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21-ORD-258

December 20, 2021

In re: Christopher Henning/Bullitt County School Board

Summary: The Bullitt County School Board (the “Board”) violated the Open Records Act (“the Act”) when it did not properly invoke KRS 61.872(5) to delay inspection of records. The Board also violated the Act when it failed to search for records responsive to one portion of the request.

Open Records Decision

On September 30, 2021, Christopher Henning (“Appellant”) submitted a request to the Board for three categories of records. First, he requested copies of the Board’s policies currently in effect and those currently being considered. Second, he requested all communications between the Board and specific government agencies regarding “protocols, funding, programs associated with Covid-19, including, operations, vaccinations, or masking[.]” Third, he requested “[a]ll email communications, or meeting minutes between the Board of Education and [the] Superintendent [] that communicate anything to do with Covid-19, masking, vaccinations, vaccination passports, vaccination clinics, or funding for said things since February 2020.”

On September 30, 2021, the Board responded and directed the Appellant to its website where it claimed the requested policies could be found.¹ The Board did not respond to the other two portions of the request “due to Fall Break.” Instead, the Board stated that it anticipated it would “formally

¹ The link the Board provides is <http://policy.ksba.org/Chapter.aspx?distid=169> and is an electronic version of its policy and procedure manual. On appeal, the Appellant has not objected to the Board directing the Appellant to its website for all of its policies, or claimed that he was not provided access to all of the Board’s enacted policies.

respond” by October 15, 2021. On that day, two weeks after the Appellant submitted his request, the Board provided the Appellant with additional responsive records. The Appellant immediately responded to the Board’s October 15 response and asked why the Board failed to acknowledge the third portion of his request, in which he sought “[a]ll email communications, *or* meeting minutes between the Board of Education and [the] Superintendent [] that communicate anything to do with Covid-19, masking, vaccinations, vaccination passports, vaccination clinics, or funding for said things since February 2020” (emphasis added). The Board stated that, because his third request contained an “or,” the Board interpreted the request as being “made in the alternative, not the conjunctive.” Although the Appellant had communicated his intent to inspect such emails, the Board did not respond further to the Appellant’s request. This appeal followed.

Under KRS 61.880(1), upon receipt of a request for records pursuant to the Act, a public agency “shall determine within five (5) [business] days . . . after the receipt of any such request whether to comply with the request and shall notify in writing the person making the request, within the five (5) day period, of its decision.” If the agency seeks to deny inspection, either in whole or in part, of any record its response 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). Otherwise, if requested records are “in active use, in storage or not otherwise available,” a public agency may delay inspection of the requested records if it provides the requester a “detailed explanation of the cause” of delay and the “earliest date on which the public record[s] will be available for inspection.” KRS 61.872(5). Consequently, an agency must issue within five business days one of three types of responses to a request—it can approve the request, deny the request and provide citations to exemptions and explain how such exemptions apply to responsive records, or properly invoke KRS 61.872(5) to delay inspection of records.

Here, the Board’s initial response did not expressly invoke KRS 61.872(5), but the Board nevertheless attempted to delay inspection of records beyond five business days. The Board claims the records were not otherwise available because of “Fall Break,” but it did not provide any further explanation of the cause of delay. Although the Board claimed that the earliest date the records would be available was October 15, 2021, it did not explain why it would take two weeks to process the request. This Office has previously found that the unavailability of agency employees is not a legitimate basis under the Act to delay inspection of records. *See, e.g.*, 09-ORD-191 (an agency

did not properly invoke KRS 61.872(5) when it claimed that Fall Break made employees unavailable). Accordingly, the Board violated the Act when it failed to properly invoke KRS 61.872(5) and provide a legitimate basis for the cause of delay.

The Appellant also claims that the Board ignored his request for any email communications between the Board and Superintendent regarding COVID-19 policies. The Board did not cite an exemption under KRS 61.878(1) to deny inspection of these emails, or claim that no such records existed in its possession. Instead, the Board claimed that the Appellant did not really request these records because he used the word “or” instead of the word “and” in his request. Even if the Board could properly reject a request based on a grammatical error, the Appellant corrected this error immediately by emailing the Board when it failed to acknowledge this aspect of his request. At no point has the Board claimed to have searched for records responsive to this portion of the Appellant’s request. Upon receiving a request for records, it is incumbent on a public agency to search for responsive records in good faith. *See City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 857 (Ky. 2013) (remanding and instructing the agency to “make a good faith effort to identify those records responsive to the [Appellant’s] request and either provide them to the [Appellant] or explain with adequate particularity why, under the Act, they are exempt”). The Board presents no evidence on appeal that it has searched for responsive records, and continues to assert that it had no duty to provide responsive records because of the Appellant’s use of “or.” Accordingly, the Board violated the Act when it ignored a portion of the Appellant’s request.

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 will accept notice of the complaint emailed to OAGAppeals@ky.gov.

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/s/Matthew Ray
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Distributed to:

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