



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-241

September 15, 2023

In re: Christopher Shaughnessy/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 denied a request for emails under KRS 61.878(1)(i) without explaining how the exception applied to each category of emails withheld. The Cabinet also violated the Act when it failed to respond to a portion of a request.

Open Records Decision

Christopher Shaughnessy (“Appellant”) submitted a request to the Cabinet for:

All records, written or electronic communications, and documents concerning or regarding Kentucky Medicaid coverage, coding, billing, and reimbursement of Intermediate Care Facilities for Individuals with the Intellectual Disability [*sic*] (“ICF/IID”) for Psychology and Behavioral Services provided to patients [or] individuals served by the ICF/IID provider from January 1, 2020 through the present, including but not limited to regulations, policies, directives, procedures, instructions, manuals and evidence regarding the provision of Psychology and Behavioral Services being billed as ancillary services, being considered “routine” services, being reimbursed as part of the costs of the ICF/IID (and if so, how and when they are reimbursed as part of the costs of the ICF/IID), and any regulatory changes regarding same between January 1, 2020 through the present, the effective date of those changes, the promulgation and implementation of those changes, and how providers were notified of those changes.

The Cabinet denied the request under KRS 61.878(1)(h) because the Department for Medicaid Services had “searched its database for releasable documents [and]

discovered that the records pertain to a case that is still under investigation” and release of the records would “harm the investigation by releasing information that may prevent the Cabinet from obtaining unbiased evidence.” In addition, the Cabinet withheld some records under KRS 61.878(1)(i) “independently of the pending investigation because they constitute interoffice emails and correspondence with private individuals not intended to give notice of final action.” This appeal followed.

The Appellant claims the Cabinet improperly invoked KRS 61.878(1)(h) because his request “does not seek any investigative files, deliberate [*sic*] processes, etc.,” but “essentially requests information on laws (i.e., rules, regulations, policies, manuals, etc.) governing reimbursement of ICF/IID facilities as those may have changed and evolved from January 1, 2020 through May 24, 2023.” In response, the Cabinet agrees it should not have relied on KRS 61.878(1)(h) to deny the request, but reiterates its claim that the responsive emails unrelated to a pending investigation are exempt under KRS 61.878(1)(i) “because they constitute interoffice emails and correspondence with private individuals not intended to give notice of final agency action.”

When a public agency denies a request under the Act, it must give “a brief explanation of how the exception applies to the record withheld.” KRS 61.880(1). The agency’s explanation must “provide particular and detailed information,” not merely a “limited and perfunctory response.” *Edmondson v. Alig*, 926 S.W.2d 856, 858 (Ky. 1996). “The agency’s explanation must be detailed enough to permit [a reviewing] court to assess its claim and the opposing party to challenge it.” *Ky. New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76, 81 (Ky. 2013). This requires the agency to assign the withheld records to “meaningful categories” that describe the nature of the documents and how the claimed exemption applies to the documents in the category. *See, e.g.*, 19-ORD-120; 15-ORD-003. Here, the Cabinet has identified two categories, “interoffice emails” and “correspondence with private individuals.”

KRS 61.878(1)(i) exempts from disclosure “[p]reliminary drafts, notes, [and] correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency.” Emails with private individuals, not intended to give notice of final action, are clearly exempt under KRS 61.878(1)(i). However, while most “interoffice emails” may be drafts or notes that have not been adopted into final action, not all of them are. *See, e.g.*, 23-ORD-024 (distinguishing interoffice emails discussing potential actions to take in the future, which are preliminary, from interoffice emails discussing events that took place in the past, which are not). The Cabinet has not described the general subject matter of the emails such that the Appellant could determine whether the Cabinet has properly applied the claimed exception. *See, e.g.*, 22-ORD-262 (the agency complied with KRS 61.880(1) by categorizing and describing by subject matter emails that were exempt under KRS 61.878(1)(i)). Because the Cabinet has not described the

content of the emails or explained how KRS 61.878(1)(i) allowed it to withhold them, it violated the Act.

The Cabinet also asserts that, if the Appellant seeks “public laws and regulations” relating to Medicaid reimbursement, he can locate them in public legal databases. The Cabinet is correct that an agency is not required to provide copies of such materials. *See, e.g.*, 22-ORD-007; 00-ORD-130 (the Act does not require public agencies to perform legal research for a requester). But the Appellant did not limit his request to just public laws. He also requested “policies, directives, procedures, instructions, [or] manuals” regarding billing and reimbursement practices for psychology and behavioral services.¹

The Cabinet has not stated whether any such “policies, directives, procedures, instructions, [or] manuals” exist. Moreover, if such records do exist, the Cabinet has not claimed they are exempt from disclosure. “A public agency cannot ignore portions of a request.” 21-ORD-090. If the records exist and an exemption applies to deny inspection, the public agency must cite the exemption and explain how it applies. KRS 61.880(1). If the records do not exist, then instead of ignoring those portions of the request, the public agency must affirmatively state that such records do not exist. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov’t*, 172 S.W.3d 333, 341 (Ky. 2005); *see also* 22-ORD-007. Therefore, the Cabinet violated the Act by failing to respond to the Appellant’s request for “policies, directives, procedures, instructions, [or] manuals.”

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.

¹ The Cabinet also now attempts to characterize the Appellant’s request as a request for information rather than for records. However, “policies, directives, procedures, instructions, manuals and evidence regarding” billing and reimbursement practices for psychology and behavioral services are clearly records that can be inspected, absent an applicable exemption. Of course, the Appellant’s request for “evidence” could implicate pending investigations, but he has clarified that he does not seek such records. Moreover, as discussed previously, the Appellant also sought “written or electronic communications.” Therefore, the Appellant has described records to be inspected and has not merely requested information.

Daniel Cameron
Attorney General

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

#297

Distribution:

Christopher J. Shaughnessy, Esq.
David T. Lovely, Esq.
Elyssa S. Morris, Esq.