealing with" Delta-8 and Delta-10 THC that have "been through" the Department is an "open-ended any-and-all-records-that-relate type of request," which does not precisely describe the records sought. *See, e.g.*, 08-ORD-058. This Office has consistently held that "blanket requests for information on a particular subject need not be honored." *See, e.g.*, OAG 90-83; 95-ORD-108; 13-ORD-077. Thus, the Department was not obligated to comply with this portion of the Appellant's request.

Lastly, the remainder of the Appellant's request does not seek production of any public records, but merely seeks information. Here, the Appellant asked "who ordered" the opinion letter to be written, "what was paid" for the letter, and "why an opinion letter was circulated." The Act does not require public agencies to answer interrogatories or provide *information*; it requires only the production of *records* for inspection. KRS 61.872; *Dept. of Revenue v. Eifler,* 436 S.W.3d 530, 534 (Ky. App. 2013) ("The ORA does not

dictate that public agencies must gather and supply information not regularly kept as part of its records."). Under the Act, the Department had no duty to respond to the Appellant's requests for information.

In sum, the Department violated the Act by failing to respond to portions of the Appellant's request. However, the Department was not obligated to respond to either imprecise requests that did not sufficiently describe the records sought or requests for information.

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 e-mailed to OAGAppeals@ky.gov.

Daniel Cameron
Attorney General

/s/ James M. Herrick

James M. Herrick
Assistant Attorney General

#70

Distributed to:

David K. Pennington
Joseph A. Bilby, Esq.
Nicole T. Liberto, Esq.