



COMMONWEALTH OF KENTUCKY  
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**22-ORD-069**

April 22, 2022

In re: Mark Graham/Todd County Board of Education

**Summary:** The Todd County Board of Education (the “Board”) violated the Open Records Act (“the Act”) when it did not explain how KRS 61.878(1)(a) applies to withhold requested records, and when it delayed access to records without providing a detailed explanation of the cause the delay. This Office cannot resolve a factual dispute between the parties as to whether the requester received the Board’s response to his request.

***Open Records Decision***

On March 14, 2022, Mark Graham (“Appellant”) submitted a request to the Board for an electronic copy of a specific employee’s complete employment file. The Appellant asked the Board to redact any personal information before providing responsive records. On the same day, the Board acknowledged receipt of the request and stated that the request had been forwarded to the Board’s attorney for review. On March 24, 2022, the Appellant initiated this appeal, claiming that he had received no further response from the Board.

Under KRS 61.880(1), upon receiving a request for records under 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.” Here, the Board received the Appellant’s request on March 14, 2022. On appeal, the Board claims it issued a timely response on March 15, 2022. As proof, the Board submits a copy of a letter dated March 15, 2022 that the Board claims to have mailed and emailed to the Appellant. However, the

Appellant claims he did not receive this letter. This Office has historically found that it cannot resolve factual disputes between requester and a public agency, such as whether a requester received a response to his request. *See, e.g.*, 22-ORD-024; 21-ORD-233; 21-ORD-163. Thus, this Office cannot find that the Board failed to issue its response within five business days.

Although this Office cannot find that the Board's response was untimely, the Board's response was deficient nevertheless.<sup>1</sup> Under KRS 61.880(1), "[a]n agency response denying, in whole or in part, inspection of any record shall 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." In its response, the Board cited KRS 61.878(1)(a) as an applicable exemption, but the Board did not explain how that exemption specifically applies to the requested records. The Board stated only that it anticipated the need to redact the records with KRS 61.878(1)(a) "in mind." KRS 61.878(1)(a) exempts from inspection "[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." On appeal, the Board states again that "KRS 61.878(1)(a) may apply to the requested records," but the Board still does not explain how that exception applies to the records.<sup>2</sup> Accordingly, the Board violated the Act when it failed to explain how an exemption applied to the records withheld.

The Board also violated the Act when it failed to give a detailed explanation for delaying the Appellant's inspection of responsive records by 14

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<sup>1</sup> The Board's response also indicated that the Appellant had failed to provide a statement as to how the Appellant qualified as a resident of the Commonwealth. Under KRS 61.872(1), only residents of the Commonwealth have a statutory right to inspect public records. The term "resident" is defined in KRS 61.870(10). However, the Appellant provided his Kentucky address when he submitted his request, and thus he demonstrated that he qualified as a resident of the Commonwealth. Regardless, the Board did not deny the Appellant's request on this basis, so it unnecessary to consider this issue further.

<sup>2</sup> Public agencies may categorically redact certain types of personal information appearing in public records, such as the addresses, phone numbers, social security numbers, and driver's license information under KRS 61.878(1)(a). *See Kentucky New Era, Inc., v. City of Hopkinsville*, 415 S.W.3d 76, 89 (Ky. 2012). This Office has also recognized that dates of birth may be categorically redacted from public records under KRS 61.878(1)(a). *See, e.g.*, 18-ORD-022; 16-ORD-120. But the Board has not indicated whether it would simply be redacting these categories of information, or if other portions of responsive records would also be redacted under KRS 61.878(1)(a).

days after receipt of the request. As stated previously, a public agency must decide within five business days of receiving a request whether to grant the request, or deny the request and explain why. KRS 61.880(1). However, a public agency may also delay access to responsive records if such records are “in active use, storage, or not otherwise available.” KRS 61.872(5). A public agency that invokes KRS 61.872(5) to delay access to responsive records must also notify the requester of the earliest date on which the records will be available, and provide a detailed explanation for the cause of the delay.

Here, the Board notified the Appellant of the earliest date on which he would receive responsive records—14 days later. But the Board did not give a “detailed explanation” of the cause for delay. The Board stated only that, in addition to reviewing and redacting information with KRS 61.878(1)(a) “in mind,” the Board would be providing the employee who was the subject of the request an opportunity to review and “object” to the Board providing the records to the Appellant.

The Kentucky Supreme Court has recognized that a person who is the subject of a request under the Act has standing to object to the release of responsive records. *See Beckham v. Bd. of Ed. of Jefferson Co.*, 873 S.W.2d 575, 579 (Ky. 1994). To exercise that right, the person must first be made aware of the request and afforded an opportunity to seek injunctive relief in the circuit court before the agency releases the requested records. However, the Board did not cite to the *Beckham* case, or explain that it was delaying the Appellant’s access to the records under that authority. Accordingly, the Board failed to provide a “detailed explanation” for the cause of delay and therefore violated the Act.<sup>3</sup>

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court under KRS 61.880(5) and KRS 61.882 within 30

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<sup>3</sup> If the Board was indeed relying on *Beckham* to delay the Appellant’s inspection of responsive records, this Office does not find 14 days to be an unreasonable delay. If the employee objects to the release of the records, then the employee will have to petition a circuit court having competent jurisdiction. The employee would have to review the records, decide whether to object, and would likely have to retain counsel to petition the circuit court. Thus, a two-week delay would not be unreasonable. The Board did not violate the Act by delaying the Appellant’s inspection for two weeks. Instead, the Board violated the Act by failing to provide the detailed explanation required under KRS 61.872(5).

days from the date of this decision. Under 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.

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

/s/Matthew Ray  
Matthew Ray  
Assistant Attorney General

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Distributed to:

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