19-ORD-228

December 9, 2019

In re: Mark Graham/Christian County Public Schools

Summary: Christian County Public Schools ("CCPS") initially violated KRS 61.880(1), but corrected the error on appeal. CCPS violated the Open Records Act by withholding three emails regarding a "Nickel Tax," but properly withheld five of the emails. CCPS properly withheld groups of emails as "preliminary" under KRS 61.878(1)(i) and (j), as records "of a purely personal nature unrelated to any governmental function" under KRS 61.878(1)(p), and as protected education records under FERPA and KFERPA, incorporated into the Act by KRS 61.878(1)(k) and (l).

Open Records Decision

The question presented in this appeal is whether the Christian County Public Schools ("CCPS") violated the Open Records Act ("Act") in the disposition of a request for records submitted by Mark A. Graham ("Appellant's"). Based on the following, we find that CCPS violated KRS 61.880(1) by failing to identify emails or categories of emails and provide a brief explanation of how the asserted exceptions applied to each, but corrected the error on appeal. CCPS violated the Act in withholding three emails regarding a "Nickel Tax," but properly withheld five of the emails. CCPS properly withheld groups of emails as "preliminary" under KRS 61.878(1)(i) and (j), as records "of a purely personal nature unrelated to any governmental function" under KRS 61.878(1)(p), and also as protected education records under 20 U.S.C. Section

1232g ("FERPA"), and KRS 160.700, *et seq*. ("KFERPA"), incorporated into the Act by KRS 61.878(1)(k) and (l).

On September 24, 2019, Appellant requested from CCPS, "[a]ny and all emails sent or received by the following [CCPS] employees: 1. Stephanie Harton 2. Pam Schmidt Dossett for the entire month of August and September 1-24, 2019."[1] On September 30, 2019, CCPS responded by providing access to some of Stephanie Harton's emails, but denying access to an unidentified number of responsive emails. CCPS stated that KRS 61.878(1)(a), KRS 61.878(1)(i), KRS 61.878(1)(p), KRS 61.878(1)(k) incorporating the FERPA, and KRS 61.878(1)(l) incorporating KFERPA justified withholding the emails, and explained why it was asserting the exceptions. However, CCPS failed to identify the emails or categories of emails it withheld, and it failed explain how the asserted exceptions applied to each email or category of emails.

On October 4, 2019, Appellant appealed, arguing, "Stephanie Harton is an employee who is for the Nickel Tax and is only soliciting support for the Nickel Tax using her CCPS issued email…I do not believe these emails fall under the scope of exempted information[.]" Appellant also argued that, "[CCPS] is…saying that I am not allowed to have copies of [Stephanie Harton's] non-school related emails because they are private emails between her and her friends/family/co-workers. I do not believe these emails fall under the scope of exempted information[.]" Appellant argued that CCPS violated the Act by blanketly withholding some emails "without redacting the names of students, teachers, parents, etc."

On October 18, 2019, CCPS responded to the appeal by providing this office 333 pages of responsive emails for purposes of *in camera* review, under KRS 61.880(2)(c)[2] and 40 KAR 1:030[3], Section 3. CCPS explained that the school

[1] Appellant filed a separate appeal regarding the CCPS response to his request for the emails of Pam Schmidt Dossett. That appeal is the subject of a separate decision, issued by this office under appeal number 201900408.

[2] KRS 61.880(2)(c) states: "On the day that the Attorney General renders his decision, he shall mail a copy to the agency and a copy to the person who requested the record in question. The burden of proof in sustaining the action shall rest with the agency, and the Attorney General may request additional documentation from the agency for substantiation. The Attorney General may also request a copy of the records involved but they shall not be disclosed."

system employs Stephanie Harton as a Physical Therapist, and it identified her emails by subject categories and stated the specific exemptions authorizing the withholding of each email or category of emails. On November 6, 2019, we asked CCPS to verify that no additional responsive emails existed in its possession. On November 26, 2019, CCPS verified that it had provided all existing responsive emails to this office.

CPS Initially Violated KRS 61.880(1) but Corrected the Error on Appeal. CCPS's initial response to the requests violated KRS 61.880(1), because it did not identify emails or categories of emails, and failed explain how the asserted exceptions applied to each email or category of emails. Pursuant to KRS 61.880(1), a "response denying, in whole or in part, inspection of any record shall include a statement of the specific exception authorizing the withholding of the record and a brief explanation of how the exception applies to the record withheld." The mere invocation of exceptions, without identifying the records withheld and explaining how the asserted exceptions apply, does not satisfy the burden of proof imposed on an agency under KRS 61.880(2)(c) to justify the nondisclosure of public records. 12-ORD-211, p. 6; 03-ORD-165. CCPS corrected the error on appeal by identifying individual emails and categorizing emails by subject, with an explanation of how each asserted exception applied. CCPS fulfilled its duty under KRS 61.880(1) by providing a copy of the corrected response to this office and Appellant.

"Nickel Tax" Emails. CCPS identified 9 emails relating to the "Nickel Tax," and argued that the emails were excluded as "preliminary" under KRS 61.878(1)(i) and (j),[4] or as records "of a purely personal nature unrelated to any governmental function" under KRS 61.878(1)(p). Our *in camera* review shows

---

[3] 40 KAR 1:030, Section 3 states: "Additional Documentation. KRS 61.846(2) and 61.880(2) authorizes the Attorney General to request additional documentation from the agency against which a complaint is made. If documents thus obtained are copies of documents claimed by the agency to be exempt from the Open Records Law, the Attorney General shall not disclose them and shall destroy the copies at the time the decision is rendered."

[4] KRS 61.878(1)(i) and (j), respectively, create exceptions to the Act in the cases of: (i) preliminary drafts, notes, correspondence with private individuals other than correspondence which is intended to give notice of final action of a public agency; [and] (j) preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended[.]

that CCPS properly withheld the four emails found on pages 1 and 6[5] under KRS 61.878(1)(j), because those emails are solely between Stephanie Harton and another CCPS employee in which they express opinions and recommendations. In 99-ORD-206, we held that emails between state agency employees in which opinions were expressed, but were not adopted into final agency action, were properly withheld under KRS 61.878(1)(j). *Id*., p. 9. No evidence exists in the record that CCPS adopted these emails as part of a final policy or action. Accordingly, the emails on pages 1 and 6 were properly withheld under KRS 61.878(1)(j).

The 3 emails exchanged with Hopkinsville High School Principal John Gunn found on pages 2-5 are not exempt, but the reply from Stephanie Harton found at the bottom of page 3 is exempt. CCPS argues that all of the emails are exempt under KRS 61.878(1)(i) and (j), and KRS 61.878(1)(p), but the record does not support that argument.

The emails are also not exempt under KRS 61.878(1)(p), which was enacted by the General Assembly in 2018 to create an exception to the Act for "[c]ommunications of a purely personal nature unrelated to any governmental function." Our *in camera* review shows that these emails relate to Stephanie Harton and Principal Gunn's governmental function as educators, and therefore are not "communications of a purely personal nature." Accordingly, exemption of the emails under KRS 61.878(1)(p) is not appropriate.

Withholding the three emails exchanged with Principal Gunn under KRS 61.878(1)(j) was inappropriate, because the emails were sent to two recipients who do not have non-government email addresses and therefore do not appear to be CCPS employees. As such, the emails are not communications solely "between state agency employees," as required for application of KRS 61.878(1)(j). *See* 99-ORD-206. However, the reply email from Stephanie Harton to Principal Gunn found at the bottom of page 3 is "preliminary" under this exception because she replied solely to Principal Gunn expressing opinions and recommendations. As such, CCPS properly withheld Stephanie Harton's reply

[5] Pages 1 and 6 are duplicate copies of an email exchange relating to a fake Facebook account. We shall address the pages in this decision separately to avoid confusion.

email under KRS 61.878(1)(j). *See* 99-ORD-206. Accordingly, CCPS may redact the reply email from pages 2 through 5, as permitted by KRS 61.878(4).[6]

The emails on pages 2-5 are not exempt under KRS 61.878(1)(i). In 00-ORD-168, the Attorney General held that KRS 61.878(1)(i), insofar as it extends protection to "correspondence to private individuals," 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.*, p. 2 (emphasis added). We have found that the conditions affecting candor of the correspondence must be assessed in view of the totality of the circumstances. 18-ORD-117.

Here, Principal Gunn copied his two emails to 17 employee and non-employee recipients, and he invited those recipients to share their advice with others. The totality of the circumstances does not evidence "conditions in which the candor of the correspondents depends on assurances of confidentiality" necessary for application of KRS 61.878(1)(i). The reply from Lee Harton to Principal Gunn found on pages 4 - 5 is not exempt. The fact that Mr. Harton, a private individual, used the "reply to all" function to the 17 recipients of Principal Gunn's email negates any suggestion that he relied on assurances of confidentiality. Accordingly, we find that the reply is not exempt under KRS 61.878(1)(i). However, CCPS may redact the personal home addresses, personal email addresses, and personal telephone numbers from the responsive emails to protect personal privacy, per KRS 61.878(1)(a).[7] *See* 16-ORD-205, p. 5 (following *Kentucky New Era, Inc. v. City of Hopkinsville,* 415 S.W.3d 76, 83 (Ky. 2013)).

The email from Kaitlyn Selfridge found on page 10 is exempt under KRS 61.878(1)(i). Our *in camera* review shows that the email consists of a draft spreadsheet circulated solely among Stephanie Harton and other CCPS employees for purpose of review and comment. Emails consisting of

[6] KRS 61.878(4) provides: "[i]f any public record contains material which is not excepted under this section, the public agency shall separate the excepted and make the nonexcepted material available for examination."

[7] KRS 61.878(1)(a) excludes: "[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy[.]"

preliminary drafts and notes, which have not been adopted as the basis of final action of the public agency, are properly within the scope of the KRS 61.878(1)(i). *See University of Kentucky v. Courier-Journal & Louisville Times Co.*, 830 S.W.2d 373, 378 (Ky. 1992). No evidence exists in the record that CCPS adopted this email as part of a final policy or action. Accordingly, CCPS properly withheld the email pursuant to KRS 61.878(1)(i).

Emails Exchanged with CCPS Staff. Likewise, CCPS properly withheld the emails on pages 11 and 17, because the exchanges consist of preliminary drafts, and reply comments and recommendations. Our *in camera* review shows that these emails meet the definition of "drafts" under KRS 61.878(1)(i), because they are a "tentative version, sketch, or outline of a formal and final written product." *See* 97-ORD-183, p. 4. The reply emails are recommendations and opinions from CCPS employees, and no evidence exists in the record that CCPS adopted the emails as the basis of a final agency action. Accordingly, CCPS properly withheld the emails on pages 11 and 17 as drafts under KRS 61.878(1)(i), and properly withheld the replies under KRS 61.878(1)(j).

CCPS identified three emails on pages 12 - 14[8] as physical therapy questions and requests for assistance to Stephanie Harton from other CCPS educators. Our *in camera* review shows that these emails are not exempt because the recipients of the emails did not respond. In 11-ORD-052, we found that KRS 61.878(1)(j) does not extend to emails between agency employees consisting of mere factual updates, gratuitous commentary, questions, or the mere exchange of information. *Id.*, pp. 6–7. Absent responses stating opinions or recommendations, the emails on pages 12–14 are not exempt, but CCPS may redact the personal telephone numbers from the emails, per KRS 61.878(1)(a). *See Kentucky New Era, Inc.*, 415 S.W.3d at 83.

Emails Relating to Individual Students. On appeal, CCPS identified 261 emails found on pages 18–190 as emails that directly relate to students. Our *in camera* review shows that the emails identify individual students by name, and also contain discussions of student health conditions, rehabilitation needs, and medical information that can be used to identify individual students. CCPS

[8] Pages 13 and 14 are duplicate copies of emails relating to an exchange of note card messages. We shall address the pages in this decision separately to avoid confusion.

invoked FERPA and KRS 61.878(1)(k),[9] which incorporates federal restrictions on disclosure into the Act, and KFERPA, which is incorporated into the Act by KRS 61.878(1)(l),[10] the "preliminary" records exemption under KRS 61.878(1)(j), and the "personal privacy" exemption under KRS 61.878(1)(a) in withholding these emails. We find no error.

Both FERPA and KFERPA preclude the disclosure of education records containing personally identifiable student information without prior parental written consent. 17-ORD-191. The relevant provision of FERPA, 20 U.S.C. § 1232g(b)(1), provides:

> 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." KFERPA generally requires schools to maintain the confidentiality of student academic records. KRS 164.283; 18-ORD-087. Our *in camera* review shows that the emails are brief exchanges with teachers that name students, and directly relate the student's healthcare, rehabilitation, or education needs. We find that CCPS properly construed the emails as "education records" as defined by FERPA and KFERPA.

---

[9] KRS 61.878(1)(k) exempts "[p]ublic records or information the disclosure of which is prohibited by federal law or regulation[.]"

[10] KRS 61.878(1)(l) exempts "[p]ublic records or information the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly[.]"

Appellant argues that CCPS was required to redact the excepted information from the emails and make the nonexcepted material available for examination, per KRS 61.878(4). The Act prohibits the "nondisclosure of an entire record or file on the ground that some part of the record or file is exempt." *Kentucky New Era, Inc.*, 415 S.W.3d at 88. In addition, the Supreme Court gave tacit approval of redaction of education records otherwise subject to nondisclosure under FERPA and KFERPA, finding that statistical compilations of student disciplinary records did not meet the definition of "education records" after all student personally identifying information was removed. *Hardin Cty. Sch. v. Foster*, 40 S.W.3d 865, 869 (Ky. 2001).

However, the facts of this appeal support withholding the 261 emails found on pages 18–190. Our *in camera* review shows that the specific descriptions of student health and rehabilitation needs stated in these brief emails, viewed in the context of the school system employing Stephanie Harton, make the referenced students readily identifiable. An educational agency is prohibited from releasing education records where, despite redaction, it has reason to believe the requester, "knows the identity of the student to whom the record relates." 34 C.F.R. § 99.3. There is no evidence that Appellant knows the identity of individual students referenced in the emails, but we find that students within the school system would be readily identifiable from the particular descriptions stated in these emails.

Further, additional exemptions apply to these emails providing support for withholding the records. Some emails contain teacher questions regarding an individual student's rehabilitation equipment and Stephanie Harton's recommendations and opinions in reply, therefore making the emails exempt as "preliminary" under KRS 61.878(1)(j). *See* 99-ORD-206. Some emails contain health information and the identification of medical conditions, the nondisclosure of which has been upheld by this office as a "clearly unwarranted invasion of personal privacy," pursuant to KRS 61.878(1)(a). 09-ORD-059, p. 10; 05-ORD-239. Some of the emails contain drafts of individual education plans for review and comment, making them "preliminary" under KRS 61.878(1)(i). *See* 97-ORD-183, p. 4. Under the facts presented in this appeal, we find that CCPS did not violate the Act in withholding the brief emails containing information subject to multiple exemptions.

Emails Consisting of Personal Notes and Reminders. Our *in camera* review shows that the 62 emails found on pages 191-250, described by CCPS as Stephanie Harton's work related notes and self-reminders, were properly withheld under KRS 61.878(1)(i). These emails consist of very brief notes relating to Ms. Harton's physical therapy work, written as reminders of the assistance needs of individual students and teachers. The emails are "notes" within the meaning of KRS 61.878(1)(i), because they were "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." 97-ORD-183, p. 4; 05-ORD-179.

Emails Relating to Purely Personal Matters. CCPS identified emails on pages 7–9, 15–16, and pages 251–333 as purely personal emails, excluded under KRS 61.878(1)(p). Our *in camera* review shows that the emails found on pages 7–9, and pages 15-16 are related solely to the school activities of Stephanie Harton's children. The emails on pages 251–333 consist of Ms. Harton's communications with her church, social clubs, and family members. The emails are of a purely personal nature and do not relate to any governmental function. Accordingly, we find that CCPS properly withheld these emails pursuant to KRS 61.878(1)(p).

A party aggrieved by this decision shall 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 proceeding.

Andy Beshear
Attorney General

J. Marcus Jones
Assistant Attorney General

#409

Distributed to:

Mark A. Graham

Mary Ann Gemmill
John N. Lackey, Jr., Esq.