



COMMONWEALTH OF KENTUCKY  
OFFICE OF THE ATTORNEY GENERAL

ANDY BESHEAR  
ATTORNEY GENERAL

CAPITOL BUILDING, SUITE 118  
700 CAPITOL AVENUE  
FRANKFORT, KENTUCKY 40601  
(502) 696-5300  
FAX: (502) 564-2894

**19-ORD-084**

May 9, 2019

In re: Arif Panju/Louisville Metro Councilmembers Barbara Sexton-Smith, Pat Mulvihill, Scott Reed, and Brandon Coan

*Summary:* Louisville Metro Councilmembers did not violate the Open Records Act where requests for all records mentioning or relating to a certain subject, or “all documents and communications” with an entity without date restriction, did not comply with KRS 61.872(3)(b), which requires a request for copies by mail to describe the records with more precision; but Councilmembers did violate the Act by denying a request for all communications including certain terms within a specific date range that gave a sufficiently precise description and did not pose an unreasonable burden on councilmembers under KRS 61.872(6).

*Open Records Decision*

The question presented in this appeal is whether Louisville Metro Councilmembers Barbara Sexton-Smith, Pat Mulvihill, Scott Reed, and Brandon Coan (collectively, the “Councilmembers”)<sup>1</sup> violated the Open Records Act in the disposition of Arif Panju’s November 1, 2018, requests for copies of certain records broadly relating to proposed ordinance O-347-18, which concerns the regulation of “itinerant vendors, peddlers, and solicitors.” For the reasons that follow, we find that the majority of items in Mr. Panju’s requests failed to

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<sup>1</sup> An individual member of a municipal council, as a “local government officer,” is a “public agency” under KRS 61.870(1)(a) for purposes of the Open Records Act. 03-ORD-196; 15-ORD-201.

describe the records with the precision required by KRS 61.872(3), but as to the remaining item, the Councilmembers violated the Act by denying the request.

In his requests to the four Councilmembers, which were identical in their substantive content, Mr. Panju requested five items. The exact descriptions of the items requested are crucial to the determination of this appeal:

1. Copies of all documents and communications concerning (or referencing) the proposed ordinance O-347-18.
2. Copies of all documents reflecting communications (sent or received by you or your staff) between June 1, 2017 and November 1, 2018 containing any of the following words: (1) "food truck"; (2) "food trucks"; (3) "vendor"; (4) "vendors"; (5) "vending"; (6) "restaurant"; or (7) "restaurants."
3. Copies of all documents concerning (or referencing) the Louisville Downtown Partnership containing any of [those terms].
4. Copies of all documents and communications to or from the Louisville Downtown Partnership (including to or from any of its representatives or employees) containing any of [those terms].
5. All documents and communications concerning or referencing the "No Food Trucks" signs authorized and/or installed by Louisville Metro in 2017.

The record does not reflect the date or dates when the Councilmembers received the requests.

The Louisville Metro Council's open records coordinator issued an initial joint response dated November 7, 2018, which for some reason was postmarked November 12, 2018. On appeal, the Councilmembers have no explanation for why the postmark shows that date, but believe it was timely dispatched according to the usual procedure. Since the record on appeal is unclear, we can only conclude that if the initial response was not dispatched within three business days from receipt of the requests, it was untimely under KRS 61.880(1).

In the initial joint response, the open records coordinator asserted that a search was "in progress, but [had] not yet returned results on the specified search terms," although "with the broad terminology it [was] expected to yield sizable hits." Therefore, the coordinator invoked KRS 61.872(5) and stated that additional time was necessary due to the need for the individual Councilmembers to conduct searches and to review the records "for exemptions and/or redactions in order to protect against invasions of personal privacy." She further stated that records would be available on December 7, 2018.

KRS 61.872(5) allows a public agency additional time to produce records that are "in active use, in storage or not otherwise available" if "a detailed explanation of the cause is given for further delay" and the agency provides a date certain when records will be available. We have held that "broadly worded requests" encompassing potentially vast amounts of records may warrant "reasonable delays in records production." 12-ORD-097. Due to the breadth of Mr. Panju's requests, we do not find the 30-day time frame inherently unreasonable in this case.

On December 7, 2018, Metro Council Clerk H. Stephen Ott denied Mr. Panju's requests in their entirety, on grounds that "it is an improperly framed open records request and because compliance would create an unreasonable burden on the agency." He argued that the requests did not reasonably identify the records and were "more properly characterized as a request for research to be performed." (Internal quotation marks omitted.) Mr. Ott further stated, "upon coordinating an electronic search utilizing the search terms you provided, approximately 8,300 records were uncovered. Producing these records would require an extraordinary amount of time as each record would be reviewed for, at least, attorney-client privileged information and personal information exempt pursuant to KRS 61.878(1)(a)." Mr. Panju initiated an appeal dated April 5, 2019, which this office received on April 11, 2019.

With regard to requests to receive copies of public records by mail, KRS 61.872(3)(b) provides, in pertinent part:

The public agency shall mail copies of the public records to a person whose residence or principal place of business is outside the county in which the public records are located *after he precisely*

*describes the public records* which are readily available within the public agency.

(Emphasis added.) "A description is sufficiently precise for purposes of records access by mail if it describes the records in definite, specific, and unequivocal terms." 98-ORD-17 (internal quotation marks omitted).

We have often held that "blanket requests for information on a particular subject need not be honored." OAG 90-83. (*See also* 95-ORD-108 and opinions cited therein.) Thus, we found that a request to the City of Louisville for "all items pertaining to UPS and the airport expansion" was properly denied for lack of specificity. OAG 91-58 (emphasis omitted). Similarly, a request for "[a]ll memoranda, correspondence and/or documentation of whatever kind and nature regarding [a certain employee] not included in her personnel file" was insufficiently specific. OAG 90-83.<sup>2</sup>

This standard of precise description for records by mail is generally not met by what has been described as the "open-ended any-and-all-records-that-relate type of request." 08-ORD-058. Such a request runs the risk of being "so nonspecific as to preclude the custodian from determining what, if any, existing records it might encompass." 96-ORD-101. Furthermore, as the agency pointed out in its response, "a request for any and all records which contain a name, a term, or a phrase is not a properly framed open records request, and ... generally need not be honored. Such a request places an unreasonable burden on the agency to produce often incalculable numbers of widely dispersed and ill-defined public records." 99-ORD-14.

In 00-ORD-79, we found that a request for copies of "[a]ny and all records related to the granting of easements by the City of Indian Hills to its property owners for the purpose of connecting to any MSD sewer line ... from January 1, 1990 to January 1, 1999" was properly denied for lack of a precise description. We stated as follows:

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<sup>2</sup> To whatever extent our prior decisions may have applied a "reasonable particularity" standard to requests for on-site inspection of records, they have been implicitly overruled by *Com. v. Chestnut*, 250 S.W.3d 655 (Ky. 2008). Our analysis here is concerned with requests for copies by mail under KRS 61.872(3)(b).

Mr. Mabry provided information that the number of properties that received easements was small and limited the timeframe of his records request. However, he did not identify the records that he wanted copied in definite, specific, and unequivocal terms. Unless he can describe the records he seeks with precision, the City is not obligated to search through its records for "any and all" records that may relate to his request.

00-ORD-79.

Here, item 1 of the request is clearly a blanket request for all records relating to or mentioning a subject, and thus resembles the request we found inadequate in 00-ORD-79. Similarly, item 3, for "all documents concerning (or referencing)" a subject, is insufficiently precise, despite specifying search terms to be used within those documents. Item 4, for "*all documents and communications to or from*" an entity (emphasis added), with no date range, likewise fails to describe the records with precision, notwithstanding the addition of search terms. Item 5, for "[a]ll documents and communications concerning or referencing" a subject, is also a blanket request, and is as imprecise as item 1. Therefore, as to items 1, 3, 4, and 5 of the requests, we find no violation of the Open Records Act.

Item 2, however, describes "communications" to or from the Councilmembers or their staff, within a specific time frame of 17 months, containing certain search terms. We find this a sufficiently precise description of the records under KRS 61.872(3)(b). On appeal, the Councilmembers do not claim that they cannot identify what records are encompassed by item 2; they merely argue that the responsive records "could include communications irrelevant to the real matter Mr. Panju is investigating - the proposed ordinance." It is irrelevant to our analysis under KRS 61.872(3)(b) whether the responsive documents might give the requester more than what the public agency believes he is really interested in. The only question is whether the request "precisely describes" an identifiable group of records. Under that standard, item 2 is a proper request.

This leaves only the Councilmembers' argument that fulfilling the request would impose an unreasonable burden. In pertinent part, KRS 61.872(6) provides:

If the application places an unreasonable burden in producing public records[,] 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.

In extreme cases, we have occasionally found that a public agency met this burden of clear and convincing evidence in a case of exceptionally large volumes of records requiring statutorily mandated redactions. *See, e.g.*, 14-ORD-109 (request included at least 6,200 e-mails which must be redacted for information protected by FERPA); 11-ORD-173 (at least 8,500 e-mails must be redacted under FERPA); 17-ORD-104 (225 million records must be redacted under FERPA); *but see* 14-ORD-153 (clear and convincing standard was not met where school district did not provide minimum number of e-mails that required FERPA redaction).

In this case, the Councilmembers have provided an estimated number of 8,300 records, but this represented an aggregate of all documents found electronically using Mr. Panju's search terms, for *all* items of the request, not a figure for those records specifically responsive to item 2. Furthermore, this appeal is distinguishable from those involving mandatory redactions under FERPA, as the Councilmembers have cited only speculative privacy concerns and potential issues of attorney-client privilege. Nor have the Councilmembers provided any estimate of the staff time that would be required to review the responsive records for these discretionary redactions. *Cf.* 17-ORD-104 n.4 (university estimated that review of 225 million items, even at one second per item, "would take over 29 years of staff time"). Given the limited information offered by the Councilmembers, we cannot conclude that they have met their burden of clear and convincing evidence to establish that compliance with item 2 would impose an unreasonable burden. Therefore, we conclude that the Councilmembers violated the Open Records Act by denying item 2 of Mr. Panju's requests.

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court pursuant to KRS 61.880(5) and KRS 61.882. 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.

Andy Beshear  
Attorney General



James M. Herrick  
Assistant Attorney General

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Distribution:

Mr. Arif Panju  
Ms. Lisa Franklin Gray  
Annale R. Taylor, Esq.