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22-ORD-182

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In re: Charlotte Flanary/Office of the Treasurer

Summary: The Office of the Treasurer ("the agency") violated the Open Records Act ("the Act") when it denied a request as unreasonably burdensome without providing clear and convincing evidence in support of its denial.

Open Records Decision

On July 28, 2022, Charlotte Flanary ("the Appellant") submitted a request to the agency seeking "any and all requests for out of state [or] out of country travel for [the Treasurer] from January 1, 2016 to present [including] any and all Forms DOA28 and DOA28A." In a timely response the next day, the agency stated that no responsive records existed. The Appellant immediately replied to the agency's denial by requesting "any records of any out-of-state or international travel by" the Treasurer. In a timely response, the agency cited KRS 61.872(6) to deny the request as unreasonably burdensome because the request was "vague, overly broad, and fail[ed] to identify the requested records with sufficient particularity to identify responsive records." This appeal followed.

When a person seeks to inspect public records by receiving copies in the mail, the person must "precisely describe" the records to be inspected. KRS 61.872(3)(b). And a public agency may deny a request to inspect records under KRS 61.872(6) "[i]f the application places an unreasonable burden in producing public records" on the agency. However, an agency denying a request under KRS 61.872(6) must support its denial with "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 catalogue 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.

On appeal, the agency continues to assert that the request is unreasonably burdensome because the request is "vague" and does not "precisely describe" the records sought. The agency cites to previous decisions in which the Office opined that requests seeking "any-and-all records" related to broad topics placed unreasonable burdens on the responding agencies. *See, e.g.*, 22-ORD-054; 21-ORD-126; 17-ORD-177. However, in those decisions, the requests sought all documents (including emails or other correspondence) relating to broad and ill-defined topic areas. When a request seeks "any-and-all records" related to a broad and ill-defined topic, such as "documents evidencing that . . . the historical horse racing games . . . are legal under Kentucky law," 17-ORD-177, such a request could lead to an incalculable number of records.[1] Although the Office has found requests for "any-and-all records" to be unreasonably burdensome in various circumstances, the agency always carries the burden of proving that any particular "any-and-all" type of request actually places an unreasonable burden on the agency. KRS 61.872(6). The agency has not carried that burden here.

The Appellant's second request for "any records of any out-of-state or international travel by" the Treasurer must be viewed in the context of her first request. The Appellant's first request was narrow, and precisely described one type of record related to travel—"requests" for out of state travel, such as Forms DOA28 and DOA28A. When the agency denied this request because no responsive records existed, the Appellant broadened the scope of the request to include more travel records than just "requests" for travel and the associated forms.[2] Considering the context of the Appellant's two requests, her second request for "any" out-of-state travel records did not seek records related to a broad and ill-defined topic.

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[1] Email communications tend to be the primary generator of larges number of potentially responsive records.

[2] In fact, the Appellant submitted her second request by replying to the email the agency sent to deny her first request.

Here, the agency has not articulated, or estimated, the number of potential records implicated by the Appellant's request. Although the number of records implicated is not the only factor the Office considers when determining whether a request is unreasonably burdensome, it is the most important factor to be considered. *See, e.g.*, 22-ORD-176 (finding an agency's response to a request to be inadequate when it failed to estimate the number of records implicated by the request, but holding that reviewing and redacting over 16,000 Microsoft Teams messages would be unreasonably burdensome). Nor has the agency claimed that responsive records are required to remain confidential. Reviewing and redacting large numbers of records to comply with various confidentiality laws adds to the burden any request might place on agency.

Thus, neither the number of records at issue nor the fact they must be redacted, in isolation, is dispositive of whether a request is unreasonably burdensome. But the combination of these factors, as well as the other factors discussed above, are what *makes* "any-and-all" types of requests relating to broad and ill-defined topics unreasonably burdensome under KRS 61.872(6). An agency does not carry its burden (that of "clear and convincing evidence") merely by citing the Office's prior decisions that found "any-and-all" types of requests were unreasonably burdensome. Rather, an agency's response must provide sufficient information about the potential number of responsive records, whether such records are in electronic or physical format, whether such records require redaction to comply with law, and whether the agency is capable of searching for records based on the request as framed. The agency has not provided this information, and thus, it has not carried its burden under KRS 61.872(6). The agency, therefore, violated 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 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 e-mailed to OAGAppeals@ky.gov.

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s/Marc Manley
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Distributed to:

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