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-225**

August 21, 2023

In re: Melanie Barker/Cabinet for Health and Family Services

***Summary:*** The Cabinet for Health and Family Services (the "Cabinet") violated the Open Records Act ("the Act") when it failed to respond properly to a request to inspect records within five business days and when it denied the Appellant's request for certain emails sent over a seven-month period.

## *Open Records Decision*

On June 9, 2023, Melanie Barker ("Appellant") submitted to the Cabinet a request to inspect emails about her and her two businesses, which four Cabinet employees sent between July 2022 and January 2023. That same day, the Cabinet acknowledged receipt of the request and stated it would take two weeks to respond. On June 30, the Appellant asked when she would receive a response to her request and the Cabinet stated it would respond "in the upcoming week." On July 25, 2023, having received no further response from the Cabinet, the Appellant initiated this appeal.

Upon receiving a request to inspect records, a public agency must decide within five business days whether to grant the request, or deny it and explain why. KRS 61.880(1). Or, if responsive records are "in active use, in storage or not otherwise available," a public agency may delay access to them by stating the earliest date on which they will be available and a detailed explanation of the cause of the delay. KRS 61.872(5). Here, although the Cabinet responded to the request, it neither granted nor denied the request within five business days. Instead, it stated it would take two weeks to respond without specifying the earliest date on which the records would be available or giving a detailed explanation for the cause of the delay. Rather,

the Cabinet did not substantively respond to the Appellant's request until after this appeal was initiated. Accordingly, the Cabinet's response did not comply with KRS 61.872(5), and it therefore violated the Act.

On appeal, the Cabinet asserts it was concerned with contacting the Appellant in light of a civil lawsuit she had filed against the Cabinet. The Office recognizes the ethical obligations of attorneys to not engage in direct communications with adverse parties represented by counsel regarding the subject matter of the representation. *See* SCR 3.130(4.2). However, the rule does not prohibit an attorney from communicating with a represented adverse party who initiated the communication if the extent of the communication is for the sole purpose of informing the party that the attorney will not communicate with him and will only speak to his retained counsel. *See id.* at cmt. 4 (stating a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so). In the context of requests to inspect records, the Act not only provides the "independent justification or legal authorization" for an agency to respond to a plaintiff's request, but also *requires* the agency to respond within five business days of receiving the request. KRS 61.880(1). Thus, when an agency engaged in litigation against a person represented by counsel receives a request to inspect records pertaining to that litigation, the agency must, at a minimum, respond to the request and inform the plaintiff that her request is being denied, either because SCR 3.130(4.2) prevents further communications with the plaintiff or because the records are otherwise exempt. Simply put, a public agency may not ignore a request to inspect records even if the requester is an adverse party in litigation and represented by counsel. *See* 23-ORD-096 (holding that a Commonwealth's Attorney could not ignore a request to inspect records submitted by a criminal defendant he was prosecuting). Here, the Cabinet does not dispute having received the Appellant's request or otherwise claim to have timely issued a response. Accordingly, the Cabinet did not comply with KRS 61.880(1).[1]

The Cabinet further states on appeal that the Appellant has not provided enough information to enable the Cabinet to locate responsive records. Specifically, the Cabinet states, "to perform a search of employee [email] accounts" it needs "a date range, the specific accounts to be searched, and keywords." According to the Cabinet, the Appellant provided subjects rather than keywords when she requested emails about her and her two businesses. As such, the Cabinet asserts the Appellant has not

[1] On appeal, the Cabinet claims it provided its response to the Appellant's request directly to her attorney on July 17, 2023.

precisely described the records to be inspected and, citing 16-ORD-082, asserts that "blanket requests for information on a particular subject need not be honored."

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). 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 also, 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).

Here, the Cabinet argues it cannot ascertain the nature and scope of the Appellant's request because the Appellant requested emails about specific subjects and she did not provide keywords to search. Specifically, the Cabinet explains that, if it performed three searches which alternatively used the Appellant's first name, last name, or first and last name, each search would yield different results. Thus, according to the Cabinet, the Appellant's request cannot be performed without her specifying keywords to be included in its search. However, the Appellant has not requested records "related to a broad and ill-defined topic." Rather, the Appellant specified the types of records she sought, *i.e.*, emails. She narrowed her request to emails sent over a seven-month period, from July 2022 to January 2023. And she narrowed the topic of her request to emails that discussed her or her two businesses. Given all these limitations the Appellant placed on her request, the Office cannot conclude the request related to a broad, ill-defined topic that would lead to an incalculable number of potentially responsive records. *See, e.g.*, 23-ORD-168, 23-ORD-024, 23-ORD-006; 22-ORD-182. Accordingly, the Cabinet violated the Act when it denied the Appellant's request.

A party aggrieved by this decision may appeal it by initiating an 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/ Zachary M. Zimmerer
Zachary M. Zimmerer
Assistant Attorney General

#331

Distributed to:

Melanie Barker
Elyssa S. Morris
David T. Lovely