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**21-ORD-245**

December 7, 2021

In re: Tyler Fryman/Hazard Independent Board of Education

***Summary:*** The Hazard Independent Board of Education ("the Board") violated the Open Records Act ("the Act") when it denied requests for records without citing exceptions under the Act and when it denied a request for the superintendent's e-mails without a sufficient basis. The Board further violated the Act when it denied a request for internal e-mails referencing the word "dance" and did not meet its burden of proof that the e-mails were privileged. The Board also violated the Act when it failed to conduct an adequate search for records. The Board subverted the intent of the Act, within the meaning of KRS 61.880(4), when it imposed an improper copying fee. The Board did not violate the Act when it made redacted e-mails available in hard-copy form because it was impossible to redact them electronically.

## *Open Records Decision*

On October 28, 2021, Tyler Fryman ("Appellant") requested copies of the superintendent's e-mails from October 26 through 28, 2021; all e-mails "to and from any other" Hazard Independent Schools e-mail address referencing the word "dance" from October 1 through 28, 2021; the "[f]inal action taken in a personnel matter related to a student led activity on or around" October 26, 2021; and "[a]ll documents used to come to that final action," including but not limited to e-mails and text messages. In his request, the Appellant stated: "If any of the requested documents are available in electronic form, I request that the documents be provided in the same electronic form or ASCII equivalent as required by [KRS] 61.874(2)(a)."

In response, the Board denied the Appellant's request for the superintendent's e-mails, explaining that "[s]uch a broad request would cover many emails that include information excepted from disclosure," such as "[p]ersonal emails, emails regarding students, information regarding grants and other protected information." The Board cited no provision of the Act to justify its denial. Additionally, the Board denied the Appellant's request for e-mails referencing the word "dance" on grounds that all responsive e-mails were subject to the attorney-client privilege. In response to the Appellant's request for final personnel actions, the Board provided one written reprimand. Finally, the Board denied the Appellant's request for "documents used to come to that final action" on the grounds that the only documents were privileged e-mails with counsel and "preliminary notes made regarding conversations with counsel," which were also subject to the privilege. This appeal followed.

When a public agency denies a request for a public record, it must "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." KRS 61.880(1). Because the Board did not cite any exception to the Act in its response to the Appellant's request, it violated the Act.

On appeal, the Board claims that the Appellant's request for the superintendent's e-mails over a three-day period is "overbr[oa]d and unduly burdensome" because it would require the Board to review each e-mail to determine whether it contains information that is exempt from the Act, "when [the Appellant] could easily tailor his request to more relevant and identifiable content." Under KRS 61.872(6), a records custodian may refuse to fulfill an open records request "[i]f the application places an unreasonable burden in producing public records[.] However, refusal under this section shall be sustained by clear and convincing evidence." To satisfy the burden of proof by clear and convincing evidence, this Office has required public agencies "to make a reasonable effort to ascertain the number of responsive records it claims to pose an unreasonable burden." *See, e.g.,* 14-ORD-153. Here, the Board has not attempted to do so.

Furthermore, under KRS 61.878(4), if public records contain "material which is not excepted under this section, the public agency shall separate the excepted and make the nonexcepted material available for examination." Thus, in all cases, an agency is "obligated to sift through any requested materials in order to determine which documents (or portions of a document) must be redacted or excised." *Com. v. Chestnut,* 250 S.W.3d 655, 664 (Ky. 2008). "[T]he obvious fact that [this process] will consume both time and manpower is,

standing alone, not sufficiently clear and convincing evidence of an unreasonable burden." *Id.* at 665. Because it has not met its burden of proof on this issue, the Board violated the Act when it denied the Appellant's request for the superintendent's e-mails.

With regard to the Appellant's request for e-mails "to and from" any other school e-mail address referring to a "dance," the Board states on appeal that it misinterpreted the request as seeking only internal e-mails. The Board has agreed to provide to the Appellant the e-mails with external parties, but has made them available only in hard-copy form at 10 cents per page. Initially, the Board told the Appellant that this was necessary because the files were "too large to send electronically." However, the Board subsequently explained that the e-mails had to be printed out in order to redact "student information that cannot be disclosed [under] Federal law."[1] The Appellant objects to receiving paper copies when he requested electronic copies, and further objects to the copying fee.

Under KRS 61.874(2)(a), public records "shall be available for copying in either standard electronic or standard hard copy format, as designated by the party requesting the records, where the agency currently maintains the records in electronic format." A public agency violates KRS 61.874 if it provides hard copies when electronic copies are specified and "presents no evidence that it was unable to honor the request" for electronic copies. *See* 19-ORD-118; 14-ORD-148. Here, however, the Board asserts that it had no means of redacting the e-mails electronically, but could only do so by printing them out. In their redacted form, those records existed only as hard copies. Although the Board could have scanned the redacted records to convert them into an electronic format, "[a]gencies are not required to convert hard copy format records to electronic formats." KRS 61.874(2)(a). Therefore, the Board did not violate the Act when it provided redacted e-mails in hard-copy form.

Under KRS 61.880(4), a person may petition the Attorney General to review an agency's action if the "person feels the intent of [the Act] is being subverted by an agency short of denial of inspection, including but not limited to the imposition of excessive fees[.]" A public agency may impose a copying fee for paper copies of electronic records if the requester has not specifically designated electronic copies. *See*, *e.g.,* 14-ORD-130. However, such a fee is

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[1] Although the Board does not identify the federal law to which it refers, the Federal Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g *et seq.*, makes certain student records and information confidential.

improper where, as here, the requester has designated electronic copies. *See, e.g.,* 19-ORD-118; 14-ORD-148. Furthermore, an agency may not impose such a fee for copies made for the sole purpose of redaction. *See Dept. of Ky. State Police v. Courier-Journal,* 601 S.W.3d 501, 508 (Ky. App. 2020) (noting that KRS 61.878(4) "does not specify the costs must be borne by the requester"). Because the copying fee was improper and thus excessive, the Board subverted the intent of the Act, within the meaning of KRS 61.880(4), when it imposed such a fee.

As to the responsive e-mails that are internal within the school system, the Board continues to assert the attorney-client privilege. Likewise, the Board invokes that privilege with respect to those documents that served as the basis for personnel actions, which consist of e-mails with the Board's attorney and notes from conversations with the attorney.

The attorney-client privilege protects from disclosure "confidential communication[s] made for the purpose of facilitating the rendition of professional legal services to [a] client." KRE 503(b). "A communication is 'confidential' if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." KRE 503(a)(5). KRS 61.878(1)(l) operates in tandem with KRE 503 to exclude from inspection public records protected by the attorney-client privilege. *Hahn v. Univ. of Louisville,* 80 S.W.3d 771 (Ky. App. 2001). However, when a party invokes the attorney-client privilege to shield documents in litigation, that party bears the burden of proof. That is because "broad claims of 'privilege' are disfavored when balanced against the need for litigants to have access to relevant or material evidence." *Haney v. Yates*, 40 S.W.3d 352, 355 (Ky. 2000) (quoting *Meenach v. General Motors Corp.*, 891 S.W.2d 398, 402 (Ky. 1995)). So long as the public agency provides a sufficient description of the records it has withheld under the privilege in a manner that allows the requester to assess the propriety of the agency's claims, then the public agency will have discharged its duty. *See City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 848–49 (Ky. 2013) (providing that the agency's "proof may and often will include an outline, catalogue, or index of responsive records and an affidavit by a qualified person describing the contents of withheld records and explaining why they were withheld.").

Here, the Board has identified the records as e-mails between unidentified school representatives and the Board's attorney, as well as unidentified school representatives' notes of conversations with the Board's

attorney. Although minimal, this description is sufficient for this Office to determine that the attorney-client privilege applies to the communications insofar as they relate to pending disciplinary matters. Considering the potential for disciplinary action, it appears that those communications were made "for the purposes of facilitating the rendition of professional legal services" to the Board. KRE 503(b)(1). Therefore, those communications between the Board's attorney and the unidentified school representatives fall under the attorney-client privilege.

The same is not true, however, for the Appellant's other request for all internal e-mails referencing the word "dance." The Board has provided no description or context to indicate that those communications were made in facilitation of professional legal services. The Board has only stated that these communications involved the Board's attorney. Not every communication between attorney and client is privileged. *See, e.g., Com., Cabinet for Health and Family Services v. Scorsone,* 251 S.W.3d 328, 330 (Ky. 2008) (rejecting, in an Open Records Act appeal, an agency's "blanket redaction of all descriptive portions of the disclosed billing records without particularized demonstration that each description is privileged"). The Board bears the burden of proof not only because it is a public agency, KRS 61.880(2)(c), but also because it is asserting the privilege, *Haney,* 40 S.W.3d at 355. Yet the Board has not met this burden by merely asserting that the e-mails were communications with counsel. Therefore, the Board violated the Act when it withheld internal e-mails referencing the word "dance."

Finally, the Appellant argues that the Board failed to conduct an adequate search for records responsive to his request for final personnel actions. Initially, the Board provided the Appellant a copy of one written reprimand. However, the Appellant learned from a newspaper report that two other employees had received reprimands on the same day. When the Appellant brought this fact to the Board's attention, the Board produced copies of the other two written reprimands. On appeal, the Board is unable to explain why it did not initially provide the Appellant all three reprimands. Thus, the Board violated the Act by initially failing to conduct an adequate search for records. *See, e.g.,* 21-ORD-178; 20-ORD-013 (finding that an agency violated the Act when its "search was clearly insufficient to locate all responsive records").

In sum, the Board violated the Act when it denied requests for records without citing exceptions to the Act and when it denied the request for the superintendent's e-mails without a sufficient basis. The Board further violated

the Act when it denied the Appellant's request for internal e-mails referencing the word "dance" because it did not meet its burden of proof that the e-mails were privileged. Additionally, the Board violated the Act when it failed to conduct an adequate search for records. Finally, the Board subverted the intent of the Act, within the meaning of KRS 61.880(4), when it imposed an improper copying fee. However, the Board did not violate the Act when it made redacted e-mails available in hard-copy form because it was impossible to redact them electronically.

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 be named as a party in that action or in any subsequent proceedings. The Attorney General accepts notice of the complaint through e-mail to OAGAppeals@ky.gov.

**Daniel Cameron**
**Attorney General**

/s/ James M. Herrick

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Distributed to:

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