



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-234**

September 5, 2023

In re: Ronald Godsey/Department of Criminal Justice Training

**Summary:** The Department of Criminal Justice Training (“the Department”) violated the Open Records Act (“the Act”) when it failed to establish by clear and convincing evidence that repeated requests were unduly burdensome or intended to disrupt essential agency functions under KRS 61.872(6). The Department did not violate the Act when it withheld attorney-client communications or when it withheld preliminary records under KRS 61.878(1)(i) or (j) that did not relate to the requesting employee within the meaning of KRS 61.878(3).

***Open Records Decision***

On July 5, 2023, Department employee Ronald Godsey (“Appellant”) requested five categories of records from the Department. First, he requested “[a]ll documentation reviewed by [the commissioner] to make determination of modification of” the Appellant’s May 2023 request for accommodation under the Family and Medical Leave Act (“FMLA”) and the Americans with Disabilities Act (“ADA”). Second, he requested “any supporting documentation used to determine that the position of Resource Analyst I is considered essential to” the Department. Third, he requested “any supporting documentation of the stated ‘extensive timely team interaction’ that could not be performed telecommuting.” Fourth, he requested “any supporting documentation that would show that providing the original ADA accommodation request would entail significant difficulty or expense to the agency.” Finally, he requested “any documentation or directives from Justice and Public Safety Cabinet, [the Department], and/or the Personnel Cabinet regarding [Department] personnel are considered non-essential.”

In a timely response, the Department provided 161 pages of documents but withheld other records. Specifically, the Department withheld “communications

between state employees and their attorneys for the purpose of seeking legal advice” under Kentucky Rule of Evidence (“KRE”) 503, which is incorporated into the Act under KRS 61.878(1)(l) and (k). In addition, under KRS 61.878(1)(i) and (j), the Department withheld “policy review discussions that are not part of the final action of the agency,” which “are subject to many changes and are work papers or drafts.”

On July 13, 2023, the Appellant complained that he could not ascertain which records, and which denials, were responsive to the specific parts of his request. He therefore asked the Department to “identify the Request [number] associated with each responsive document” and to “provide each request [number] in which [the Department] denied any part of that request and the reason for the denial.” The Department refused, claiming it was “not required to respond to a request for information or gather, supply, or create a new record to satisfy requests for information.”<sup>1</sup>

On July 17, 2023, the Appellant resubmitted the second, third, and fourth parts of his original request as three separate requests. The Department assigned individual numbers to these requests, but denied them all under KRS 61.872(6) because they “are duplicative requests for the same records.” However, the Department offered to provide “duplicate copies of the responsive records” if the Appellant “indicate[d] that the records provided to [him] were lost, misplaced or destroyed.” This appeal followed.

The Appellant claims the Department improperly denied his July 17 requests. Under KRS 61.872(6), “[i]f the application places an unreasonable burden in producing public records or if the custodian has reason to believe that repeated requests are intended to disrupt other essential functions of the public agency, 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.” “Clear and convincing proof is that ‘of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinary prudent minded people.’” *F.V. v. Commonwealth, Cabinet for Health & Family Servs.*, 567 S.W.3d 597, 606 (Ky. App. 2018) (quoting *Rowland v. Holt*, 70 S.W.2d 5, 9 (Ky. 1934)). Here, the Appellant has explained that his repeated requests were intended to help him determine which records pertained to each separate portion of his original request. When a requester articulates a reason for repeated requests and the agency produces no evidence that those requests are unreasonably burdensome or “intended to disrupt [its] other essential functions,” the agency fails to sustain its denial by clear and convincing evidence. *See, e.g.*, 23-ORD-180; 09-ORD-076. Because the Department has not met its burden, it violated the Act when it denied the Appellant’s requests under KRS 61.872(6).

---

<sup>1</sup> The Act does not require a public agency to explain the contents of records, OAG 89-81, or provide additional information not contained in the records themselves. *See, e.g.*, 14-ORD-109.

The Appellant also claims the Department wrongly withheld records responsive to his original request. Although the Appellant does not dispute the Department's position that the records are exempt from disclosure to the general public under KRS 61.878(1)(i), (j), (k), or (l), he claims he may nevertheless obtain the records because they relate to him as an employee of the Department. Under KRS 61.878(3), "[n]o exemption in this section shall be construed to deny, abridge, or impede the right of a public agency employee . . . to inspect and to copy any record including preliminary and other supporting documentation that relates to him or her."

This Office has consistently recognized that a public employee's right of access does not extend to records that are made confidential by state law, including records protected by the attorney-client privilege or the work product doctrine. *See, e.g.*, 21-ORD-260; 10-ORD-177; 08-ORD-065; 04-ORD-045; 02-ORD-168; 98-ORD-124; 96-ORD-40. Accordingly, the Appellant does not have a right under KRS 61.878(3) to obtain privileged communications exchanged between an attorney and client to facilitate the rendering of legal services, even if those privileged communications relate to him. Thus, the Department did not violate the Act when it withheld records subject to the attorney-client privilege.

However, the Appellant is entitled under KRS 61.878(3) to obtain "preliminary and other supporting documentation that relates to him," notwithstanding the exempt status of the records. The question is whether any of the material the Department withheld under KRS 61.878(1)(i) or (j) "relates to" the Appellant within the meaning of KRS 61.878(3). Whether a particular record "relates to" a public employee depends on the context of the request. For example, if a record contains no specific reference to an employee but has been used in determining that employee's fitness for a promotion, it "relates to him" in the context of his request for records relating to his assessment for that promotion. *See* 02-ORD-168 n.3.<sup>2</sup>

Here, the Appellant claims all the records he requested relate "to information used for consideration related to [his] request for accommodations" under the ADA. The Department, however, disputes whether two of the categories of records are in fact related to the determination of the Appellant's ADA request. Specifically, the Department takes issue with "supporting documentation used to determine that the position of Resource Analyst I is considered essential" and "documentation or directives from Justice and Public Safety Cabinet, [the Department], and/or the Personnel Cabinet regarding [Department] personnel are considered non-essential."

---

<sup>2</sup> The employee in 02-ORD-168 had requested an examination used for promotion. Although the Office found the examination "related to" the employee for purposes of his request, he was not entitled to obtain a copy of it because KRS 61.878(3) specifically excludes "the right to inspect or copy any examination."

The Department claims these documents “generally relate to whether [Department] employees may be designated ‘essential’ for the purposes of return to work during emergencies.”

In its response to the Appellant’s original request, the Department characterized these records as “policy review discussions[,] work papers or drafts.” Accordingly, the Department asserts the withheld records relate to the Appellant’s ADA claim “only remotely” because they are preliminary materials used in formulating a general policy, not documentation used in determining the Appellant’s request for accommodation. This distinguishes the present appeal from 02-ORD-168. While an employee may have a right under KRS 61.878(3) to inspect “supporting documentation” representing general agency policies applied to his situation, he is not entitled to inspect the preliminary drafts, notes, or preliminary discussions that preceded those general policies when such records are exempt under KRS 61.878(1)(i) or (j). Preliminary records pertaining to the formulation of general policy do not “relate to” a specific employee within the meaning of KRS 61.878(3). Thus, the Department did not violate the Act when it withheld such records under KRS 61.878(1)(i) and (j).

A party aggrieved by this decision may appeal it by initiating an 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 emailed to OAGAppeals@ky.gov.

**Daniel Cameron**  
**Attorney General**

s/ James M. Herrick  
James M. Herrick  
Assistant Attorney General

#343

Distribution:

Mr. Ronald Godsey  
Erritt Griggs, Esq.  
Denna D. Brockman, Esq.  
Nicolai R. Jilek, Commissioner

