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22-ORD-213

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In re: Charlotte Flanary/University of Kentucky

Summary: The University of Kentucky ("the University") violated the Open Records Act ("the Act") when it failed to respond to portions of a request for records in accordance with KRS 61.880(1). The University subverted the intent of the Act, within the meaning of KRS 61.880(4), when it demanded that a requester narrow the scope of a request that precisely described the records as required under KRS 61.872(3)(b).

Open Records Decision

On September 7, 2022, Charlotte Flanary ("Appellant") requested electronic copies of all e-mails and text messages exchanged between the head coach or associate head coach of the University's football program and two private individuals, as well as "any tweet, quote tweet, or retweet" on the University's official Twitter account for the head coach or associate head coach that related to a specific person. The Appellant stated that the scope of the request included any communications "sent on behalf of the individuals named."

The University responded that the "request for 'all emails,' is too broad" and that it was "unclear from [the] request precisely what records" the Appellant sought. Thus, the University declined to "address" the Appellant's request for e-mails unless she provided "a timeframe for which [she] believe[d] such communication took place, and specific search terms." The University did not respond to the Appellant's requests for text messages or Twitter postings.

The Appellant replied that she did not have to narrow the scope of her request because she was "requesting specific emails to and from identified individuals." In response, the University stated that it had not denied the request, but "asked for a

specific timeframe and subject, so that [it could] conduct the appropriate searches." 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). A public agency cannot ignore portions of a request. *See, e.g.,* 21-ORD-090. Here, the Appellant requested e-mails, text messages, and Twitter postings, but the University only responded to her request for e-mails. Thus, the University violated the Act when it failed to respond to all portions of the request.

Moreover, under KRS 61.880(4), a person may invoke this Office's review to allege "the intent of [the Act] is being subverted by an agency short of denial of inspection." On appeal, the University reiterates that it has not denied the Appellant's request for e-mails, but only "asked her to clarify and narrow her request" before it would respond. However, the University has not explained how the Appellant's request is unclear. Under KRS 61.872(3)(b), a public agency must provide copies of records to a requester who resides or works in a different county "after he or she precisely describes the public records which are readily available within the public agency." Here, the Appellant requested specific types of communications sent by or on behalf of two specific employees to two other specific private individuals. This is a sufficiently precise description to identify the requested records.

The University argues the Appellant "did not identify the email addresses of" the private individuals. But it is not necessary for the Appellant to know or to provide a person's e-mail address in order to request e-mails employees have sent to, or received from, that person. The University further argues that the Appellant did not "specify a particular period" of time for which she seeks records. This does not make her request unclear, but merely indicates that she seeks all responsive records during the employment of the head coach and associate head coach. Finally, the University argues that the Appellant did not "seek to narrow the subject matter of the records being requested." Again, this does not make the request unclear, but indicates that she seeks all communications between the named persons regardless of subject matter. Thus, the University has not shown any need for clarification of the Appellant's request.

The University asserts that "if [the Appellant] will narrow her request, the University will respond in a reasonable period." The Appellant, however, has already declined to narrow her request. Therefore, it is the University's duty to respond in a timely manner to the request as framed. *See, e.g.,* 17-ORD-128; 17-ORD-082; 14-ORD-044. Depending on the number of responsive records, the University may need

more than the five business days provided under KRS 61.880(1) to provide them.[1] *See* KRS 61.872(5); *see also* 14-ORD-044. Alternatively, such a broad request might carry the risk of implicating so many responsive records that the request could become unreasonably burdensome under KRS 61.872(6). *See, e.g.*, 22-ORD-176. But the University did not deny the Appellant's request on that basis, and her request nevertheless precisely describes the records sought. The fact that a public agency may have grounds to deny an unreasonably burdensome request does not mean that the public agency is excused from "determin[ing] within five (5) [business] days . . . whether to comply with the request" and "notify[ing] in writing the person making the request, within the five (5) day period, of its decision." KRS 61.880(1). Accordingly, the University subverted the intent of the Act, short of a denial of inspection, when it demanded that the Appellant narrow her request before the University would "determine . . . whether to comply" and issue its written decision. *Id*.

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

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Distributed to:

[1] However, the public agency has the burden of establishing that a longer time is needed. *See, e.g.,* 21-ORD-045. According to the applicable records retention schedule, the records in the University's possession should encompass no more than two years. *See* State University Model Records Retention Schedule, "Correspondence – General," Series U0101 ("Retain no longer than two (2) years, then destroy"); "Nonbusiness Related Correspondence," Series U0122 ("Delete all nonbusiness related e-mail immediately"), *available at* https://kdla.ky.gov/records/recretentionschedules/Documents/State Records Schedules/KYUniversityModel.PDF (last accessed October 4, 2022). But, if the University has retained more records than required under the retention schedule, it must nevertheless provide them to the Appellant. *See, e.g.,* 19-ORD-004; 12-ORD-097.

Ms. Charlotte Flanary
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