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26-ORD-410

September 8, 2026

In re: Shlomo Litvin/University of Kentucky

Summary: The University of Kentucky (“the University”) violated the Open Records Act (“the Act”) when it denied a request for records as unreasonably burdensome.

Open Records Decision

On June 18, 2026, Rabbi Shlomo Litvin (“the Appellant”) submitted a request to the University to inspect “all emails, documents, and correspondence containing the word ‘Chabad’ from” two named employees, a professor and an administrator, from April 10, 2024, to the date of the request. In response, the University denied the request as “unreasonably burdensome pursuant to KRS 61.872(6),” as its Information Technology Department had “initially identified 2,112 pages that are potentially responsive.” In addition, the University stated some of the records were “likely” to be exempt from disclosure under the attorney-client privilege, KRS 61.878(1)(i) and (j), or KRS 61.878(1)(a). This appeal followed.

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.* The “clear and convincing evidence” standard is a difficult threshold for an agency to meet, as it “requires the party with the burden of proof to produce evidence substantially more persuasive than a preponderance of evidence, but not beyond a reasonable doubt.” *Fitch v. Burns*, 782 S.W.2d 618, 622 (Ky. 1989). Thus, the trier of fact “must be persuaded that the truth of the contention is ‘highly probable.’” *Id.* (quoting *McCormick on Evidence* § 340(b), at 796 (2d ed. 1972)).

As the courts have noted, “the obvious fact that complying with an open records request will consume both time and manpower is, standing alone, not sufficiently clear and convincing evidence of an unreasonable burden.” *Commonwealth v.*

Chestnut, 250 S.W.3d 655, 665 (Ky. 2008). 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).

On appeal, the University argues the Appellant's request is unreasonably burdensome for three reasons. First, the University claims the request does not "precisely describe" the records the Appellant wishes to inspect. A person may obtain copies of public records through the mail "after he or she *precisely* describes the public records which are readily available with the public agency." KRS 61.872(3)(b) (emphasis added). But if, as here, the requester seeks to inspect records in person, he need only "describ[e] the records to be inspected." KRS 61.872(2)(a). As such, the description is sufficient if it is "adequate for a reasonable person to ascertain the nature and scope of [the] request." *Commonwealth v. Chestnut*, 250 S.W.3d 655, 661 (Ky. 2008). Here, the Appellant described the records as "all emails, documents, and correspondence" from two identified University employees during a 26-month period that contain the word "Chabad." In 24-ORD-152, the Office found an identically worded request provided a sufficient description for the University to identify the responsive records. Therefore, the University's argument fails.

Next, the University argues the request is an unreasonable burden because "searching physical records can easily disrupt the normal operations of the agency." The University admits, however, that "it is extraordinarily easy to search emails or other records that are stored electronically." A public agency discharges its duty under the Act "by searching in the location where responsive [records] would likely exist." 24-ORD-112. In 24-ORD-152, the Office concluded that a request essentially identical to the one at issue here could be fulfilled by searching the sender's individual computer or email account. Here, on appeal, the Appellant described his request as seeking "the emails of a[n] administrator and a professor" containing a specific keyword. Thus, just as in 24-ORD-152, the University need not search through countless physical records, but only the email accounts or computers of two individual employees. As the University acknowledges, this is "extraordinarily easy."

Last, the University claims it is an unreasonable burden “to review 2,112 pages of documents to determine if any of the records are exempt, and, if so, to redact the exempt materials.” However, “[t]he winnowing process required [by] the General Assembly” to separate exempt from nonexempt material “does not rise to the level of an unreasonable burden under KRS 61.872(6).” *Chestnut*, 250 S.W.3d at 664–65. Thus, in 22-ORD-255, the Attorney General found it was not unreasonably burdensome for an agency to review and redact 4,701 emails between two individuals to determine which were “purely personal communications, privileged communications, or ‘policy formation.’” In so concluding, the Office distinguished 14-ORD-109, which found an unreasonable burden where a school board “would have to search all employees’ workstations for responsive records and a minimum of 6,200 e-mails would have to be reviewed by the employees, supervisors, and legal counsel to determine whether they were education records made confidential under federal or state law.” Here, as in 22-ORD-255, “the agency has not alleged that any of the [records] are required to be kept confidential under federal or state law, unlike the records at issue in 14-ORD-109.” *See also* 19-ORD-084 (distinguishing 14-ORD-109 where a public agency “cited only speculative privacy concerns and potential issues of attorney-client privilege”). As the University makes only speculative claims that some records may be subject to redaction on the basis of privacy, preliminary status, or attorney-client privilege, it has not shown by clear and convincing evidence that performing its statutory duty of redaction under KRS 61.878(4) would constitute an unreasonable burden.¹

Alternatively, the University reiterates its claim that “many” of the responsive records are “likely” to be exempt from disclosure under KRS 61.878(1)(a), KRS 61.878(1)(i), KRS 61.878(1)(j), or the attorney-client privilege, but asserts “[i]t is not necessary to examine all 2,112 pages to reach” this conclusion. On the contrary, when a public agency denies inspection of any public record, it must state “the specific exception authorizing the withholding of the record and [give] a brief explanation of how the exception applies to the record withheld.” KRS 61.880(1). To fulfill this duty, the agency must provide “sufficient information about the nature of the withheld record (or the categories of the withheld records) . . . to permit the requester to dispute the claim and [a reviewing] court to assess it.” *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 852 (Ky. 2013). Thus, an agency cannot rely on an exemption if it “fail[s] to identify the documents withheld.” 20-ORD-016. When the agency does not identify the records it claims are “likely” exempt, on the grounds that doing so is unreasonably burdensome, “the Office is unable to determine whether any potential exemptions apply to the requested records.” 24-ORD-180. Any argument that some records may be exempt is therefore not ripe for review. *See* 24-ORD-152

¹ The University further claims the duty to redact “raises concerns related to the potential production of documents which should have been withheld.” This novel argument, that redacting is an unreasonable burden because the University might overlook something, is without merit.

n.3. Accordingly, the University 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.

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Distributed to:

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