



COMMONWEALTH OF KENTUCKY OFFICE OF THE ATTORNEY GENERAL

RUSSELL COLEMAN
ATTORNEY GENERAL

1024 CAPITAL CENTER DRIVE
SUITE 200
FRANKFORT, KY 40601
(502) 696-5300

24-ORD-047

February 26, 2024

In re: Howard Froelicher/Campbell County Attorney

Summary: The Campbell County Attorney (“the County Attorney”) did not violate the Open Records Act (“the Act”) when he denied as unreasonably burdensome a request for records that would require a review of more than 100,000 emails.

Open Records Decision

Howard Froelicher (“the Appellant”) submitted a request to the County Attorney for “2 years of email communications.” In a timely response,¹ the County Attorney denied the request as unreasonably burdensome under KRS 61.872(6) because “[t]here are 111,343 emails that [are] responsive to [his] request.” The County Attorney further explained that many responsive emails pertain to criminal investigations and litigation, which are exempt under KRS 61.878(1)(h). Other emails relate to “juvenile court matters which are confidential pursuant to KRS 610.340.” The County Attorney estimated it would take at least one minute to review each email to determine whether any exemption applied, and therefore, would take one employee “more than 46 weeks” working 40 hours per week to review all responsive emails. This appeal followed.

¹ The Office notes the Appellant has sent multiple requests to the County Attorney for the same records and copied the Office when submitting those requests. Often, the Appellant failed to wait five business days before attempting to initiate an appeal with the Office. See KRS 61.880(1) (requiring a public agency to decide within five business days after receiving a request whether to comply with the request). The Appellant also previously attempted to appeal the County Attorney’s alleged failure to respond to a different request for emails specifically mentioning him, but subsequently withdrew his appeal after allegedly reaching an agreement with the County Attorney. In response to this appeal and the Appellant’s claims the County Attorney has failed to comply with the parties’ bargain, the County Attorney claims to have provided the Appellant’s counsel with all emails related to him and his criminal case through the criminal discovery process. With respect to the Appellant’s most recent request, the County Attorney claims he received it on February 2, 2024, and issued a timely response on February 5, 2024.

Under KRS 61.872(6), a public agency may deny a request to inspect records “[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.” However, an agency must substantiate its denial “by 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 catalog 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. However, both factors are the most important to consider. The Office has previously found that searching and sorting through 5,000 emails to separate exempt emails from nonexempt emails was not an unreasonable burden, when it was not clear the emails contained information that was required to remain confidential by law. *See, e.g.*, 22-ORD-255. On the other hand, the Office has found an unreasonable burden when the request required an agency to search through 20,000 files, most of which were exempt under the attorney-client privilege and contained property appraisals exempt under KRS 61.878(1)(f). *See, e.g.*, 04-ORD-117 (finding “no reason why the Cabinet should be compelled to expend countless hours in reviewing 20,000 files to insure that protected information is not disclosed”). Similarly, here, the County Attorney has carried his burden under KRS 61.872(6) that reviewing over 100,000 responsive records places an unreasonable burden on the agency.² Accordingly, the County Attorney did not violate 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 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

² Further, on appeal, the County Attorney claims the Appellant’s request is intended to disrupt the essential functions of the agency. *See* KRS 61.872(6). The County Attorney notes the Appellant has sent “hundreds” of emails to him and his staff, many of which contain threats and harassing language. Because the Office concludes the Appellant’s most recent request, standing alone, places an unreasonable burden on the agency, it is unnecessary to determine whether his repeated requests are also intended to disrupt the agency’s functions.

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.

Russell Coleman
Attorney General

/s/ Marc Manley
Marc Manley
Assistant Attorney General

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Distributed to:

Howard Froelicher
Adam Hill