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23-ORD-010

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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 redacted communications that were purely personal under KRS 61.878(1)(r). However, the agency violated the Act when it denied a request for correspondence between or among 13 named individuals "mentioning or related to" a named individual, where the requester clarified that he only sought messages containing a specific search term.

Open Records Decision

On December 8, 2022, Sean Southard ("Appellant") requested copies of certain records pertaining to certain named individuals. First, the Appellant requested "[a]ny and all correspondence, including emails and text messages on personal devices, between" the Governor and the Lieutenant Governor "related to unemployment claims or the Office of Unemployment [Insurance] from December 10, 2019 to March 1, 2022." Second, the Appellant requested the same types of communications between 13 named individuals and the former Executive Director of the Office of Unemployment Insurance during two specific date ranges. Finally, the Appellant requested the same types of communications "between or among" the same 13 individuals "related to or mentioning" the former Executive Director between December 10, 2019, and July 15, 2021.

In a timely response, the agency produced four records, with some redactions. At issue in this appeal is the agency's redaction of communications that "discuss family members and holidays," which the agency stated were "of a purely personal nature unrelated to any governmental function" and therefore exempt from

disclosure under KRS 61.878(1)(r).[1] The agency also denied the request for communications "related to or mentioning" the former Executive Director, 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 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)(r) exempts from disclosure "[c]ommunications of a purely personal nature unrelated to any governmental function." On appeal, the agency explains that the content of the reacted communications was "expressing well wishes over the holidays, sharing photos of each other's children, and discussions about the cuteness of those children and discussing teams they support." Although the Appellant states that he does "not agree with [the agency's] analysis," he does not explain how the redacted content purportedly relates to any governmental function. Accordingly, the agency did not violate the Act when it redacted these communications under KRS 61.878(1)(r).

Regarding the Appellant's request for communications "mentioning or related to" the former Executive Director, 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.2d 43, 48 n.2 (Ky. 2021) (holding a request was proper when it sought "all records detailing [the] resignation" of a specific employee).

Here, the agency claims it cannot determine the scope of the Appellant's request because he seeks "any and all records" related to the former Executive

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[1] The agency also withheld some communications that were unresponsive to the request and redacted personal identifying information of unemployment insurance applicants under KRS 341.190(4). The Appellant does not challenge these actions on appeal.

[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.

Director. But the Appellant did not request "any and all records." Rather, he requested "correspondence, including emails and text messages," of specific individuals. The ordinary meaning of "correspondence" is "letters or emails exchanged." 22-ORD-255. The Appellant's request also specifically includes text messages as another form of correspondence. Thus, the Appellant 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 it cannot ascertain the nature and scope of the Appellant's request because the language "mentioning or related to" is ambiguous, inasmuch as a record may "mention" or "relate to" the former Executive Director without using specific language. However, the Appellant has clarified on appeal that the agency could satisfy his request by searching the electronic messages of the named individuals for the name of the former Executive Director. Given that the Appellant has expressly limited his request to electronic messages containing a specific term, 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 the name of the individual." But the Appellant has clarified on appeal that he only seeks searchable electronic records that include a specific search term.

Among the factors this Office considers when 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.[3] But here, the agency has not

[3] However, not all electronic records are easily searchable. The Appellant also requested to inspect text messages related to the specified search terms. While the Office has found that text messages on personally-owned devices are not "public records" within the meaning of KRS 61.870(2), *see, e.g.*, 21-ORD-127, text messages on state-owned devices are "public records." As noted in 22-ORD-182, whether the public records are maintained in a manner capable of being queried by the specified search term is one factor this Office considers to determine whether a request places an unreasonable burden on the agency. The agency carries the burden of proving it cannot search the requested public records by querying the specified search term, because it carries the burden of sustaining a denial under KRS 61.872(6) with clear and convincing evidence. But here, the agency neither claims, nor puts forth

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*. Moreover, the timeframe of the request is not "more than three years," but approximately 19 months. 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
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s/ James M. Herrick
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Distributed to:

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evidence, that it was incapable of querying text messages on state-issued devices using the specified search terms. At this stage, the agency has provided no evidence in support of this or any other factor this Office considers when deciding whether a request is unreasonably burdensome, and therefore, has failed to meet its burden of proof. KRS 61.872(6); KRS 61.880(2)(c); *see also* 22-ORD-182 ("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").