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23-ORD-024

February 2, 2023

In re: Perry Boxx/Murray State University

Summary: Murray State University ("the University") violated the Open Records Act ("the Act") when it withheld an email containing a statement describing past events because none of its claimed exceptions apply to that email. The University also violated the Act when it denied as unreasonably burdensome a request that sufficiently described the records sought. However, the University did not violate the Act when it withheld other emails, some of which were exempt under KRS 61.878(1)(i) as preliminary drafts and notes, while others were exempt under KRS 61.878(1)(j) as records containing preliminary opinions.

Open Records Decision

On October 20, 2022, Perry Boxx submitted to the University a request to inspect two categories of records. First, he sought "[c]orrespondence, including but not limited to emails and attachments, responses and threads, letters and other forms of communications" exchanged between five[1] individuals, "the content of which regards a Kentucky Open Records Request filed by the news department of WKMS Radio News seeking courthouse security video showing" a former circuit court judge "walking in the Marshall County Courthouse in his underwear." Second, he sought "[c]orrespondence, including but not limited to emails and attachments, responses and threads, letters and other forms of communications regarding WKMS News" sent

[1] Specifically, the President, the Provost and Vice President for Academic Affairs, the Dean of the Arthur J. Bauernfeind College of Business, the former circuit court judge, and the former WKMS Station Manager.

to or from nine individuals.[2] The Appellant sought by his request only correspondence that was exchanged from March 1, 2022, to the date of the request.

In a timely response, the University fully denied the second part of the request because it claimed the Appellant failed to precisely describe the records he sought. The University also claimed it would be an unreasonable burden to search for, review, and produce the requested records. The University similarly claimed the first part of the request did not precisely describe the records the Appellant sought, but instead of denying the request on this basis, it invoked KRS 61.872(5) and claimed it needed additional time to search for and review responsive records. The University committed to providing responsive records by November 4, 2022.[3] However, the University also stated, "WKMS, as a member of the press, is entitled by the First Amendment to the U.S. Constitution to the free exercise of the press protections contained therein." It therefore denied the Appellant's request "to the extent" the disclosure of the documents "would impinge or inhibit the freedom of the press," claiming the First Amendment right is incorporated into the Act's exemptions under KRS 61.878(1)(k).

On November 4, 2022, the University provided 52 pages of records containing 31 emails responsive to the first part of the Appellant's request. The University's supplemental response itemized each of the 31 emails, many of which were redacted, and cited various exemptions in support of the redactions. But the University did not describe the content of those emails or explain how the cited exemptions applied to the redactions. The exemptions on which the University relied were the "preliminary exemptions" under KRS 61.878(1)(i) and (j), the attorney-client privilege under KRE 503, and the First Amendment, which it claimed is incorporated into the Act under KRS 61.878(1)(k).[4] This appeal followed.

On appeal, the University provided the Office with unredacted copies of the emails responsive to the first part of the request. *See* KRS 61.880(2)(c). The Office

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[2] Specifically, the former Chair of the Department of Journalism and Mass Communication, a former WKMS News Director, the current WKMS News Director, the Chair of the Department of Journalism and Mass Communications, the previous WKMS interim Station Manager, a WKMS reporter, the Executive Director of Governmental and Institutional Relations, the Senior Executive Coordinator for the President and Coordinator for Board Relations, and the Executive Director, Marketing and Communication.

[3] The Appellant has not challenged the University's invocation of KRS 61.872(5) to delay his access to the records.

[4] The University also redacted a few personal telephone numbers under KRS 61.878(1)(a). The Appellant has not challenged the University's redaction of telephone numbers.

cannot disclose the contents of these emails, but it is necessary to generally describe them to explain why some are exempt and others are not.

The University claims many of the emails are exempt under KRS 61.878(1)(i) or (j). "Preliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency" are exempt from inspection under KRS 61.878(1)(i). And "[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended" are exempt from inspection under KRS 61.878(1)(j). These two exemptions are separate and distinct from one another. The distinction is important because Kentucky courts have held "investigative materials that were once preliminary in nature lose their exempt status once they are adopted by the agency as part of its action." *Univ. of Ky. v. Courier–Journal & Louisville Times Co.*, 830 S.W.2d 373, 378 (Ky. 1992). But neither KRS 61.878(1)(i) nor (j) discusses preliminary "investigative materials." Rather, KRS 61.878(1)(i) relates to preliminary drafts and notes, which by their very nature are rejected when a final report is approved. In other words, a first draft is not "adopted" when a second draft is written, and the first draft is always exempt under KRS 61.878(1)(i). *See, e.g.*, 21-ORD-089 (agency properly relied on KRS 61.878(1)(i) to deny inspection of the "first draft" of a report that was later adopted).

The same is true of "notes," which constitute the majority of interoffice emails and chat messages. *See, e.g.*, 22-ORD-176 n.6; OAG 78-626. To the extent specific thoughts or beliefs contained within drafts and notes are "adopted," they are adopted into whatever final document the agency produces from those drafts and notes. That final document represents the agency's official action and is subject to inspection. But the initial and preliminary thoughts on what the final product should contain, which are expressed during the drafting process through emails, do not lose their preliminary status once a final end-product is produced. To do so would destroy the "full and frank discussion[s] between and among public employees and officials" as they "hammer[ ] out official action," which is the very purpose of KRS 61.878(1)(i). 14-ORD-014.

Here, the University properly relied on KRS 61.878(1)(i) to redact the emails on pages 30–34 and 36–37. Those emails contain preliminary drafts of a proposed response to the media inquiry appearing on page 35.[5] It is not clear whether the University issued a formal response to the media inquiry. If it did, that formal response would have contained the portions of the proposed draft responses that were

[5] Page 35 was provided to the Appellant without redaction.

ultimately adopted. Any variation between the proposed responses and the official response to the media inquiry would necessarily constitute a rejection of the proposed language that did not make it into the University's final response. And if the University did not issue an official response to the inquiry, then by implication, no version of these proposed drafts were adopted, and they retain their preliminary status. The University did not violate the Act by redacting these drafts under KRS 61.878(1)(i).[6]

The University also properly relied on KRS 61.878(1)(i) to redact the emails on page 1, the duplicate copies of an email dated April 14, 2022 at 10:49 p.m. appearing on pages 2 and 16, and the email on page 52 because all of these emails constitute "notes."[7] These emails can be generally described as short, "for your information" types of emails, which are not substantive communications in themselves, but merely direct the recipient to other attached emails. They are the equivalent of a digital post-it note, such as a note affixed to a paper file instructing the recipient to read the file, and they are the types of notes that would be thrown in a wastebasket if they existed in physical form. *See* 22-ORD-176 n.6.

However, the duplicate copies of the other email appearing on pages 2 and 16 are not exempt under KRS 61.878(1)(i) or (j). Unlike the emails containing proposed drafts of a potential response, or the emails containing merely "for your information" types of notes, this email is a substantive statement describing the author's past decision and the factual basis for that decision. On its face, the email does not refer to a proposed course of conduct to be taken in the future, express the author's opinions about potential options to be taken, or contain any type of disclaimer that it is a working draft. The email is more analogous to a written statement by a witness to a specific event. *See, e.g.*, 21-ORD-052 (distinguishing drafts, notes, and investigatory materials containing opinions, which are exempt under KRS 61.878(1)(i) and (j), from "evidence of a past event [that] is not subject to change," which is not). Because the email is not a preliminary statement subject to future change, but instead is a statement describing past events and the justification for taking past action, it is not exempt under KRS 61.878(1)(i) or (j).

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[6] The author of the draft response also specifically directed the draft to the University's legal counsel, seeking advice about the legal implications of the draft. Thus, even if the author's initial draft was not exempt under KRS 61.878(1)(i), it would also qualify as a communication from a client to an attorney seeking legal advice about the implications of the proposed statement. Such a communication from an employee or representative of a client to the client's lawyer is protected by the attorney-client privilege. *See* KRE 503(b)(1).

[7] Moreover, the email on page 52 expresses the author's opinions about acting in the future and is exempt under KRS 61.878(1)(j).

Alternatively, the University claims this email is exempt under the First Amendment's prohibitions against government "abridging the freedom of . . . the press." U.S. Const. amend. I. The University claims the First Amendment's protection of the freedom of the press is incorporated into the Act under KRS 61.878(1)(k), which exempts from inspection "public records or information the disclosure of which is prohibited by federal law." Although the First Amendment is "federal law," it does not, on its face, "prohibit" the disclosure of any public records. Rather, the University argues the First Amendment is indirectly implicated because insight into the editorial processes of journalists would have a "chilling effect" on the press. Even if disclosure would create such a "chilling effect," the University cites no binding or persuasive legal authority holding that the First Amendment shields a government-funded news organization's records from its state's open records law.[8]

To the contrary, Kentucky law presupposes that the First Amendment does not shield press records. Perhaps because of the First Amendment's limitations, the General Assembly has enacted a *statutory* privilege preventing any member of the press from being compelled to divulge "the *source* of any information procured or obtained by him, and published in a newspaper or by a radio or television broadcasting station by which he is engaged or employed, or with which he is connected." KRS 421.100 (emphasis added). There may indeed be a "chilling effect" on the press if journalists were compelled to identify anonymous sources, because sources would be less forthcoming with information. To the extent its records may contain the name of a source for a published news story, a public agency acting as a news organization could potentially argue KRS 421.100 permits redaction of that person's name from records provided in response to a request under the Act. *See* KRS 61.878(1)(l). But the First Amendment does not grant the press a constitutional privilege to refuse to name its sources, and KRS 421.100 does not prevent the press from being compelled to provide the *information* a source provides. *See Branzburg v. Hayes*, 408 U.S. 665, 703 (1972) ("The administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order."); *Lexington Herald–Leader Co. v. Beard*, 690 S.W.2d 374, 379 (Ky. 1984) (holding the

[8] The University cites only *Tinker v. Des Monies Independent Community School District*, 393 U.S. 503 (1969), in support of its novel First Amendment claim. In that case, the United Supreme Court found the First Amendment prohibited school officials from punishing students for silently protesting the Vietnam War by wearing black armbands. *See id.* at 513. The *Tinker* case is a decision about the First Amendment's free *speech* clause. *Id.* at 506 ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom *of speech* or expression at the schoolhouse gate" (emphasis added)). It does not touch on the First Amendment's free *press* clause. The burden is on the University to sustain its actions, KRS 61.880(2)(c), and it has not done so here.

press could not rely on the First Amendment or KRS 421.100 to prevent discovery of its records in a libel action). Accordingly, the Office is unpersuaded that the First Amendment exempts inspection of the email, and the University's reliance on the First Amendment as a basis for redacting the requested records was in error. The University therefore violated the Act by withholding this email.[9]

The University also violated the Act when it fully denied the second part of the Appellant's request. The Appellant requested emails and correspondence exchanged between nine individuals "regarding WKMS news." He specified that he only sought correspondence exchanged between March 1, 2022 and the date of the request, which was October 20, 2022. The University denied this request because it claimed the request did not "precisely describe" the records sought and the request was unreasonably burdensome.

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 is not 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 also* 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).

Here, the University claimed it could not determine the scope of the Appellant's request because it did "not identify a specific or approximate date, nor [did] it identify a University record or correspondence between a specific sender and a recipient." But that is not true.[10] The Appellant requested "correspondence," including "emails" and

[9] The University does not claim this specific email is exempt under the attorney-client privilege. To the extent the University makes that claim, the privilege does not apply. The email was not sent to or by a lawyer, and it does not seek the rendition of legal services. It is simply a statement memorializing the author's editorial decision and the reasons therefor.

[10] The University also stated it should not be required to "guess" whether a record discusses WKMS News. But the Supreme Court of Kentucky has recently noted the opposite. *See Kernel Press, Inc.*, 620 S.W.3d at 48 n.2 (Open Records "requests routinely seek 'all documents pertaining to [subject matter].'

"letters," which is a specific type of record. He also identified the nine people whose correspondence he sought, and he sought only their correspondence that took place during a specific eight-month period. He further narrowed the scope of his request by subject matter, requesting just those records relating to WKMS News. Thus, the Appellant complied with KRS 61.872(3)(b) by limiting his request by persons, time frame, subject matter, and type of records. *See, e.g.*, 23-ORD-006; 22-ORD-182.

In addition to claiming the request failed to precisely describe the records sought, the University claimed the request was unreasonably burdensome. 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 University claims the Appellant's request is unreasonably burdensome because it could "*potentially* result in thousands of individual emails and attachments which would each require individual review." (emphasis added). The University stated it would have to review the records for "confidential information, information protected by the attorney-client privilege, and information that may require redaction as may be permitted under" the Act.

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).

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 records" types of requests relating to broad and ill-defined topics

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The responsibility for identifying responsive records and any applicable exception lies with the receiving public agency, not the requester" (brackets in original)).

unreasonably burdensome under KRS 61.872(6). An agency will not carry its burden (that of "clear and convincing evidence") merely by citing the Office's prior decisions finding that "any-and-all records" 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.

Here, the University estimated the number of potential records implicated by the Appellant's request to be in the "thousands."[11] But even if that were true, it is not clear that responsive records would be required by law to remain confidential. The University merely asserted that it would have to review the records for "confidential information" and "information that may require redaction as may be permitted under" the Act. The University does not explain what it means by "confidential information," or which exemptions to the Act may be implicated. The University also claims the records may be protected by the attorney-client privilege, but none of the nine people the Appellant identified in the request are attorneys. It may be possible that an attorney communicated with one of the nine individuals about WKMS News while providing professional legal services, but the University does not claim "thousands" of these privileged communications exist.[12] At bottom, the University did not search for records responsive to the Appellant's second request. Thus, the University's estimate that "thousands" of records exist and that many or all of them are required to be kept confidential remains wholly speculative at this point. The University's burden is to provide "clear and convincing *evidence*" that the request is unreasonably burdensome. KRS 61.872(6) (emphasis added). Speculation is not evidence, nor is it clear and convincing. Accordingly, the University violated the Act when it denied the second part of the Appellant's request.

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[11] It is not clear how the University has derived this estimate because it is not clear the University actually searched for responsive records. It is one thing to estimate that a request implicates "thousands" of records if an initial search indicates many records exist, even though many may not ultimately be produced because further review reveals they are not responsive to the request. It is another matter to assume, without conducting a search at all, that a request will implicate "thousands" of records. Regardless, the Office has previously rejected claims that it would be unreasonably burdensome to review 5,000 potentially responsive emails when it is not clear the records are required to be kept confidential. *See, e.g.*, 22-ORD-255.

[12] In fact, as stated in note 6, *supra*, some of the redacted emails provided in response to the first request do contain privileged attorney/client communications, even though none of the five individuals identified in that request were attorneys (other than the former judge who clearly was not the *University's* attorney).

In sum, the University violated the Act when it wholly denied the second part of the Appellant's request. The University also violated the Act when it redacted an email not exempt under KRS 61.878(1)(i) or (j) because that email described a past event and the author's justification for his past actions without any indicia the statement was preliminary to future action contemplated by the University or otherwise exempt under the Act. Moreover, the First Amendment does not permit the University to redact that email. However, the University did not violate the Act when it redacted other emails that were preliminary drafts, and discussions of those drafts, regarding a proposed response to a media inquiry or emails constituting nothing more than "for your information" types of notes.

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court under KRS 61.880(5) and KRS 61.882 within 30 days from the date of this decision. Under 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 emailed to OAGAppeals@ky.gov.

Daniel Cameron
Attorney General

s/ Marc Manley
Marc Manley
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Distributed to:

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