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25-ORD-200

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In re: Andrew Cooperrider/Cabinet for Economic Development

Summary: The Cabinet for Economic Development ("the Cabinet") did not violate the Open Records Act ("the Act"), when it determined a request posed an unreasonable burden under KRS 61.872(6).

Open Records Decision

Andrew Cooperrider ("Appellant") submitted to the Cabinet a request seeking "[a]ny and all written record[s], notes, recordings, emails, and contracts regarding the state incentives awarded to Envision AESC Bowling Green, LLC." In response, the Cabinet denied the request because it did not "precisely describe" the records sought, citing KRS 61.872(3)(b). This appeal followed.

On appeal, under KRS 61.872(6), the Cabinet explains that, due to the imprecise nature of the Appellant's request, it is unduly burdensome. 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 a request implicating thousands of physical files pertaining to nursing facilities to be 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). Of these, the number of records implicated

"is the most important factor to be considered." 22-ORD-182. 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). When a request does not "precisely describe" the records to be inspected, KRS 61.872(3)(b), the chances are higher that the agency is incapable of searching its records using the broad and ill-defined keywords used in the request.

The Cabinet explains that the parameters of the Appellant's request cause it to be unreasonably burdensome to compile the requested records. The Cabinet states that it employs 80 individuals. According to the Cabinet, because the request identifies a project and asks for "any and all written records," the Cabinet must review all its employees' physical records to determine if they are related to "the state incentives awarded to Envision AESC Bowling Green, LLC." Indeed, the Office has previously agreed the number of people employed by an agency is relevant in evaluating the burden of a particular request. *See, e.g.*, 25-ORD-150; 24-ORD-048.

The Cabinet explains that it conducted an initial limited search to determine the breadth of the Appellant's request. The Cabinet explains it searched for only emails sent to or from "the five . . . employees most likely to have records pertaining to the request" using search terms it created itself. That search resulted in 7,798 responsive records. The Cabinet further explains that many of the email records contain "records that are confidential or proprietary in nature [and] disclosed in conjunction with the company's application for incentives" under KRS Chapter 154, which are exempt under KRS 61.878(1)(c)(2)(b). Similarly, the Cabinet explains that many records are also exempt because they contain "information confidentially disclosed to the Cabinet and generally recognized as confidential or proprietary that would permit an unfair commercial advantage to competitors of the company if openly disclosed" and are exempt under KRS 61.878(1)(c)(1). Finaly, the Cabinet explains that the records contained "personal identification information" exempt under KRS 61.878(1)(a) and "preliminary drafts, notes, correspondence, and memoranda of opinions and policy formulations not intended to give notice of final action of a public agency" exempt under KRS 61.878(1)(i) and (j).

Finally, the Cabinet estimates it would take roughly 390 hours to review and redact each email records, assuming each email records contained only a single page. In 23-ORD-076, the Office found a public agency had met its burden of "clear and

convincing evidence" that it would be unreasonably burdensome to redact 71,000 records at 20 seconds per record, for a total of 394 hours of staff time. Here, the estimated time articulated by the Cabinet to review the records is commensurate with that in 23-ORD-076. *See also* 25-ORD-150; 25-ORD-042. Moreover, the Cabinet has explained that the number of responsive records identified is likely to be larger than the number identified in its initial, limited search. Accordingly, the Cabinet has met its burden of proof under KRS 61.872(6) and, therefore, 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 under KRS 61.880(5) and KRS 61.882 within 30 days from the date of this decision. Under 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/ Zachary M. Zimmerer
Zachary M. Zimmerer
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Distributed to:

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