



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-048

February 28, 2024

In re: Austin Horn/Office of the Governor

Summary: The Office of the Governor (“the agency”) violated the Open Records Act (“the Act”) when it denied a request as too imprecise and unreasonably burdensome.

Open Records Decision

Austin Horn (“the Appellant”) emailed a request to the agency for “the full emails threads to or from Governor’s Office employees” containing six keywords: “HHR”; “Revolutionary Racing”; “Sandy Ridge”; “EBCI”; “Larry Brown”; and “TJ Morrison.” The Appellant clarified the “time frame of the request is inclusive of the last 2 years from today.” In a timely response, the agency denied the Appellant’s request because he did not “precisely describe” the records he sought. The agency also denied the request as unreasonably burdensome. Specifically, the agency claimed the Appellant’s request was not specific enough because it “does not identify a specific employee, a specific department within the [agency] or the specific type of record” sought. As such, the agency claimed it would have to search “tens of thousands” of emails contained in the email inboxes of roughly 50 current employees, some former employees, and “constituent emails and open records requests.” This appeal followed.¹

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

¹ The Appellant’s request was submitted to the agency on the standardized open records request form promulgated by the Attorney General. See 40 KAR 1:040. He attached the form to an email, but in the body of the email he explained that the scope of the request was limited to two years. When the Appellant initiated this appeal, he provided only a copy of the standardized open records request form he submitted to the agency, but he omitted the email to which the request form had been attached. To seek the Attorney General’s review of an agency’s denial of a request under KRS 61.880(2)(a), the requester must provide a copy of both the written request and the agency’s response. Because the email modified the substance of the request, it is itself part of the request and should have been provided initially. However, the Appellant has corrected his initial omission and provided the email to the Office, thus complying with the requirements of KRS 61.880(2)(a).

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, 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).

Here, the Appellant did not seek “any-and-all records” related to a broad and ill-defined topic. Rather, he sought emails, which are fairly easy to search. Moreover, the Appellant narrowed the scope of his request to only those emails that contain any of six specific keywords. The Appellant narrowed the request still further by limiting its scope to only those emails sent or received by the agency in the past two years. Although the agency faults the Appellant for not identifying the employees or departments that might possess responsive records, the Act does not require the Appellant to do so. Because he seeks copies of records by mail, the Act requires him to precisely describe the *records* sought, not their potential location. The agency is the party responsible for ascertaining the location of responsive records or the personnel who may possess them. *Univ. of Ky. v. Kernel Press, Inc.*, 620 S.W.3d 43, 48 n.2 (Ky. 2021) (“ORA requests routinely seek ‘all documents pertaining to [subject matter].’ The responsibility for identifying responsive records and any applicable exception lies with the receiving public agency, not the requester.”).

The Office has previously found that a request for any emails sent or received by agency personnel containing certain keywords is not a vague request. *See, e.g.*, 23-ORD-006 (involving emails of 13 employees); 23-ORD-010 (same); 23-ORD-230 (emails of 30 employees). As stated in 23-ORD-230, “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.” Similarly, the fact this agency employs 50 people might make its search slightly more burdensome than an agency employing 30 people, but it does not make the Appellant’s request any less specific. Simply put, the Appellant’s request only requires the agency to ask each of its employees to search for a mere six keywords in their emails. As such, the request is sufficiently specific for the agency to conduct the statutorily required search.

Of course, the *number* of emails that may be found in response to that search would be relevant to how burdensome the request truly is, especially if the content of those emails is subject to statutory exemptions requiring the emails to be redacted. Indeed, imprecise requests may result in a burden that becomes unreasonable because of the requester’s failure to limit the scope of the request. Under KRS 61.872(6) “[i]f the application places an unreasonable burden in producing

public records” on the agency, then the agency can deny the request. However, an agency denying a request under KRS 61.872(6) must support its denial by “clear and convincing evidence.” *Id.* In addition to claiming the request is too imprecise, the agency here also claims the Appellant’s request is unreasonably burdensome.

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).

Here, however, the agency has not estimated or quantified the number of records at issue, or explained how they may contain exempt information, because it has not conducted a search. As such, the main factors the Office considers—numerosity and the exempt status of the records—do not tilt in the agency’s favor. And because emails can be searched by querying keywords, the last factor also cuts against the agency. At bottom, the agency has put forward no evidence the request is unreasonably burdensome, let alone evidence that is clear and convincing. As such, the agency 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 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.

Russell Coleman
Attorney General

/s/ Marc Manley
Marc Manley
Assistant Attorney General

#39

Distributed to:

Austin Horn
Travis Mayo
Laura Tipton
Taylor Payne