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24-ORD-180

August 19, 2024

In re: Michael Frazier/University of Kentucky

Summary: The University of Kentucky (“the University”) did not violate the Open Records Act (“the Act”) when it denied a request for copies of records that did not precisely describe the public records requested. However, the University violated the Act when it denied a request for records from a named employee during a specific time period containing certain search terms.

Open Records Decision

On July 11, 2024, Michael Frazier (“the Appellant”) submitted a lengthy request to the University for electronic copies of records relating to several topics. Some portions of the request were for specifically identified records, including syllabi and reading assignments for two University courses, financial statements relating to the student diversity fee and Faculty Diversity Fund, and applications for five specific scholarships or awards. The University provided those records to the Appellant.

However, the remaining portions of the request were less specific. The Appellant requested “all documents, material, communications, [and] correspondence” relating to several different topics during certain time periods. These topics have been summarized by the University¹ in a list, as follows:

1. UK 101 – Academic Orientation (since 2023)
2. UK 201 – Academic Orientation for Transfer Students (since 2023)
3. The “Diversity Fee” charged to full time students (since 2020)
4. The Faculty Diversity Fund (since 2020)
5. Six different Scholarship Funds (since 2018)²

¹ As the University points out in its response to this appeal, the actual text of the Appellant’s request would fill four single-spaced pages.

² With respect to this portion of the request, the Appellant also sought “material relating directly or from [*sic*] those administering” the scholarships and awards.

6. The University Senate's requirement that all syllabi contain a "statement on Diversity, Equity and Inclusion" (since 2017)
7. The subject of Diversity, Equity, and Inclusion at the Lewis Honors College (since 2016)
8. The subject of Diversity, Equity, and Inclusion at the Dean of Students' Office (since 2018)
9. The subject of Diversity, Equity, and Inclusion at the College of Arts and Sciences and all departments within the College (since 2017)
10. The subject of Diversity, Equity, and Inclusion in admissions and recruitment (since 2017)
11. Any climate surveys issued by the University of Kentucky, Student Government Association, or the University's affiliated corporations (since 2014)
12. The involvement of senior administrators concerning various terms related to Diversity, Equity, and Inclusion (since 2017)

With respect to the "Diversity Fee" and Faculty Diversity Fund, the Appellant also requested "any and all employee emails, official and preliminary documents, internal chats, text messages sent in professional capacity, reports, and minutes." Finally, the Appellant requested "all documents, material, communications, correspondence from" a named employee since 2016 containing several listed terms.

The University denied these portions of the request as "unduly burdensome" under KRS 61.872(6) because the request did not "precisely describe" the records sought, and the custodian would "have to search emails, electronic files, and paper records throughout the University" and could "never be certain that it has obtained 'all' of the relevant records." Additionally, the University claimed the records would encompass many "preliminary drafts, notes, [and] correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency," which are exempt from disclosure under KRS 61.878(1)(i), as well as "preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended," which are exempt under KRS 61.878(1)(j). Finally, the University stated any confidential communications between an attorney and his or her client to facilitate the rendition of professional legal services would be privileged under KRE 503. This appeal followed.

When a person requests copies of public records under the Act, "[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 readily available within the public agency." KRS 61.872(3)(b). 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). 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 also* 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); *but see Univ. of Ky. v. Kernel Press, Inc.*, 620 S.W.3d 43, 48 n.2 (Ky. 2021) (holding a request was proper when it sought “all records detailing [the] resignation” of a specific employee). A request that does not precisely describe the records “places an unreasonable burden on the agency to produce often incalculable numbers of widely dispersed and ill-defined public records.” 99-ORD-14.

On appeal, the University explains that, in responding to a request, it must “decide which [of its] offices and employees to consult about potentially responsive records” and, in the case of electronic records, “craft search terms and then work with University Information Technology to run the search.” Here, the disputed portions of the Appellant’s request are not limited to electronic records. Indeed, these portions are not limited to identifiable types of records at all but encompass all “documents” and “materials” relating to a subject. Most are neither limited to records pertaining to specific employees³ nor searchable based on the criteria provided. *See* 23-ORD-066 n.2. Unlike the precise subject matter at issue in *Kernel Press*, which involved a discrete personnel matter, the 12 subjects listed above include topics as varied as courses, fees, funds, surveys, “Diversity, Equity, and Inclusion,” and “the involvement of senior administrators.” In each of these cases, the Appellant essentially requested any and all records relating to those topics. Unlike the records in *Kernel Press*, which could reasonably have been found within a specific employee’s personnel file or a particular investigative file, the types of records requested by the Appellant could potentially concern anyone and be located anywhere. A request of this nature is “so nonspecific as to preclude the custodian from determining what, if any, existing records it might encompass.” 96-ORD-101. Because portions of the Appellant’s request did not precisely describe the records as required by KRS 61.872(3)(b), the University did not violate the Act when it denied them.⁴

However, the last portion of the request, in which the Appellant sought “all documents, material, communications, [and] correspondence from” a named

³ According to its website, the University “is one of the state’s largest employers,” consisting of “more than 12,000 staff and 2,000 faculty.” *See* <https://www.uky.edu/faculty-staff/> (last accessed August 8, 2024).

⁴ The Appellant claims the University should already “have most of these records compiled” from its July 31, 2024, response to an inquiry from a member of the General Assembly on June 26, 2024. The legislator’s inquiry, however, was a request for information and bears no resemblance to the Appellant’s request, apart from its concern with the same general subject matter. The University has provided the Office and the Appellant with a copy of that inquiry and response.

employee since 2016 that contain certain words or phrases,⁵ must be analyzed differently. In 24-ORD-152, the Office found a similarly worded request was sufficiently specific because the University could fulfill its obligation under the Act by searching the named employee's computer and email account.⁶ Further, in 23-ORD-006, the Office found a request for correspondence to or from certain named individuals within a specific time frame and containing certain keywords "precisely describe[d]" the records requested. Similarly, the request here does not implicate widely dispersed or ill-defined public records. Accordingly, this portion of the request "precisely describe[d]" the records within the meaning of KRS 61.872(3)(b).

The University also claims the Appellant's request is unreasonably burdensome. 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." 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.,* 24-ORD-152.

Here, the University states it "has not determined what records are potentially responsive." Thus, the number and nature of the records implicated by the last portion of the Appellant's request are unknown. Nevertheless, the University argues it is unduly burdensome to redact the records, as required by KRS 61.878(4), because they are likely to contain material that is exempt from disclosure under the Family Educational Rights and Privacy Act ("FERPA"), preliminary drafts and notes that are exempt under KRS 61.878(1)(i), preliminary recommendations and policy memoranda that are exempt under KRS 61.878(1)(j), and attorney-client communications that are privileged under KRE 503. However, because the University has not yet determined what records exist that are potentially responsive to the Appellant's request, the Office is unable to determine whether any potential exemptions apply to the requested records. As to the University's argument under KRS 61.872(6), the University has not shown by clear and convincing evidence that

⁵ The words and phrases identified in the request are "unconscious bias," "anti-racism," "decolonization," "safe-zone," "ally," "cis-gender," "heteronormativity," "gender inclusive," "gender inclusion," "queer," "queerness," and "civility."

⁶ The University claims the Office's decision in 24-ORD-152 is "wrong." If a public agency disagrees with an open records decision, its remedy is to appeal that decision to the appropriate circuit court under KRS 61.882.

the last portion of the Appellant's request imposes an unreasonable burden or is intended to disrupt other essential functions of the University.⁷

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.

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⁷ The University also generally asserts that the Act should not “be a vehicle to pursue personal grudges or to harass the university or individual employees.” That argument, however, is grounded upon the other provision of KRS 61.872(6), which requires the University to prove “by clear and convincing evidence” that the Appellant intended to disrupt its essential functions. The University has not made such a showing here.