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**22-ORD-176**

August 26, 2022

In re: Jason Howard/Kentucky Department of Education

***Summary:*** The Office cannot find that the Kentucky Department of Education ("the Department") violated the Open Records Act ("the Act") for failing to respond within five business days to a request it claims it did not receive. The Department's initial responses failed to give detailed explanations for the cause of delay, as required under KRS 61.872(5), because the Department failed to quantify or estimate the number of potentially responsive records justifying the need for the stated delay. However, the Department's delay in providing some responsive records was reasonable, and the Department has substantiated that portions of the request place an unreasonable burden on the Department.

## *Open Records Decision*

Jason Howard ("the Appellant") claims to have submitted a request to the Department to inspect records on March 8, 2022. As proof, he attaches to his appeal two emails that he sent to the Department's official records custodian that day. He appears to have sent the first email at 8:43 a.m. on March 8, and he asked to inspect three categories of records. He described the first category as "[t]he entire list, with time stamps, on email [*sic*] received and from who and email sent and to who from" for seven Department employees since June 1, 2021. The Appellant described the second category as "a report" for three email addresses "that includes any of the following search terms," and the Appellant provided a list containing the first name, the last name, and the first and last name, of those three employees as well as his own name, and the term "evaluations."[1] The Appellant also sought the Microsoft

[1] Although the Appellant asks for a "report," he stated later in his request that "[f]or now" he would "prefer a listing with time stamps on the large pulls. Individual [*sic*] copies of emails with search terms applied." Agencies tend to possess emails, not "reports" categorizing emails. The Department actually

Teams ("Teams") messages exchanged between those three employees and "a report" about those Teams messages containing the same search terms as the second category of his request. At the conclusion of his request, the Appellant stated he "may ask later for individual copies of specific emails. For now [he'd] prefer a listing with time stamps on the large pulls. Individual [*sic*] copies of emails with search terms applied."

The Appellant appears to have sent his second email to the Department's official records custodian on March 8 at 12:58 p.m. His second email contained only a picture of his driver's license and three statements: "not for commercial use," "[p]refer electronic copies," and "[d]river's license as proof of residency." Having received no response to either email by Saturday, March 19, the Appellant sent another email to the Department's official custodian of records asking for a response "soon." On Monday, March 21, the Department's official records custodian responded and claimed that the only email he had received from the Appellant was dated "3/18/22 [*sic*]" and that email contained only a picture of the Appellant's driver's license without a request to inspect records.

On March 28, 2022, the Department responded to the Appellant's request, invoked KRS 61.872(5), and stated the requested records were "in active use, in storage, or not otherwise available." The Department further explained that the request was "for a substantial number of records located in voluminous files and requires review for possible redaction or exemption" under the Family Education Rights and Privacy Act ("FERPA"), the attorney-client privilege, and "other applicable laws." The Department did not estimate or quantify the number of potentially responsive records, or explain why it was unable to provide a more concrete estimation than a "substantial number." The Department stated it "anticipate[d] the first set of records will be ready for delivery on or before April 8, 2022," it would issue a "follow-up response on or before April 8," and it would commit to "produce records on a rolling basis in good faith" as they were reviewed.

On April 8, the Department issued its "follow-up response," but did not provide any responsive records. This time, the Department stated it "has been performing electronic searches for responsive records" since March 28. As a result of those searches, the Department "identified a significant number of data, both responsive and non-responsive." The Department further stated it was still searching for

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created a "report" in response to the first category of the request, even though the Act did not require it to do so. *See Dep't of Revenue v. Eifler*, 436 S.W.3d 530, 534 (Ky. App. 2013) ("The ORA does not dictate that public agencies must gather and supply information not regularly kept as part of its records.") But the Department seems to have interpreted the second category as a request for emails instead of a "report" about emails, and that ultimately such an interpretation leads it to produce almost 300,000 responsive records.

responsive records, and repeated its earlier response that the request involved "a substantial number of records" that would potentially be exempt under FERPA, the attorney-client privilege, "and other applicable laws." This time the Department committed to providing "the records," (not "the first set" of records), on April 29. The Department stated that if some records became available prior to April 29 then it would produce them on a rolling basis in good faith. The Department advised the Appellant that he may receive records sooner if he narrowed the scope of his request. But the Appellant refused to narrow the scope of his request and claimed "[i]f anything" he would "expand[]" the scope in future requests. He further stated he understood the breadth of his current request and that "time is a luxury [he has] at the moment."

On April 29, the Department issued another response and, for the first time, quantified the number of some records at issue. As for the first category of records requested, the "list" of emails exchanged between seven employees, including time stamps, the Department advised that it involved 15,388 data "entries." The Department advised that this "list" contained private email addresses that would require redaction under KRS 61.878(1)(a). The Department did not quantify the number of records potentially responsive to the Appellant's second and third categories of the request, but advised it was still searching for responsive records. The Department claimed it "anticipate[d] the records [would] be ready for delivery on or before, Friday, June 3, 2022."

On June 3, the Department issued its final response to the request and provided a link containing records responsive to the "list" of emails the Appellant requested in category one of the request. However, the Department denied the Appellant's request for the second category of records, the emails between three employees containing various search terms, because the Department located 295,086 "entries." Invoking KRS 61.872(6), the Department claimed it would be unreasonably burdensome to review and redact almost 300,000 responsive records. The Department also denied, as unreasonably burdensome, the Appellant's request for the third category of records, the Teams messages, because it located 16,822 responsive records that would require review for potential redactions under FERPA or because of the attorney-client privilege. 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, within five business days of receipt of the request, 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. *Id.*

Under KRS 61.880(4), a person who feels the intent of the Act has been subverted, short of denial, may seek the Attorney General's review. Such violations include "delay past the five (5) day period described in [KRS 61.880(1) and] excessive extensions of time." *Id*. Given that a public agency may delay access to records beyond five business days if it provides the requester the earliest date on which records will be available and a detailed explanation for the cause of delay, KRS 61.872(5), this Office has recognized that the length of delay is a question of reasonableness in light of the request at issue and the agency's explanations. *See, e.g.*, 21-ORD-045 (the agency failed to substantiate that a delay of four months was necessary to review 5,000 emails under the facts presented).

In determining whether a 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 (("FERPA"), which ties continued federal funding to confidentiality compliance) *with* KRS 61.878(1)(a) (exempting from inspection personally private information, but imposing no consequences for the failure to protect that information).[2] Weighing these factors is a fact-intensive inquiry. Some delays are warranted. *See, e.g.*, 12-ORD-097 (finding a six-month delay to review over 22,000 e-mails was reasonable). Some delays are not. *See, e.g.*, 01-ORD-140 (finding that a delay of two weeks to produce three documents was unreasonable). At all times, however, a public agency must substantiate the need for any delay and that it is acting in good faith. *See* KRS 61.880(2)(c) (placing the burden on the public agency to substantiate its actions).[3]

On the other hand, instead of delaying access to records under KRS 61.872(5), an agency can fully deny a request under KRS 61.872(6) "[i]f the application places an unreasonable burden in producing public records or if the custodian has reason to believe that repeated requests are intended to disrupt other essential functions of the public agency." A public agency's burden of proof to deny a request under KRS 61.872(6) is higher than its burden of proof to substantiate the reasonableness of its

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[2] Consider also the attorney-client privilege, KRE 503, which is incorporated in the Act under KRS 61.878(1)(l). Although there may be no loss of federal funding because of an inadvertent disclosure of privileged material, such disclosure could result in tremendous disadvantage to a public agency engaged in litigation.

[3] One way that a public agency can demonstrate its good faith, especially when it claims such a lengthy delay is required, would be to release batches of processed records on an ongoing basis. If a public agency claims it is only able to process a certain amount of records per week, there is little reason that it should continue to deny inspection of the records it has already processed.

delay under KRS 61.872(5). That is because "refusal under [KRS 61.872(6)] shall be sustained by clear and convincing evidence." *Compare id. with* KRS 61.880(2)(c) ("The burden of proof in sustaining the action shall rest with the agency.")

Whether a particular request places an unreasonable burden on an agency is similar to the question of whether the "earliest date on which [the agency claims] the public record[s] will be available" under KRS 61.872(5) is reasonable. The only real difference is a matter of degree, signified by the agency's higher burden of proof under KRS 61.872(6). For example, when determining whether a particular request places an unreasonable burden on an agency, the Office considers the number of records implicated, whether the records are in a physical or electronic format, and whether the records contain exempt material requiring redaction. *See, e.g.*; 97-ORD-088 (finding that a request implicating thousands of physical files pertaining to nursing facilities was unreasonably burdensome, where the files were maintained in physical form in several locations throughout the state, and each file was subject to confidentiality provisions under state and federal law). In addition to these factors, this Office has found that a public agency may demonstrate an unreasonable burden if it does not catalogue its records in a manner that will permit it to query keywords mentioned in the request. *See, e.g.*, 96-ORD-042 (finding that it would place an unreasonable burden on the agency to manually review thousands of files for the requested keyword to determine whether such records were responsive).

Against this backdrop, the Office turns to the merits of the appeal. First, the Appellant alleges the Department violated the Act when it failed to respond within five business days of his request sent on March 8, 2022 at 8:43 a.m. The Department claims to have never received that email, but instead, received only the Appellant's second email sent at 12:58 p.m., which contained only a picture of the Appellant's driver's license and did not include a request for records. While it is unclear how the Department received the second email but not the first, when both were sent to the same email address, the Office cannot resolve factual disputes about whether and when an agency actually received a request for records. *See, e.g.*, 22-ORD-100; 12-ORD-122; 03-ORD-172. Accordingly, the Office cannot find that the Department failed to respond within five business days to a request it claims it did not receive when the request was sent.

Second, the Appellant challenges the Department's delay and excessive extensions of time that ultimately led to the Department's outright denial more than two months after receiving the request. Although the Department invoked KRS 61.872(5) in its first response on March 28, it did not give a "detailed explanation for the cause of delay." The Department did not quantify, or provide an estimate, for the number of records implicated by the request. Nor did the Department explain why it

was unable to provide such an estimate.[4] The fact that an agency must invoke KRS 61.872(5) within five business days of receiving the request, and that it must pick the earliest date records will be available and explain why that is the date chosen, indicates that the agency should have completed its search by the fifth business day. Or, at the very least, that the agency has begun its search and the search has already implicated so many records that the agency is on notice that it cannot comply with the request within five business days. Either way, the date the agency chooses as the "earliest date" must be governed by what the agency knows at the time it invokes KRS 61.872(5) in the first place. Moreover, if the number of responsive records is so large that instead of delay the agency will claim the request is unreasonably burdensome, then the agency must have some idea of the number of records implicated to meet its "clear and convincing evidence" burden. KRS 61.872(6). Otherwise, neither the requester nor this Office can judge the reasonableness of the stated delay or the agency's claim that the request is unreasonably burdensome. But here, the Department did not quantify the number of records implicated by the request, or even estimate the number, in its first response on March 28. The Department first quantified the number of records responsive to the first category on April 29, and did not quantify the number of records responsive to the second or third categories until June 3. When it did so on June 3, it realized the request was unreasonably burdensome and finally informed the Appellant of that decision. For these reasons, the Department failed to provide a "detailed explanation" for the cause of its continual delay. KRS 61.872(5).

Finally, the Appellant challenges the Department's ultimate decision to deny the second and third categories of his request as unreasonably burdensome. As discussed, the Office will consider the number of records implicated, whether such records are physical or electronic, whether the records will require redaction, and whether the Department has the ability to search its files by the Appellant's chosen keywords.

With respect to the second category of records, all emails between three employees containing various search terms, the Department claims this search resulted in 295,086 "entries."[5] The Department explains that many of these are duplicates because of the duplicative nature of the Appellant's keywords. For

[4] For example, if records are not kept in electronic form and must be manually searched, it may take more than five business days to physically locate such records and manually count them. Electronic searches, however, tend to provide a number of files responsive to the query.

[5] "Entries" is not a word typically used when discussing emails. While the Office appreciates that public employees send and receive thousands of emails in the scope of their employment, it is doubtful that three employees sent and received almost 300,000 emails in less than a year. The Department also used the word "entries" when describing the "list" it created in response to the first category. Regardless, the Act does not require the Department to create a report containing almost 300,000 "entries." And the Department has carried its burden that processing and reviewing almost 300,000 emails would be an unreasonable burden.

example, the Appellant sought emails containing the first name of four people, the last name of those four people, and both the first and last name of those four people. Presumably the names of the employees will appear in every email they send, because their email addresses include their names. Moreover, many of the emails appear in chains, so the same email is duplicated each time as the chain grows. The result is, according to the Department, almost 300,000 responsive records that must each be reviewed to comply with FERPA and many of which may implicate the attorney-client privilege.

As for the third category, the Teams messages, the Department claims to have located 16,822 responsive records. The Department also notes that one of the search terms the Appellant requested included "evaluations," and this Office has previously found that employee evaluations are not subject to inspection under the privacy exemption, KRS 61.878(1)(a). *See, e.g.*, 02-ORD-197. Further, while the Department stresses that it did not deny the request under KRS 61.878(1)(i), it points out that Teams messages are the electronic version of post-it notes that can be swapped among employees and unceremoniously thrown in the wastebasket. *See, e.g.*, 21-ORD-168; 97-ORD-191; OAG 78-626. Considering both that most Teams messages would qualify as "notes," which are not subject to inspection under KRS 61.878(1)(i), and that the Appellant's request implicated over 16,000 records, the Office agrees with the Department that this request places an unreasonable burden on it.[6] Accordingly, the Department did not violate the Act for ultimately denying the second and third category of requested records as an unreasonably burdensome request.

In sum, the Office cannot resolve the factual dispute of whether the Department's official records custodian received the Appellant's March 8 email sent at 8:43 a.m., even though the Department's official records custodian apparently received the Appellant's second email that day without incident. The Department violated KRS 61.872(5) when it failed to give a "detailed explanation for the cause of

[6] One would not expect an author to create a public record adopting substantive policy or final agency action on a stack of post-it notes, but that does not mean it would be impossible to do so. Likewise, a message sent via Teams is not automatically a "note" under KRS 61.878(1)(i) because it was sent via Teams. Teams is an electronic messaging system similar to email, but the primary purpose of the Teams chat feature is to exchange short bits of information like one would do with a post-it note. It serves as a collaboration tool between employees within an agency and potentially with other agencies. As the Office stated long ago, with now a small addition for the technological age—"Not every paper [or series of computer bits] in the office of a public agency [or its computers] is a public record subject to public inspection. Many papers are simply work papers which are exempted because they are preliminary drafts and notes. KRS 61.878(1)[(i)]. Yellow pads can be filled with outlines, notes, drafts and doodlings which are unceremoniously thrown in the wastebasket or which may in certain cases be kept in a desk drawer for future reference. Such preliminary drafts and notes and preliminary memoranda are part of *the tools which a public employee or officer uses* in hammering out official action within the function of his office. They are expressly exempted by the Open Records Law and may be destroyed or kept at will and are not subject to public inspection." OAG 78-626 (emphasis added).

delay," because on March 28 the Department did not indicate that it had begun its search and on April 8, more than two weeks after it received the request, the Department still had not quantified the number of records implicated. On April 29, a month after receiving the request, the Department was able to quantify the number of records responsive to the first category but not the two other categories. And finally, on June 3, after having waited for more than two months, the Department finally claimed that the request was unreasonably burdensome—a decision it could have made in the beginning had it conducted a proper search to obtain sufficient information to give the "detailed explanation for the cause of the delay" that KRS 61.872(5) requires. But the Department has nevertheless carried its burden by clear and convincing evidence that the second and third category of the request places an unreasonable burden on it.

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/Marc Manley
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