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21-ORD-107

June 8, 2021

In re: Sarah Bunch/Nelson County School District

Summary: The Nelson County School District (the "District") violated the Open Records Act ("the Act") when it failed to properly invoke KRS 61.872(5) to delay access to requested records, and when it directed a requestor to its website in lieu of providing her with copies of public records.

Open Records Decision

After the close of business on April 30, 2021, Sarah Bunch ("Appellant") emailed a request to inspect records to the District. The Appellant sought to inspect records from the District related to the District's proposal to create "Community Campuses," which is a proposed initiative involving the consolidation or relocation of various schools within the District. She also sought to inspect other records, including emails, agendas, meeting minutes, and transcripts related to other topics of school administration.

The District received the request on May 3, 2021, the first business day after the Appellant sent her request. On May 6, 2021, the District first responded to the Appellant's request and claimed that it needed more time to process her request "because of the volume of records to be search[ed] and the labor hours required to conduct the search." The District also stated that it would provide the Appellant with most of the requested records on May 14, 2021. But the District denied the Appellant's request for correspondence, emails, agendas, meeting minutes, and transcripts related to the initial proposals for Community Campuses under KRS 61.878(1)(j). On May 9, 2021, the Appellant launched this appeal, claiming that the District's delay in providing responsive records was unreasonable, and that it improperly relied

on KRS 61.878(1)(j) to deny inspection of records related to the Community Campus proposal.

In response to the public health emergency caused by the novel coronavirus, the General Assembly enacted Senate Bill 150 ("SB 150"), which became law on March 30, 2020. SB 150 provides, notwithstanding the provisions of the Act, that "a public agency shall respond to the request to inspect or receive copies of public records within 10 days of its receipt." SB 150 § 1(8)(a). Under KRS 446.030, when the period of time prescribed by statute is seven days or less, weekends and legal holidays are excluded from the computation of time. Therefore, because SB 150 provides ten days to respond, weekends or holidays are not excluded from the computation of time and a response is due within ten calendar days of receipt. However, if records are "in active use, in storage, or not otherwise available," a public agency shall notify the requester within the prescribed time and provide a "detailed explanation of the cause" for delay and the "earliest date on which" the records will be available for inspection. KRS 61.872(5).

The Appellant claims that the District delayed her access to records unreasonably. On receiving the request on May 3, 2021, the District responded on May 6 and claimed that it would be unable to provide responsive records within three business days. But the District did not have to respond to the Appellant's request, or provide responsive records, within three business days. SB 150 §1(8). Because the District received the request on May 3, its response was due by May 13. Nevertheless, the District responded earlier than required under SB 150, and claimed responsive records would be available on May 14, or one day after its statutory deadline, as modified by SB 150. In its response, the District did not cite KRS 61.872(5), nor did it state whether the records were in active use, storage, or were otherwise unavailable. Therefore, it violated the Act when it failed to properly invoke KRS 61.872(5) to delay inspection. *See*, *e.g.*, 21-ORD-079. But given that the District ultimately provided the Appellant with close to 1,000 pages of responsive records, the District's delay of one day was not unreasonable under these facts.

On appeal, the District abandons its reliance on KRS 61.878(1)(j), and claims that it made all such responsive records available to the Appellant on May 14, 2021. Therefore, the Appellant's claim that the District improperly denied her request under KRS 61.878(1)(j) is moot. *See* 40 KAR 1:030 § 6. However, in response to the Appellant's request for "correspondence, emails, agendas, meeting minutes, and transcriptions . . . regarding the initial proposal of Community Campuses," the District merely directed the Appellant

to its website, and claimed that all responsive records could be found there.[1] The District claims that under KRS 61.874(6), it has discharged its duty to provide records by directing the Appellant to its website.

Under KRS 61.874(6),

> Online access to public records in electronic form, as provided under this section, may be provided and made available at the discretion of the public agency. If a party wishes to access public records by electronic means and the public agency agrees to provide online access, a public agency may require that the party enter into a contract, license, or other agreement with the agency, and may charge fees for these agreements.

KRS 61.874(6) was enacted in 1994, when the Internet was still in its infancy. *See* 1994 Ky. Laws Ch. 262. Few, if any, public agencies had websites at that time. When KRS 61.874(6) was enacted, "online access to public records in electronic form" was an expensive endeavor. That is why KRS 61.874(6) permits each public agency to establish fees that do not exceed "the cost of physical connection to the system and reasonable cost of computer time access charges." KRS 61.874(6)(a). In other words, KRS 61.874(6) contemplates an agreement in which a person is provided direct access to a public agency's electronic records database through a physical connection to the database.

Under KRS 61.872(3), a person has a right to inspect records in-person at a public agency's facilities, or by receiving copies of such records by mail. A public agency cannot sidestep a requester's statutory right to inspection by directing her to its website. *See*, *e.g.*, 06-ORD-131. Therefore, the District violated the Act.

Moreover, the District's website included no correspondence, emails, agendas, or meeting minutes associated with the Community Campuses initial proposal. The website only provides presentation materials about the project. Thus, the materials on the website do not appear to be responsive to the Appellant's request. Nevertheless, on appeal, the District claims that its

[1] The website link that the District provided is available at https://sites.google.com/nelson.kyschools.us/nccommunitycampus/home (last accessed June 4, 2021).

superintendent has searched for responsive records and that he could not locate any such records other than those appearing on the website.[2]

A public agency cannot grant a requester access to a record that does not exist. *Bowling v. Lexington Urban County Gov't*, 172 S.W.3d 333, 341 (Ky. 2005). Once a public agency states affirmatively that it does not possess responsive records, that burden shifts to the requester to present a *prima facie* case that the record requested does exist in the agency's possession. *Id*. If the requester can make a *prima facie* case that records do or should exist, then the agency "may also be called upon to prove that its search was adequate." *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 848 n.3 (Ky. 2013) (*citing Bowling*, 172 S.W.3d at 341).

Here, the Appellant has not made a *prima facie* showing that the District possesses or should possess any additional records beyond what the District has provided. Moreover, this Office cannot resolve competing factual claims about the existence of additional records. *See, e.g.*, 19-ORD-076; 03-ORD-61. Therefore, this Office is unable to find that the District has failed to provide all responsive records.

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.

Daniel Cameron
Attorney General

/s/Matthew Ray
Matthew Ray
Assistant Attorney General

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[2] But the District did provide several emails and correspondence related to the formation of a "Local Planning Committee" and communications exchanged between Committee members, which the Appellant had also requested. It appears as though the Committee is the body administering the Community Campuses plan. Such emails may also be responsive to the Appellant's request for correspondence related to the Community Campuses proposal.

Distributed to:

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