19-ORD-227

December 9, 2019

In re: Mark A. Graham/Christian County Board of Education

Summary: Christian County Board of Education violated the Open Records Act by withholding two e-mail exchanges not subject to any exception, but did not violate the Act by withholding purely personal communications under KRS 61.878(1)(p) or records directly related to individual students under FERPA.

Open Records Decision

The question presented in this appeal is whether the Christian County Board of Education ("Board") violated the Open Records Act in its denial of Mark A. Graham's September 24, 2019, request for all e-mails sent or received by elementary school teacher Pam Dossett between August 1 and September 24, 2019. For the reasons stated below, we find that the Board violated the Act as to two of the records it withheld.

On September 30, 2019,[1] the superintendent of Christian County Public Schools responded to Mr. Graham's request, granting access to the records with the following exceptions:

> Some of the withheld emails are exempt from disclosure under KRS 61.878(1)(a) because the nature of those emails is personal such that the disclosure would constitute and [*sic*] unwarranted invasion of

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[1] As the date when the Board received the request does not appear in the record, we make no finding as to whether the response was timely.

> privacy, such as emails with family and friends. Some [are exempt] under KRS 61.878(1)(i) as preliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency, including email discussions of teaching techniques and events at her home school. Some [are exempt] under KRS 61.878(1)(a) [*sic*] because they are emails in which preliminary memoranda and opinions are expressed[2] with respect to certain matters at her home school. Some [are exempt] under KRS 61.878(1)(k) and (l) as the notes and summaries constitute education records under the Family Education Right to Privacy Act, and the Kentucky Family Education Rights and Privacy Act, including emails in which … particular students are discussed. Likewise, some [are exempt] under KRS 61.878(1)(p) as they are communication [*sic*] of a personal nature unrelated to a governmental function, such as emails with family and friends.

This office received Mr. Graham's appeal on October 11, 2019.

In his letter of appeal, dated October 4, 2019, Mr. Graham argued that Ms. Dossett's "non-school related" e-mails, and in particular any having to do with a proposed "Nickel Tax" to fund renovation or replacement of Hopkinsville High School, are not exempt from disclosure. He further argued that the Board should have redacted "the names of students, teachers, parents, etc." to protect their privacy, as opposed to withholding e-mails in their entirety.

On October 18, 2019, the Board responded to the appeal and at the same time submitted a copy of the disputed e-mails for *in camera* review pursuant to KRS 61.880(2)(c) and 40 KAR 1:030, Section 3. In referring to the records herein, we use the page numbers assigned to the e-mails by the Board in its submission.

E-mails relating to "Nickel Tax"

On appeal, the Board clarified that "[t]here are no emails where Ms. Dossett actively solicited support for the Nickel Tax." There were, however, two e-mails *received* by Ms. Dossett concerning the tax: one (page 1) from "a member

[2] Based on the language used here, it appears that the intended reference was to KRS 61.878(1)(j).

of a group of professional women that Ms. Dossett happens to be a part of" and one (pages 2-4) from the principal of Hopkinsville High School. The Board argued that both of these were exempt from disclosure under KRS 61.878(1)(i), as "preliminary communications," and under KRS 61.878(1)(p), as communications having no relation to Ms. Dossett's governmental function.

Enacted in 2018, KRS 61.878(1)(p) creates an exception to the Open Records Act for "[c]ommunications of a purely personal nature unrelated to any governmental function." The e-mail to Ms. Dossett on page 1 is not from a government address and is addressed to 21 recipients, only two of whom have government e-mail addresses. Neither the content of the e-mail, nor the content of another recipient's "reply to all," relates to the governmental function of Ms. Dossett or anyone else. Accordingly, we find that page 1 falls under the exception.

As this office has not previously construed KRS 61.878(1)(p), we take this opportunity to note its similarities and differences with KRS 61.878(1)(a), which excludes "[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." Although both provisions reflect a legislative intent to protect personal privacy, the contours of the two exceptions are different. Whereas KRS 61.878(1)(a) can apply to any public records, KRS 61.878(1)(p) is limited to "communications." In its application, however, KRS 61.878(1)(a) requires the agency to meet a higher standard – "clearly unwarranted invasion of personal privacy" – while KRS 61.878(1)(p) merely requires that the communication be "personal" as opposed to government-related.

An individual who possesses a personal privacy interest in public records under KRS 61.878(1)(a) can, of course, waive that interest when making a request to inspect those records. 17-ORD-009. Similarly, our analysis of page 1 here might differ if the sender or one of the recipients were requesting a copy of the record, as that individual would have already viewed the e-mail and "the right to obtain copies [of public records] is correlative to the right to inspect those records." 07-ORD-252 n.1. Mr. Graham, however, was not a party to the communication, and thus is not entitled to obtain the e-mail on page 1.

We find KRS 61.878(1)(p) inapplicable to pages 2-4, the e-mail from Hopkinsville High School Principal John Gunn to various recipients, most of whom have Christian County Schools e-mail addresses,. In its response to the appeal, the Board described page 2 as "reach[ing] out to Ms. Dossett" and other "parent[s] and supporter[s] of the Nickel Tax, for feedback on things Dr. Gunn could do to promote [its] passage." Based on our review, we find the e-mail to be motivated by Dr. Gunn's perception that advocacy of the Nickel Tax was expected of him in his role as principal. Accordingly, the communication was related to Dr. Gunn's governmental function and not of a purely personal nature.

Included in Dr. Gunn's e-mail, at pages 3-4, is a "reply to all" from private attorney Lee Harton, who, according to the Board's response to the appeal, "made some recommendations to Dr. Gunn about someone that might be able to provide assistance." This communication likewise pertains to Dr. Gunn's governmental function, as he perceived it, and therefore is not exempt under KRS 61.878(1)(p).

The Board also invoked KRS 61.878(1)(i) with regard to pages 2-4. That subsection applies only to "[p]reliminary drafts, notes, [and] correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency."

The e-mail exchange cannot be characterized as a "preliminary draft" under KRS 61.878(1)(i) because it does not "represent a tentative version, sketch, or outline of a formal and final written product," but rather the formal and final written product itself. 05-ORD-179. It is not a "note" because it was not "created as an aid to memory or as a basis for a fuller statement, as are, for example, written or shorthand notes taken at a meeting." *Id.* As for "correspondence with private individuals," that category of records "is generally reserved for that narrow category of public records that reflects 'letters exchanged by private citizens and public agencies or officials under conditions in which the candor of the correspondents depends on assurances of confidentiality.'" *Id.* (quoting 00-ORD-168). The fact that Mr. Harton, the private individual, used the "reply to all" function to 17 individuals, both inside and outside Christian County Schools, negates any suggestion that he relied on assurances of confidentiality. Therefore, KRS 61.878(1)(i) is inapplicable.

Alternatively, the Board invoked KRS 61.878(1)(j), which applies to "[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended." This office has described the purpose underlying KRS 61.878(1)(j) as "[t]o preserve the integrity of a public agency's *internal decision making process* by promoting full and frank discussion *between and among public employees and officials* and by equipping them with the tools needed in hammering out official action." 14-ORD-014 (emphasis added). This e-mail exchange, however, was not "internal … between and among public employees and officials," as some of the parties to the communication, including John Harton, were private individuals. Communications with individuals outside a public agency are not internal discussions protected by KRS 61.878(1)(j). 18-ORD-182; 19-ORD-191. Therefore, we conclude that the Board improperly withheld pages 2-4.

E-mails relating to personal matters

Pages 5-9 and 11-12 of the withheld e-mails, as described in the Board's response to the appeal, pertain to "Ms. Dossett's church, youth groups at her church, [or] her children." The Board invoked KRS 61.878(1)(a) and KRS 61.878(1)(p) as to these records.

Based on our *in camera* review, all of these communications are of a purely personal nature and none of them are related to a governmental function. Accordingly, the Board properly withheld pages 5-9 and 11-12 under KRS 61.878(1)(p). Because that exception is dispositive as to these records, we need not conduct a privacy analysis under KRS 61.878(1)(a).

E-mails relating to individual students

In its response to the appeal, the Board asserted that Ms. Dossett "has extensive communications involving her students, including special education students." As to those communications, pages 10[3] and 13-33 of the withheld records, the Board invoked the Family Education Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, as incorporated into the Open Records Act by KRS

[3] Although the Board inadvertently included page 10 among the e-mails purportedly subject to KRS 61.878(1)(a) and (p), our confidential review of its content indicates that it should instead be classified with pages 13-33.

61.878(1)(k), and the substantially similar Kentucky Family Education Rights and Privacy Act ("KFERPA"), KRS 160.700, as incorporated into the Act by KRS 61.878(1)(l). Additionally, the Board invoked personal privacy under KRS 61.878(1)(a) and "preliminary" status under KRS 61.878(1)(i) and (j).

FERPA provides, at 20 U.S.C. § 1232g(b)(1):

> No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section) of students without the written consent of their parents to any individual, agency, or organization, other than [certain limited exceptions.]

"Education records" are defined in 20 U.S.C. § 1232g(a)(4)(A) as "those records, files, documents, and other materials which … contain information directly related to a student; and … are maintained by an educational agency or institution or by a person acting for such agency or institution."

Based on our *in camera* review of the records, pages 10, 13-31, and 33 are all brief exchanges with parents or teachers, directly related to individual students' education, health, disability, or behavior. Thus, the Board properly withheld those pages as "education records" under FERPA and KRS 61.878(1)(k), which incorporates federal restrictions on disclosure into the Open Records Act.

Page 32, however, is a communication among teachers, dated September 23, 2019, regarding the scheduled time of a meeting. Although the nature of the meeting is such that its end result could be a record protected by FERPA, we find nothing in the substance of the e-mail itself that is directly related to the individual student. Therefore, we cannot conclude that page 32 is an education record under FERPA or KFERPA.[4]

[4] KFERPA defines "education record" as "data and information directly relating to a student that is collected or maintained by educational institutions or by a person acting for an institution including academic records and portfolios; achievement tests; aptitude tests; aptitude scores; teacher and counselor evaluations; health and personal data; behavioral and psychological evaluations; and directory data recorded in any medium…." KRS 160.700(3).

The Board also invoked KRS 61.878(1)(i) and (j) with regard to page 32. KRS 61.878(1)(i) applies to "[p]reliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency." The e-mail exchange on page 32 fits none of these categories. KRS 61.878(1)(j) applies to "[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended." Page 32 contains no recommendations, opinions, or formulations of policy. Therefore, neither of these subsections applies to the record.

KRS 61.878(1)(a) applies to "[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." Where a public agency asserts an individual privacy interest in a public record, that interest must be weighed against the public interest in disclosure. *Kentucky Board of Examiners of Psychologists v. Courier- Journal and Louisville Times Co.*, 826 S.W.2d 324, 327-28 (Ky. 1992). Where the agency fails to articulate a privacy interest, however, "the balance is decisively in favor of disclosure." 10-ORD-082. Here, the Board merely stated that "the disclosure of these emails would constitute an unwarranted intrusion upon privacy of the students and their parents." Page 32 contains nothing directly relating to a student or parent.

"It is incumbent on the agency advocating nondisclosure of records relating to an individual … to satisfy its burden of proof that the privacy interests of that [individual] are superior to the public's interest in disclosure." 00-ORD-162. Where the record does not directly relate to an individual, the agency cannot meet that burden. Thus, we find that KRS 61.878(1)(a) does not apply to page 32, which therefore should have been disclosed.

Conclusion

The Christian County Board of Education violated the Open Records Act insofar as it withheld pages 2-4 and 32 of the disputed e-mails. The Board properly withheld purely personal communications pursuant to KRS 61.878(1)(p) and e-mails directly related to individual students under FERPA and KRS 61.878(1)(k).

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.

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