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**22-ORD-170**

August 24, 2022

In re: Mark Graham/Todd County Board of Education

**Summary:** The Todd County Board of Education (“the Board”) did not violate the Open Records Act (“the Act”) when it provided ten days to a former employee for the opportunity to file a civil action to prevent the release of records under *Beckham v. Board of Education of Jefferson County*, 873 S.W.2d 575 (Ky. 1994). A requester is not entitled to inspect the originals of redacted records. The Board did not show by clear and convincing evidence that repeat requests were intended to disrupt essential functions under KRS 61.872(6).

***Open Records Decision***

On July 14, 2022, Mark Graham (“Appellant”) submitted a request to the Board for “live access to the originals and an electronic copy” of all employment records for a former employee of the Todd County Schools. The Appellant asked that the Board “redact any personal information such as dates of birth, social security numbers, home addresses, etc.” In a timely response, the Board stated that because original documents cannot be redacted, the Appellant could not have “live access to the originals” in the sense of “an opportunity to thumb through [the former employee’s] personnel file.” The Board further indicated that the former employee had standing to bring a civil action under *Beckham*, to enforce her privacy rights under KRS 61.878(1)(a). For this reason, the Board stated that it would grant her ten days after the date of its response in which to file such an action before the Board released any records to the Appellant. On the last day of that ten-day period, the Appellant initiated this appeal.

The Appellant first complains that the Board has denied him access to the original personnel file, as opposed to a redacted copy. But in his request, the Appellant asked the Board to redact certain information. The redaction of records

necessarily involves preparing a redacted copy distinct from the original, as any redaction to the original would cause permanent damage to the records. The Board did not violate the Act by denying the Appellant's request to inspect the non-redacted originals.<sup>1</sup>

The Appellant also argues the Board violated the Act by allowing the former employee time to file an action under *Beckham*. In *Beckham*, the Kentucky Supreme Court held that, under KRS 61.882(1), a person affected by an agency's disclosure of records has standing to petition the circuit court to prevent the agency from disclosing such records. 873 S.W.2d at 579. An affected person who receives notice from the agency of an open records request is responsible for taking "such further action as he deems appropriate." *Lexington-Fayette Urb. Cnty. Gov. v. Lexington Herald-Leader Co.*, 941 S.W.2d 469, 473 (Ky. 1997). Neither the General Assembly nor the Court has specified how much time such a person may be given to bring an action under *Beckham*. In 14-ORD-064, however, this Office found that ten days was not an unreasonable delay for this purpose. Accordingly, the Board did not violate the Act by affording the former employee ten days to file an action objecting to the release of her employment records.

Finally, in its response to this appeal, the Board points out that the Appellant previously requested these same records on March 14, 2022, and states the records were provided to him after he appealed to this Office. *See* 22-ORD-069.<sup>2</sup> Therefore, the Board asserts that, because the Appellant made a previous request for the same records, KRS 61.872(6) "might very well come into play in the present circumstances." Under KRS 61.872(6), "if the custodian has reason to believe that repeated requests are intended to disrupt other essential functions of the public agency, the official custodian may refuse to permit inspection of the public records or mail copies thereof. However, refusal under this section shall be sustained by clear and convincing evidence." "Clear and convincing proof is that 'of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinary prudent minded people.'" *F. V. v. Com., Cabinet for Health and Family Svcs.*, 567 S.W.3d 597, 606 (Ky.

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<sup>1</sup> Of course, if the Appellant wished to inspect redacted copies on agency premises during regular office hours, and make copies of those redacted records, he would have the right to do so. *See, e.g.*, 21-ORD-212. However, the Appellant has asked to see both redacted and unredacted versions of the same records. The purpose of redactions is to separate exempt material from nonexempt material and provide the latter for inspection. *See* KRS 61.878(4).

<sup>2</sup> In reply, the Appellant makes two additional complaints. First, he complains of certain redactions made to the records that the Board provided to him in response to his request. Specifically, the Appellant objects that a page of an employment application listing the former employee's previous employment history and references was redacted in its entirety, and that the Board did not provide any records relating to disciplinary actions against the former employee. However, these issues arose after the Appellant initiated his appeal. Accordingly, the Office declines to adjudicate these issues. *See, e.g.*, 21-ORD-177 (the Office has discretion to consider new issues raised after an appeal is initiated, but will not do so in the absence of full argument from both parties).

App. 2018) (quoting *Rowland v. Holt*, 70 S.W.2d 5, 9 (Ky. 1934)). Here, the Appellant argues that he made a second request for the records, not to disrupt essential functions of the Board, but because his prior request did not specifically mention disciplinary records. Based on the record presented, the Board has not shown by clear and convincing evidence that the Appellant's second request was intended to disrupt the Board's essential functions. KRS 61.872(6).

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 e-mailed to OAGAppeals@ky.gov.

**Daniel Cameron**  
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s/James M. Herrick  
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Distributed to:

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