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23-ORD-230

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In re: Steve Knipper/Office of the Secretary of State

Summary: The Office of the Secretary of State ("the agency") violated the Open Records Act ("the Act") when it denied a request that adequately described records to be inspected as "vague." The agency also failed to explain how requested emails were exempt under KRS 61.878(1)(i).

Open Records Decision

Steve Knipper ("the Appellant") asked the agency to provide copies of all emails sent to the Secretary of State "or any staff" from three individuals and eleven specific email addresses. In a timely response, the agency denied the request as too vague because the Appellant failed to specify by name the staff whose email accounts he wanted the agency to search. The agency explained it "employs over 30 individuals," and therefore, the Appellant's request lacked precision. The agency also claimed "the responsive email records" of the Secretary are "preliminary in nature" and would therefore be withheld. However, the agency further stated the Secretary did not possess responsive records for all but one of the identified individuals or email addresses. This appeal followed.

When a person seeks to inspect public records by receiving copies in the mail, the person must "precisely describe" the records to be inspected. KRS 61.872(3)(b). And a public agency may deny a request to inspect records under KRS 61.872(6) "[i]f the application places an unreasonable burden in producing public records" on the agency. However, an agency denying a request under KRS 61.872(6) must support its denial with "clear and convincing evidence." *Id.* 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). When a request does not "precisely describe" the records to be inspected, KRS 61.872(3)(b), chances are higher that the agency is incapable of searching its records using the broad and ill-defined keywords used in the request.

On appeal, the agency continues to assert that the request is too vague and does not "precisely describe" the records sought. The agency cites to the Office's decision in 19-ORD-064, in which the Office found "there is no requirement that the public agency conduct a search" for responsive records "[i]f a requester cannot describe the documents he wishes to inspect with sufficient specificity." But here, the Appellant clearly described the records he wished to inspect: the emails of every employee in the agency, including the Secretary, which were received from specific individuals or email addresses. The fact the agency may employ 30 people reflects the burden of the search, not the inability to conduct one because the agency cannot determine what is being sought. Here, the agency has not explained how it would be unreasonably burdensome to ask all its employees to search their inboxes for the responsive keywords. Nor has it claimed to have uncovered so many responsive emails that it would be unreasonably burdensome to review and redact them of information that is required to remain confidential. Simply put, the request is not too vague, and the agency has not produced clear and convincing evidence that the request places an unreasonable burden on it. As such, the agency violated the Act.

The agency also located some responsive emails from the Secretary but withheld them under KRS 61.878(1)(i) because they are "preliminary in nature." However, when an agency denies a request to inspect records it must cite the applicable exemption and state how it applies to the records withheld. KRS 61.880(1). A response that merely cites and paraphrases an exemption is "limited and perfunctory." *Edmondson v. Alig*, 926 S.W.2d 856, 858 (Ky. App. 1996). In *Edmondson*, the agency's response to a request stated only that "the information you

seek is exempt under KRS 61.878(1)(a)(k)(l) [*sic*]." *Id*. The agency failed to explain how any of the three exemptions applied to the records withheld, and for that reason, the court held, it violated KRS 61.880(1). *Id*.

Kentucky courts have refined the level of detail KRS 61.880(1) requires for a "brief explanation" in support of a denial. As stated by the Supreme Court of Kentucky, an agency is not "obliged in all cases to justify non-disclosure on a line-by-line or document-by-document basis." *City of Ft. Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 851 (Ky. 2013). Rather, "with respect to voluminous [open records] requests . . . it is enough if the agency identifies the particular kinds of records it holds and explains how [an exemption applies to] the release of each assertedly [*sic*] exempt category." *Id*. (discussing the "law enforcement exception" under KRS 61.878(1)(h)). Of course, "if the agency adopts this generic approach it must itself identify and review its responsive records, release any that are not exempt, and assign the remainder to meaningful categories. A category is meaningful if it allows the court to trace a rational link between the nature of the document and the alleged" exemption. *Id*. (quotation omitted). The Court also has acknowledged the Act must be "workable." *Ky. New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76, 89 (Ky. 2013). As a result, when certain types of information that are kept in public records are routinely exempt, an agency "need not undertake an ad hoc analysis of the exemption's application to such information in each instance, but may apply a categorical rule." *Id*.

The takeaway from these decisions is that—at least with respect to voluminous requests—an agency must break up responsive records into meaningful categories and explain how the exemptions cited for each category of records applies. Here, the agency claimed the emails are all exempt under KRS 61.878(1)(i) because they are "preliminary in nature." In its initial response, the agency also explained that "[p]reliminary memoranda, drafts, notes, etc., not incorporated into final action are preliminary and therefore exempt from disclosure." However, the agency did not describe the content of the emails or explain how they qualify as preliminary drafts or notes. *See, e.g.*, 22-ORD-262 (the agency properly invoked KRS 61.878(1)(i) by assigning responsive emails to categories and describing the content of each category). Accordingly, the agency's initial "limited and perfunctory" response violated the Act. *Edmondson*, 926 S.W.2d at 858.

On appeal, the agency still has not described the contents of the emails, but instead argues "government emails are exempt from the Open Records Act as preliminary until incorporated into a 'final agency action.'" *See, e.g., Univ. of*

Louisville v. Sharp, 416 S.W.3d 313, 316 (Ky. App. 2013). But in *Sharp*, the University had described the withheld emails as pertaining to a hospital merger that had not been completed, which the Office was able to confirm by reviewing the emails confidentially under KRS 61.880(2)(c). Here, as discussed, the agency has not described the content of the emails with enough specificity for the Office to determine whether final action has or has not occurred. Thus, while the responsive emails may indeed be preliminary if they discuss options that have not been adopted into final action, the agency has not carried its burden of proving that fact under KRS 61.880(2)(c).

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.

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Distributed to:

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