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22-ORD-071

April 22, 2022

In re: Mark Graham/Christian County Board of Education

Summary: The Christian County Board of Education (“the Board”) did not violate the Open Records Act (“the Act”) when it properly invoked KRS 61.872(5) to delay inspection of records by ten business days after receipt of the request.

Open Records Decision

On March 14, 2022, Mark Graham (“the Appellant”) submitted a request to the Board to inspect “any and all emails and any other type of correspondence” exchanged between eight district employees during a three-month period, as well as the entire personnel files for nine other district employees.¹ In a timely response on March 21, 2022, the Board notified the Appellant that the requested records had been gathered, but they were “extremely voluminous” and the Board required additional time to review such records and redact exempt information. The Board stated that the records would be available “by March 28, 2022,” an additional five business days later. This appeal followed.

Upon receiving a request to inspect records, a public agency must decide within five business days whether to grant the request, or deny the request and explain why. KRS 61.880(1). 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

¹ Although the Appellant claims that these are “separate requests,” he submitted them both at the same time attached to one email. There is little difference in a request that contains multiple parts and multiple requests submitted simultaneously.

on which the records will be available, and provide a detailed explanation for the cause of the delay. When determining whether an agency's delay is reasonable, this Office has previously considered the number of the records, the location of the records, and the content of the records. *See, e.g.*, 01-ORD-140; OAG 92-117. In this analysis, the content of the records may be relevant if the records contain both exempt and nonexempt information. *Id.* The law governing the confidentiality of the records can also be a factor. Some laws require confidentiality, and can carry consequences for public agencies that fail to adhere to strict confidentiality. Others do not. *Compare* 20 U.S.C. § 1232g (the Family Educational Rights and Privacy Act ("FERPA"), which ties continued federal funding to maintaining the confidentiality of education records) *with* KRS 61.878(1)(a) (protecting personally private information but imposing no consequences for the failure to protect that information).

Here, the Board notified the Appellant that the records would be available "by March 28, 2022," or within ten business days after receiving the request. The Board explained that the delay was caused by the "extremely voluminous" amount of responsive records and the need to review the records to redact exempt information. And the Board successfully provided the redacted records to the Appellant on March 28. On appeal, the Board further explains that the Appellant's request implicated more than 4,000 records, each of which required review for information protected under FERPA. *See* 20 U.S.C. § 1232g. In 21-ORD-045, this Office recognized that a school district's need to review and redact 5,000 emails for information protected under FERPA would require "some delay." In that decision, however, the school district sought to delay inspection by four months. This Office found that the school district failed to carry its burden that a four-month delay was reasonable under the facts presented.

Unlike in 21-ORD-045, the Board required only ten business days after receiving the request to retrieve, review, and redact 4,000 pages of records in compliance with federal law. Under these circumstances, a delay of ten business days was not unreasonable. Accordingly, the Board did not violate 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 be named as a party in that action or in any subsequent proceedings. The

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Attorney General will accept notice of the complaint e-mailed to
OAGAppeals@ky.gov.

Daniel Cameron
Attorney General

/s/Marc Manley
Marc Manley
Assistant Attorney General

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