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-184

September 7, 2022

In re: Charlotte Flanary/Office of the Secretary of State

Summary: The Office of the Secretary of State ("the Secretary's Office") did not violate the Open Records Act ("the Act") when it conducted an adequate search in good faith for records responsive to a request to inspect records that did not precisely describe the records to be inspected.

Open Records Decision

On July 26, 2022, Charlotte Flanary ("Appellant") requested that the Secretary's Office provide, in electronic format, "[a]ny and all records, including any and all drafts, emails, or other correspondence, of any public statement by Secretary of State Adams related to the events that occurred on January 6, 2021 at the United State [*sic*] Capitol Building in Washington, D.C." In a timely response, the Secretary's Office stated that it "ha[d] no responsive documents." This appeal followed.

Once a public agency states affirmatively that it does not possess any responsive records, the burden shifts to the requester to present a *prima facie* case that the requested records do exist. *See Bowling v. Lexington-Fayette Urban Cnty. Gov.,* 172 S.W.3d 333, 341 (Ky. 2005). If the requester establishes a *prima facie* case that records do or should exist, "then the agency may also be called upon to prove that its search was adequate." *City of Ft. Thomas v. Cincinnati Enquirer,* 406 S.W.3d 842, 848 n.3 (Ky. 2013) (citing *Bowling,* 172 S.W.3d at 341). Therefore, to support a claim that the agency possesses responsive records that it did not provide, the Appellant must produce some evidence that calls into doubt the adequacy of the agency's search. *See, e.g.*, 95-ORD-96.

On appeal, the Appellant produces a message posted on the Twitter account "KY Secretary of State Michael Adams," on January 6, 2021, which stated: "The

reason we have elections is so we don't have what we see today – madness and mob rule. I pray for the safety of all members of Congress, staff and Capitol Police." The Appellant argues that the existence of this message proves that the Secretary's Office "possesses at least one (1) and potentially more responsive records," which may include "drafts" and "internal emails or memoranda relating to whether the Secretary should put out a "public statement." Therefore, the Appellant claims that the Secretary's Office violated the Act by failing to conduct an adequate search.

Twitter is a public-facing social media website on which a registered user creates a "profile," where the user may post brief messages known as "Tweets." A Tweet may consist of up to 280 typed characters and is stored on Twitter's website,[1] where it may be publicly viewed. According to the Secretary's Office, "Secretary Adams personally created, and personally maintains, his Twitter account, pursuant to a contract entered into in early January 2020 between him personally and the private company Twitter, Inc.," and no public funds are used in the operation of the account.

On appeal, the Secretary's Office argues that the Secretary's Tweets are not "public records" under the Act. However, the definition of "public record" includes "all books, papers, maps, photographs, cards, tapes, discs, diskettes, recordings, software, or other documentation regardless of physical form or characteristics, which are *prepared,* owned, *used,* in the possession of or *retained by a public agency."* KRS 61.870(2) (emphasis added); *see also* KRS 61.870(1)(a), (b). Here, the Twitter account in question uses the Secretary's official title and is embedded on the homepage of the Secretary's official website.[2] Because it is clear that the Secretary "prepares" these Tweets and "uses" this particular Twitter account in his official capacity as a state officer, and because the Secretary's Office retains these Tweets by embedding the account on its official website, the Tweets posted to this particular account are public records under KRS 61.870(2).[3]

---

[1] Because the Tweet is stored on Twitter's website, its existence does not prove, as the Appellant argues, that the Secretary's Office "possesses" it.

[2] *See* https://www.sos.ky.gov/Pages/default.aspx (last accessed Sept. 7, 2022).

[3] The Secretary's Office claims that the Secretary's Tweets are not "public records" because they are not publicly funded and KRS 61.870(2) excludes "any records owned or maintained by or for *a body referred to in subsection (1)(h)* of [KRS 61.870] that are not related to functions, activities, programs, or operations funded by state or local authority" (emphasis added); *see also* KRS 61.870(1)(a), (b). When the Secretary Tweets using an account that identifies him as "KY Secretary of State" and that same account is embedded into the official website of the Secretary of State, then the Tweets have been prepared, used, and retained by a "public agency," which makes them "public records." To be clear, whether any particular social media account constitutes the social media account of a "public agency" can be a fact intensive inquiry. There is no limit to the number of accounts a user can create on Twitter, and many public officials use both a "personal" account and an "official" account. Of course, other accounts not in the possession of a state agency or for the work of state government, including personal accounts, are just that: personal accounts not subject to the Act.

The Secretary's Office, however, claims that the Secretary's Tweets are not public records under *Morgan v. Bevin,* 298 F.Supp.3d 1003 (E.D. Ky. 2018), a federal case in which the court found that a public official's Twitter account was not a "public forum" for First Amendment purposes because it was not owned by the government. But the "public forum" issue in *Morgan* was an entirely separate question from whether Tweets prepared and used by a public agency are "public records" under the Act.[4] Here, the language of KRS 61.870(2) compels the conclusion that they are. *Cf.* 20-ORD-169; 17-ORD-268 (recognizing that posts or pages on a social media site operated by a public agency are public records). Thus, the *Morgan* case is not relevant here.

Nevertheless, the Appellant sought to exercise her right of inspection by receiving electronic copies of the requested records, so she was required to "precisely describe" the records of which she sought electronic copies. KRS 61.872(3)(b). Because the Tweet produced by the Appellant is a public record under the Act, the question is whether the Secretary's Office was obligated to search the Secretary's Twitter account in responding to the Appellant's request as framed. And when responding to a request for public records, an agency need only "make a good faith effort to conduct a search using methods which can reasonably be expected to produce the records requested." *See* 95-ORD-96 (quoting *Cerveny v. Central Intelligence Agency,* 445 F.Supp. 772, 775 (D. Col. 1978)).

Here, the Appellant did not "precisely describe" the requested records because her request was for "records . . . of any *public statement* by Secretary of State Adams related to the events" (emphasis added). A reasonable person interpreting such a request addressed to the Secretary's Office could understand "public statement" to refer to an official press release issued through the ordinary channels of the Secretary's Office.[5] In this case, the Secretary's Office conducted a search that included "Secretary Adams' email, and documents on his computer as well as any correspondence," which would be adequate to locate records relating to a press release or similar public statement. A public agency does not violate the Act when, in good faith, it interprets an imprecise request differently from the subjective intent of the

---

[4] The "public forum" doctrine is a concept in First Amendment jurisprudence that holds that when a government-owned property is held open to the public for purposes of permitting public speech then a person may not be denied access to the public forum based on the content of his or her speech, absent a compelling governmental interest that is narrowly tailored to protect that interest. *See Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 800 (1985). The Open Records Act, however, governs a resident's right to inspect public records. A person's right to inspect records under the Open Record's Act is separate from a resident's First Amendment right to speak freely.

[5] For example, press releases currently available on the website of the Secretary's Office include "Adams Statement on Partisan Flip in Voter Affiliation" (July 15, 2022), "Adams Statement on Overturning of *Roe v. Wade"* (June 24, 2022), and "Adams Statement on Beshear Lawsuit Against Him" (May 5, 2022). *See* https://www.sos.ky.gov/Pages/default.aspx (last accessed Aug. 29, 2022).

requester. *See, e.g.,* 21-ORD-140; 20-ORD-153; 99-ORD-199. If the Appellant wanted to inspect copies of the Secretary's official Tweets, she should have "precisely described" such records in her original request. KRS 61.872(3)(b).

In light of the ordinary meaning of "public statement," the fact that the request did not expressly include Tweets, and the fact that neither a court nor this Office has previously opined that the Tweets issued on a public official's official Twitter account are public records subject to the Act, the Appellant cannot show that the Secretary's Office failed to conduct an adequate search in good faith for records responsive to the request as framed. Thus, the Secretary's Office did not violate 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.

Daniel Cameron
Attorney General

s/James M. Herrick
James M. Herrick
Assistant Attorney General

#287

Distributed to:

Ms. Charlotte Flanary
Jennifer Scutchfield, Esq.
Michael R. Wilson, Esq.