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22-ORD-221

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In re: David Costas/City of Park Hills

Summary: The City of Park Hills ("the City") violated the Open Records Act ("the Act") when it denied a request as vague and unduly burdensome under KRS 61.872(6).

Open Records Decision

David Costas ("the Appellant") submitted a request to the City for every email or text message sent or received by the Mayor between January 1, 2022 and September 24, 2022. In a timely response, the City denied the request under KRS 61.872(6) because it was "not a properly framed question" and was "overbroad" and "too vague." 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), the 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 City continues to assert that the request is unreasonably burdensome because the request is "vague" and does not precisely describe the records sought. The Office has previously opined that requests seeking "any-and-all records" related to broad topics place unreasonable burdens on the responding agencies. *See, e.g.*, 22-ORD-054; 21-ORD-126; 17-ORD177. However, in those decisions, the requests sought all documents (including emails or other correspondence) relating to broad and ill-defined topics. 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. 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 City has not carried that burden here. *See, e.g.*, 22-ORD-213 (finding an agency violated the Act for denying as "vague" a request for all emails sent to or from an employee about a private individual because the request was not vague).

Here, the City 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 City has not provided this information, and thus, it has not carried its burden under KRS 61.872(6). The City, 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.

Daniel Cameron
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s/ Marc Manley
Marc Manley
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Distributed to:

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