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-255

November 30, 2022

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 for copies of "[a]ny email or correspondence" between two named individuals. The request precisely described the records sought, and the agency has not carried its burden that this particular request was an unreasonable burden or an attempt to disrupt the agency's essential functions under KRS 61.872(6).

Open Records Decision

On July 8, 2022, Charlotte Flanary ("Appellant") requested electronic copies of "[a]ny email or correspondence [the State Treasurer], or any member of her executive staff, sent to or received from [Deputy Treasurer] OJ Oleka." In its initial response, the agency stated it would "produce responsive records, if in its possession, to the extent those records are not exempted by KRS 61.878(a) [*sic*], (i) (j), and/or (r), and any other applicable open records exemptions[.]" However, the agency stated that it would "need 60 days to respond" to this request and three other requests made simultaneously by the Appellant.

In a follow-up e-mail, the Appellant objected that the agency had not explained why producing the records would take 60 days. The agency responded by denying the request outright under "04-ORD-193 and KRS 61.872(6)" because the request was "vague, overly broad, and fail[ed] to identify the requested records with sufficient particularity to identify responsive records."[1] Additionally, the agency stated that its staff "would need to expend significant government resources to review thousands of

[1] In 04-ORD-193, this Office applied a standard of "reasonable particularity" to requests for on-site inspection of records. That standard has since been abandoned. *See, e.g.,* 19-ORD-182; 13-ORD-015; 10-ORD-189.

documents in order to respond to this request, as OJ Oleka was on staff at this agency for four years and corresponded with Executive staff numerous times per day."

The Appellant then agreed to narrow her request to "any emails or correspondence between Treasurer Ball and OJ Oleka." However, the agency denied the request for the same reasons, stating that it was "vague, overly broad, and fail[ed] to specify the records [the Appellant] wish[ed] to be produced." The agency again asserted that the request "would require [it] to review thousands of documents." This appeal followed.

The agency claims that fulfilling the Appellant's request would constitute an unreasonable burden. Under KRS 61.872(6), "[i]f the application places an unreasonable burden in producing public records or if the custodian has reason to believe that repeated requests are intended to disrupt other essential functions of the public agency, the official custodian may refuse to permit inspection of the public records or mail copies thereof. However, refusal under this section shall be sustained by clear and convincing evidence."

To support its claim, the agency first argues the Appellant's request does not precisely describe the records requested. Under KRS 61.872(3)(b), "[t]he public agency shall mail copies of the public records to a person . . . after he or she precisely describes the public records which are readily available within the public agency." The agency claims the word "correspondence" is not a precise description because it is "overly broad" and could encompass records such as "a post-it note stuck to the back of a desk drawer," "inter-office birthday cards," and "documents in staff personnel files that have been viewed and signed by both" individuals. Thus, the agency argues it has "no way . . . to know what records are sought" because the word "correspondence" is too vague. But the common and ordinary meaning of "correspondence" is "communication by letters or email," or "the letters or emails exchanged."[2] A reasonable interpretation of a request to inspect "correspondence" would not include personal communications unrelated to government business, such as birthday cards, or post-it notes. *See* KRS 61.878(1)(i) (exempting from inspection preliminary notes); KRS 61.878(1)(r) (exempting from inspection purely personal communications). The Appellant's request is not imprecise or overbroad.[3]

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[2] *See* https://merriam-webster.com/dictionary/correspondence (last accessed November 28, 2022).

[3] The agency argues that the Appellant knows how to precisely describe records and that her choice of the word "correspondence" is designed to impose liability on the agency for failing to locate birthday cards and post-it notes. The Office recognizes the Appellant's previous attempts to claim that agencies perform inadequate searches in response to her broad requests. *See, e.g.*, 22-ORD-184 (an agency acted in good faith when it did not search for Tweets because this requester did not specifically request records from social media accounts, and a reasonable person would not consider her request for "public statements" to include publicly available Tweets). But an agency meets its obligation when it conducts a reasonable search based on the request made—regardless of the intent of the requester.

Next, the agency argues that the request is unreasonably burdensome because it "likely implicates over 5,000 discrete records," including at least 4,701 e-mails exchanged over six years. The agency claims it would be an unreasonable burden to review these e-mails to determine whether they are purely personal communications, privileged communications, or "policy formation." In support of this argument, the agency cites 14-ORD-109. In that appeal, the Office found a county school board had shown by clear and convincing evidence that a request for all e-mails exchanged between two public school systems over a 19-month period was an unreasonable burden. The school board met its burden by explaining it would have to search all employees' workstations for responsive records and a minimum of 6,200 e-mails would have to be reviewed by the employees, supervisors, and legal counsel to determine whether they were education records made confidential under federal or state law.

Here, by contrast, only two individuals' e-mails are at issue. Furthermore, the agency has not alleged that any of the e-mails are required to be kept confidential under federal or state law, unlike the records at issue in 14-ORD-109. *See, e.g.,* 19-ORD-084 (distinguishing 14-ORD-109 where a public agency "cited only speculative privacy concerns and potential issues of attorney-client privilege"). Under the facts of this appeal, reviewing and redacting almost 5,000 e-mails does not establish by clear and convincing evidence that fulfilling the request would place an unreasonable burden on the agency.

The agency further argues that this request imposes an unreasonable burden because the Appellant did not specify the official state e-mail address for the Deputy Treasurer. But a person requesting e-mails is not required to provide the specific e-mail addresses of the individuals referenced in the request. *See* 22-ORD-213.

The agency also claims the request is unreasonably burdensome because it indicates a "desire to access personal records as opposed to just official records, and because the [Act] applies only to documents that are in the agency's possession." It is true that a public agency "is responsible only for those records within its own custody or control." *City of Ft. Thomas v. Cincinnati Enquirer,* 406 S.W.3d 842, 856 (Ky. 2013) (citing *Kissinger v. Reporters Committee for Freedom of the Press,* 445 U.S. 136 (1980)). Moreover, on appeal, the Appellant has clarified that she seeks e-mails and correspondence between the Treasurer and the Deputy Treasurer. Because personal communications are exempt from inspection, KRS 61.878(1)(r), and because the Appellant seeks official communications between the Treasurer and the Deputy Treasurer, the existence of exempt personal communications between these

individuals would have no bearing on the burden imposed on the agency, beyond the ordinary burden of separating responsive records from nonresponsive records.[4]

Finally, the agency argues that the Appellant's request is one of "at least 19 distinct requests" from the Kentucky Democratic Party for broad categories of records that have "resulted in over 125 hours of work for Executive Staff." The agency therefore claims that "repeated requests are intended to disrupt other essential functions of the public agency," under KRS 61.872(6), by requiring time to be "spent on the needless errands of a political entity meant to harass the Treasurer and her staff."

While the Office understands the difficulty imposed by 19 broad requests in a short period, under KRS 61.871, "the basic policy of [the Act] is that free and open examination of public records is in the public interest . . . even though such examination may cause inconvenience" to public agencies. Without more, the Office is unable to find that this request was "intended to disrupt other essential functions of the public agency." *See, e.g.*, 22-ORD-048; 15-ORD-015; 02-ORD-230.

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:

Ms. Charlotte Flanary
Brittany J. Warford, Esq.
Lorran H. Ferguson, Deputy Commissioner

[4] On appeal, the agency claims to have located 900 e-mails between the Treasurer and Deputy Treasurer exchanged using their official state e-mail accounts. The agency has offered to make these 900 e-mails available to the Appellant after it has reviewed and redacted them of exempt material.