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21-ORD-244

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In re: Bryan Beggs/Oldham County School District

Summary: The Oldham County School District ("the District") violated the Open Records Act ("the Act") when it failed to produce evidence that a request placed an unreasonable burden on it. However, the District did not violate the Act when it made all responsive records in its possession available for inspection.

Open Records Decision

Bryan Beggs ("the Appellant") submitted a request to the District containing 20 subparts in which he sought to inspect records related to the District's hiring and retention of a specific Diversity, Equity, and Inclusion consultant ("the Consultant") formerly employed by the District, as well as records related to any other similar consultants. In a timely response, the District stated that all communications, contracts, proposals, and invoices related to the Consultant were available for inspection at the District's main office, and stated affirmatively that no other consultant had been retained, and thus, no other responsive records existed in its possession.

In addition to records related to the Consultant, the Appellant also sought records related to the District's finances, such as: any grants awarded to the District for the Consultant's work or for Diversity, Equity and Inclusion work; contracts for "social emotional learning" programs; the sources of funding for "social emotional learning" programs; and sources for funding the "Arvin Center counselor position." The District made all contracts and funding sources that were in its possession and related to these portions of the request available for inspection, but stated that no federal grants had been awarded to the District and thus no responsive records related to that portion of the Appellant's request existed.

The Appellant also requested to inspect all "communications, documentation, and other stored records . . . with respect to programs, surveys, survey results, instructions, agendas, literature, training materials, or related content within the Inclusion Coalition from August 2018 to [the] present." The District made available to the Appellant all communications and agendas from the Inclusion Coalition and the Consultant, but denied the remainder of his request because it was "a blanket request for information."

Finally, the Appellant requested to inspect "communications, documentation, and other stored records" related to several topics, including "Critical Race Theory" and similar such terms and proponents of such theories, "gender theory" and similar such terms and proponents of such theories, and COVID-19. The District denied the Appellant's requests for all communications, documentation, and stored records "related to" these broad topics as unduly burdensome under KRS 61.872(6).[1] This appeal followed.

The Appellant has not explicitly stated what portions of the District's response he intends to appeal.[2] As noted previously, he submitted a request containing 20 subparts. The District made some records available, stated other records do not exist, and also declined to search for other responsive records based on the breadth of the Appellant's request. There is also evidence in the record that the Appellant has not availed himself of the opportunity to inspect the records that have been made available to him.[3] Therefore, this Office interprets this appeal as involving only two questions. First, for those records the District affirmatively stated do not exist, whether the Appellant has presented a *prima facie* case that such records do exist. Second, whether the District properly denied as unreasonably burdensome those portions of the

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1 The District did state, however, that it does not implement "gender theory" topics as part of its curriculum, and thus no responsive records existed in its possession.

2 Specifically, the Appellant merely stated that aspects of the District's response "do not seem right," without specifying with what aspects of the response he disagreed. The Appellant also raised concerns about conflicts of interest between District officials and the topics related to the subject of his request. To the extent he is seeking this Office's review of some alleged conflict of interest, such a request is beyond the purview of this Office's review under KRS 61.880(2).

3 To the extent the Appellant is claiming that the District has not provided all records responsive to those subparts in which records were made available, it is difficult for the Appellant to maintain such a claim when he has yet to inspect the records that have been made available to him. Historically, this Office has declined to adjudicate competing claims between the parties about whether additional records should exist and have not been provided. *See, e.g.*, 19-ORD-083; 03-ORD-061.

Appellant's request in which he sought all "communications, documentation, and other stored records" covering broad topics.[4]

Once a public agency states affirmatively that it does not possess responsive records, the burden shifts to the requester to present a *prima facie* case that requested records do exist in the possession of the public agency. *See Bowling v. Lexington-Fayette Urb. Cnty. Gov.*, 172 S.W.3d 333, 341 (Ky. 2005). If the requester is able to make a *prima facie* case that the records do or should exist, then the public 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 District claims that the Consultant was the only such consultant retained by the District, and all records related to that Consultant were made available in response to the first part of the Appellant's multi-part request. Thus, the District does not possess records related to other consultants. The District also claims to have never been awarded a federal grant for Diversity, Equity, and Inclusion work. Finally, the District claims it does not teach "gender theory" or possess any records responsive to that topic. The Appellant has not made a *prima facie* case that the District retained any consultants other than the identified Consultant, that the District is receiving funding for programs for which the District claims it does not receive funding, or that the District is teaching "gender theory." Accordingly, this Office cannot find that the District violated the Act when it did not provide records that do not exist in its possession.

Finally, the Appellant has made several broad requests for all communications or other records associated with various topics; *i.e.*, "Critical Race Theory" and "COVID." The District denied these requests as unreasonably burdensome. Under KRS 61.872(6), a public agency may deny a request that "places an unreasonable burden" on the agency. However, the

[4] The Appellant also sought communications between District officials and "associated representatives recruiting or requesting attendees to appear at school board meetings to counter public expression opposed to COVID related restrictions." The District stated that only one record existed, which it claims constituted correspondence with a private individual and is exempt under KRS 61.878(1)(i). The Appellant does not appear to be challenging the District's reliance on KRS 61.878(1)(i) to deny inspection of this record. The District claims the one email was sent to a parent, and it did not give notice of any final action by the District. Accordingly, to the extent the Appellant is challenging this aspect of the District's denial, this Office finds that the District appropriately relied on KRS 61.878(1)(i) to deny inspection of one email to a private individual–a parent.

public agency must substantiate its denial under KRS 61.872(6) by clear and convincing evidence.

This Office has found that open-ended, "any-and-all" types of requests related to broad topics can place an unreasonable burden on a public agency. *See, e.g.*, 08-ORD-058; 99-ORD-014; 96-ORD-101. The burden can be especially acute regarding "communications," like emails, that reference a particular topic without identifying the parties to the communications or when such communications were exchanged, because the number of responsive records can reach the thousands. *See, e.g.*, 17-ORD-104 (over 45,000 emails); 14-ORD-109 (approximately 6,200 emails). However, in reaching these conclusions, this Office noted that the requester had sought to inspect records by obtaining copies under KRS 61.872(3)(b). If a requester seeks to inspect public records by copies received in the mail, the requester must "precisely describe" the records sought. KRS 61.872(3)(b). If the requester seeks to inspect copies in-person, however, he need only to "describe" such records, KRS 61.872(2), as opposed to "precisely describe" the records, KRS 61.872(3)(b). *See Commonwealth v. Chestnut*, 250 S.W.3d 655, 661 (Ky. 2008). And as previously discussed, the District is not providing copies of the records to the Appellant for inspection by mail under KRS 61.872(3)(b). Moreover, KRS 61.872(6) still requires the public agency to present clear and convincing evidence that the request is unreasonably burdensome. The District has not put forth any evidence that the request is unreasonably burdensome.

With regard to the topic of COVID-19, the Appellant sought records relating to masking requirements, vaccinations, quarantining, "loss of [a] teaching license" for failing to enforce such requirements, and any "threat[s] of arrest" if the guidance is not enforced. While such a request may not "precisely describe" records, it does "describe" them. *Compare* KRS 61.872(2) *with* KRS 61.872(3)(b); *see also Chestnut*, 250 S.W.3d at 661. It may be true that the District has sent voluminous communications related to COVID-19 in the past two years, perhaps in the thousands, like the requests at issue in 17-ORD-104 and 14-ORD-109. But the District has not offered evidence of that fact, if true, or that production of those records would be "unreasonably burdensome." And without providing this Office with an approximate number of emails containing the term "COVID," this Office is unable to judge whether it would be unreasonably burdensome to review such responsive emails and determine whether exemptions apply to deny their inspection. Moreover, to the extent that the District has implemented policies related to COVID-19, it has not explained why it would be unreasonably burdensome to locate such policies and provide them for inspection.

Likewise, with regard to the topic of "Critical Race Theory," or other similar theories, the District has not affirmatively stated no such policies exist or that it would be unreasonably burdensome to produce for inspection such policies if they do exist. Nor has the District claimed that thousands of emails containing the term or similar terms have been located, thus imposing an unreasonable burden to review them for potential exemptions. Similarly, the Appellant sought "programs, surveys, survey results, instructions, agendas, literature, training materials, or related content" from the Inclusion Coalition. Thus, the Appellant has "described" the records he seeks – programs, surveys, survey results, and training materials. The District, however, provided the Appellant only with communications involving the Inclusion Coalition and agendas. It has not stated affirmatively that no programs, surveys, or training materials exist in its possession.[5] The District does not explain how it would be unreasonably burdensome to locate these records. It may be true that the Appellant's request for "related content" does not describe identifiable public records, but he has at least described some identifiable public records: programs, surveys, survey results, and training materials. *See, e.g.*, 21-ORD-047 (noting that a request for "any and all information," including emails and contracts related to COVID-19 tests purchased by the Commonwealth, sufficiently described records sought). If no such records exist, then the District must affirmatively state as much. But the District has not carried its burden, with clear and convincing evidence, that complying with the Appellant's request is unreasonably burdensome.

Simply put, KRS 61.872(6) requires a public agency to put forth *evidence* that a request is unreasonably burdensome. The District, however, merely asserts that the request places an unreasonable burden upon it. The District, therefore, has not carried its burden under KRS 61.872(6) by clear and convincing evidence. Accordingly, it violated the Act.

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 within 30 days from the date of this decision. Pursuant to KRS 61.880(3), the Attorney General shall be notified of any action in circuit court, but shall not

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[5] Instead, the District faults the Appellant for not identifying the programs, surveys, and training materials he seeks. Presumably, however, the very purpose of the Appellant's request is to learn what programs the Inclusion Coalition is conducting, what surveys it has taken, and what training materials it is distributing. It is the District's obligation to identify responsive records and any applicable exemptions, "not the requester." *Univ. of Ky. v. Kernel Press, Inc.*, 620 S.W.3d 43, 48 n.2 (Ky. 2021).

be named as a party in that action or in any subsequent proceedings. The Attorney General will accept notice of the complaint emailed to OAGAppeals@ky.gov.

Daniel Cameron
Attorney General

/s/Marc Manley
Marc Manley
Assistant Attorney General

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Distributed to:

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