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**21-ORD-129**

July 21, 2021

In re: Christopher Dudgeon/Nelson County School District

***Summary:*** The Nelson County School District ("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 him with copies of public records. The District did not violate the Act when it declined to provide copies of electronic public records in a nonstandardized format.

## *Open Records Decision*

Between April 23, 2021 and May 10, 2021, Bloomfield Mayor Christopher Dudgeon ("Appellant") made a series of six requests to the District to obtain copies of several categories of public records. The District responded to each of the requests, and in most instances, as will be explained below, provided timely access to records. For brevity, and because the District has since provided all responsive records in its possession, it is unnecessary to describe each of the Appellant's requests in detail. Instead, this decision addresses only the three issues the Appellant raises on appeal and the parties' communications that are relevant to those issues.

First, the Appellant claims that the District violated the Act by failing to timely respond to his requests. Second, he claims that the District violated the Act when it responded to some portions of his requests by directing him to the District's website, instead of providing him direct access to responsive records. Third, the Appellant claims that the District violated the Act when it refused to provide him with certain records in the format that he requested.

Normally, a public agency must respond to an open records request within three business days. KRS 61.880(1).[1] However, 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 repeatedly delayed his access to records in violation of the Act. However, the District issued its final responses to each of the requests within the ten-day period permitted under SB 150, except in two instances. In the first instance, the Appellant submitted a request on April 23, 2021, and the District timely responded on April 28, 2021. However, the District did not provide responsive records, or claim that an exception applied to deny inspection of the records. Instead, the District claimed it needed additional time to comply with the request "due to the nature and volume of the material being requested." Citing KRS 61.872(5), the District claimed that the records would be available on May 7, 2021, or 14 days after the Appellant's request. Similarly, in the second instance, the Appellant submitted a request on May 6, 2021. The next day, the District responded and claimed it needed additional time "due to the nature and the volume of the material requested." The District committed to producing the records responsive to the May 6, 2021 request on May 21, 2021, or 15 days after the Appellant submitted his request. In both instances, the District did not state whether the records were in active use, in storage, or 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.

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[1] During the 2021 Regular Session of the General Assembly, the legislature passed House Bill 312 ("HB 312"). HB 312 became effective on June 29, 2021. *See* OAG 21-02. Among other changes to the Act, HB 312 amends KRS 61.880(1) such that a public agency must now respond within five business days upon receiving a request to inspect records. Because the Appellant submitted his request prior to June 29, 2021, HB 312 has no bearing on this decision.

The Appellant next argues that the District violated the Act when it directed him to the District's website in lieu of providing him with copies of the requested records. The District responded to each of the Appellant's requests by e-mailing him a PDF document containing various hyperlinks.[2] Some hyperlinks would direct the Appellant to a PDF document uploaded to an internet cloud system containing responsive financial records. If the Appellant printed the PDF, the output would be identical to physical copies of responsive records that had been sent by mail. However, in response to other portions of the Appellant's request, the District directed the Appellant to the District's website. For example, in one request, the Appellant sought monthly financial records "broken down by school." The District responded and stated "[m]onthly financials are not broken down by school, nor does [the Kentucky Department of Education] require [the District] to break them down by school. [The Appellant] may access monthly financials from the Board agendas on the Nelson County School's website or [he] can go to the [Kentucky Department of Education's] School Report Card site for per student expense by school." The District further provided a hyperlink to the District's website.

On appeal, the District claims that under KRS 61.874(6) it 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. Acts 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

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[2] As used in this decision, a "hyperlink" is a website's URL address that is embedded in readable text. The result is that the text appears blue and is underlined, but the reader does not see the actual URL address. By clicking on the readable text, the user is directed to the webpage that has been embedded in the text.

agreement in which a person is provided direct access to a public agency's electronic records database through a physical connection to the database.

The hyperlinks the District provided to the Appellant, giving him direct access to a PDF document containing responsive records, are the type of "online access" contemplated under KRS 61.874(6), although the advent of cloud computing has alleviated the need for "physical connections" to a database. In these instances, the hyperlinks the District provided are tantamount to delivery of responsive records on a CD or other physical data storage medium. But in the instances in which the District directed the Appellant to its website, the Appellant was required to do his own searching for responsive records. The District claimed that the Appellant could find his requested records by reviewing the Board's meeting agendas, which would contain the requested monthly financial records. The District should have gathered such readily available records and provided them directly to the Appellant, instead of requiring him to search for them on the District's website. *See, e.g.*, 17-ORD-177.

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 him to its website. *See*, *e.g.*, 06-ORD-131. Therefore, in those instances in which the District directed the Appellant to its website to conduct his own search for records, it violated the Act.

Finally, the Appellant argues that the District must provide records in an Excel spreadsheet upon request, even though it does not maintain the records in Excel format. KRS 61.874(2)(b) defines "standard format" for an electronic record as "a flat file electronic American Standard Code for Information Interchange (ASCII) format," and further provides that "[i]f the public agency maintains electronic public records in a format other than ASCII, and this format conforms to the requestor's requirements, the public record may be provided in this alternate electronic format for standard fees as specified by the public agency. Any request for a public record in a form other than the forms described in this section shall be considered a nonstandardized request." Thus, any format other than ASCII or the format in which the agency maintains the record is a nonstandardized format.

Under KRS 61.874(3), "[i]f a public agency is asked to produce a record in a nonstandardized format, or to tailor the format to meet the request of an individual or a group, the public agency may at its discretion provide the

requested format and recover staff costs as well as any actual costs incurred." Accordingly, a public agency also has discretion to refuse to produce a record in a nonstandard format when it does not maintain the record in that format.

On appeal, the District explains that the Appellant not only sought "payroll documentation," but additional fields of information such as the amount of hours worked, the department in which each employee is working, and each employee's job duties and pay rate. The District explains that some of these fields are not ordinarily contained within the District's payroll records that are temporarily stored in MUNIS.[3] Moreover, the only format in which MUNIS reports can be "naturally" produced is PDF format. To produce the record requested in the format in which the Appellant seeks, the District must extract several fields of information from various databases. In other words, it would be required to create a new record, which is something the Act does not require of public agencies. *See, e.g.*, 16-ORD-237; 12-ORD-026. Because the Appellant did not request the records either in ASCII format or in the format in which they are maintained, the District was not required to comply with the Appellant's request that payroll records be produced in an Excel format.

In sum, the District violated the Act when it delayed its final responses to two of the Appellant's requests without properly invoking KRS 61.872(5). The District also violated the Act when it directed the Appellant to its website instead of granting in-person inspection or providing copies of the records. But the District did not violate the Act when it declined to provide records in a nonstandardized format.

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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[3] MUNIS is a software program used by several public agencies. The District explains that MUNIS is an "accounting system in which information is entered and that information is then used to create necessary records." According to the District, it does not permanently store records in MUNIS, nor is the software capable of generating a record in Excel format that would contain all the fields of information sought by the Appellant.

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/s/ James M. Herrick

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Distributed to:

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