



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

23-ORD-006

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In re: Sean Southard/Office of the Governor

Summary: The Office of the Governor (“the agency”) did not violate the Open Records Act (“the Act”) when it denied a request for a communication pertaining to scheduling a meeting under KRS 61.878(1)(j). However, the agency violated the Act when it denied a request for correspondence to or from 13 named individuals “mentioning or related to” certain subjects, where the requester clarified that he only sought e-mails containing specific search terms.

Open Records Decision

On December 2, 2022, Sean Southard (“Appellant”) requested copies of certain records pertaining to 13 named individuals. First, the Appellant requested “[a]ny and all correspondence” between the 13 individuals and two other individuals. Second, the Appellant requested “[a]ny and all correspondence . . . to or from” the 13 individuals “mentioning or related to school closures, remote learning, nontraditional instruction or NTI, KEA or the Kentucky Education Association, JCTA or the Jefferson County Teachers Association from December 10, 2019 to present.”

In a timely response, the agency withheld one communication under KRS 61.878(1)(i) and (j) because it was “a communication solely regarding the scheduling of a meeting that may not have occurred.”¹ The agency also denied the Appellant’s request for correspondence “mentioning or related to” specific subjects, because it claimed the request was insufficiently specific to enable the agency to identify the requested records. Quoting 19-ORD-084, the agency asserted that “a

¹ The agency also provided three responsive records, but redacted from them a cell phone number and personal e-mail address under KRS 61.878(1)(a). The Appellant does not contest these redactions.

request for any and all records which contain a name, a term, or a phrase is not a properly framed open records request.” This appeal followed.²

KRS 61.878(1)(j) exempts from disclosure “[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended.” However, if a public agency adopts such opinions or recommendations as the basis of final action, the exempt status of the record is lost. *See Univ. of Ky. v. Courier-Journal & Louisville Times Co.*, 830 S.W.2d 373, 378 (Ky. 1992); *Univ. of Ky. v. Lexington H-L Services, Inc.*, 579 S.W.3d 858, 863 (Ky. App. 2018). Communications concerning “strategies used to plan [a] meeting, including discussions relating to the invitation and agenda, are preliminary to resolution of the ultimate issue” and thus exempt under KRS 61.878(1)(j) because “the meeting is merely a step along the road to deciding the ultimate issue.” *Univ. of Louisville v. Sharp*, 416 S.W.3d 313, 316 (Ky. App. 2013); *see also Courier-Journal v. Jones*, 895 S.W.2d 6, 10 (Ky. App. 1995) (holding that the Governor’s calendars and itineraries for meetings may be withheld under KRS 61.878(1)(i) and (j)). Here, the agency asserts that the withheld communication related solely to the scheduling of a meeting. Thus, because the communication was not adopted as the basis of final agency action, the agency properly withheld it under KRS 61.878(1)(j). *See, e.g.*, 22-ORD-204; 22-ORD-068.

Regarding the Appellant’s request for correspondence to or from the 13 named individuals, the agency 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.” A description is precise “if it describes the records in definite, specific, and unequivocal terms.” 98-ORD-17 (internal quotation marks omitted). This standard may not be met when a request does not “describe records by type, origin, county, or any identifier other than relation to a subject.” 20-ORD-017 (quoting 13-ORD-077). In particular, requests for any and all records “related to a broad and ill-defined topic” generally fail to precisely describe the records. 22-ORD-182; *see, e.g.*, 21-ORD-034 (finding a request for any and all records relating to “change of duties,” “freedom of speech,” or “usage of signs” did not precisely describe the records); *but see Univ. of Ky. v. Kernel Press, Inc.*, 620 S.W.3d 43, 48 n.2 (Ky. 2021) (holding a request was proper when it sought “all records detailing [the] resignation” of a specific employee).

² On appeal, the agency argues the Attorney General must recuse himself from this appeal because the Attorney General has filed to run as a candidate in the 2023 gubernatorial election. Although the Attorney General has recused himself from this decision, the Office must nevertheless carry out its mandate to adjudicate disputes under the Act. *See* KRS 61.880(2). Moreover, the Office has previously rendered decisions pursuant to its mandate under KRS 61.880(2) in similar situations. *See, e.g.*, 19-ORD-178; 19-ORD-185; 19-ORD-202.

Here, the agency claims it cannot determine the scope of the Appellant's request because he seeks "any and all records" related to certain subjects. But the Appellant did not request "any and all records." Rather, he requested "correspondence," the ordinary meaning of which is "letters or emails exchanged." 22-ORD-255. Thus, the Appellant has limited his request by persons, time frame, subject matter, and type of records.

Under the Act, a request must be "adequate for a reasonable person to ascertain [its] nature and scope." *Commonwealth v. Chestnut*, 255 S.W.3d 655, 661 (Ky. 2008). Here, the agency argues that it cannot ascertain the nature and scope of the Appellant's request because the language "mentioning or related to" is ambiguous, inasmuch as an item of correspondence may "mention" or "relate to" a subject without using specific language. However, the Appellant has clarified on appeal that the agency could satisfy his request by searching the e-mail accounts of the named individuals using the names and search terms he provided. Given that the Appellant has expressly limited his request to e-mails or attachments containing specific terms, the agency cannot claim it is impossible to determine the scope of the request.

Under KRS 61.872(6), "[i]f the application places an unreasonable burden in producing public records[,] 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." Here, the agency claims the Appellant's request is unreasonably burdensome because it "would require the retrieval and review of [all] electronic or physical correspondence to or from the identified individuals over the span of more than three years to determine whether the correspondence contained one of the eight identified terms." But the Appellant has clarified on appeal that he only seeks records searchable in the e-mail accounts of 13 individuals.

Among the factors this Office considers in determining whether a request is unreasonably burdensome is whether the requested records are in physical or electronic format, and whether the files are maintained in a manner capable of querying requested search terms. *See e.g.*, 22-ORD-182. Usually, electronic records are less burdensome to search than physical records. Furthermore, 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 unduly burdensome, it is the most important factor to be considered." *Id.* Therefore, the agency has not established by clear and convincing evidence that the Appellant's request is unreasonably burdensome, as required by KRS 61.872(6). Accordingly, the agency violated the Act when it denied this portion of the Appellant's request.

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:

Mr. Sean Southard
Taylor Payne, Esq.
La Tasha Buckner, Esq.