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**22-ORD-188**

September 13, 2022

In re: Matthew Miller/Mercer County School District

**Summary:** The Mercer County School District (the “District”) subverted the Open Records Act (“the Act”), within the meaning of KRS 61.880(4), when it required a request to be submitted directly to its attorney using a specific form.

***Open Records Decision***

On Sunday, August 7, 2022, Matthew Miller (“Appellant”) submitted a request to the District for three categories of records related to its soccer program between 2020 and 2022.<sup>1</sup> The following day, the District’s records custodian instructed the Appellant to use a specific form to complete the request. The District’s records custodian also instructed the Appellant to submit his request to the District’s attorney because the records custodian would “no longer be responding directly to [the Appellant’s] communications.”<sup>2</sup> The Appellant then initiated this appeal on Monday, August 15, 2022.

On appeal, the District claims the Office lacks jurisdiction because the Appellant initiated his appeal before the end of the District’s deadline to respond. Upon receiving a request to inspect records, a public agency must decide within five business days either to grant the request or deny the request and explain why. KRS 61.880(1). Here, the Appellant submitted his request on Sunday, August 7, 2022,

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<sup>1</sup> Specifically, he requested all records of revenue, expenditures, and correspondence related to the District’s soccer program.

<sup>2</sup> The District’s records custodian had copied the District’s attorney on this email.

and the District did not actually receive the request until the following day.<sup>3</sup> The fifth business day after Monday, August 8, was Monday August 15, the same day the Appellant initiated this appeal. However, the District did respond to the Appellant's request before August 15. The District's records custodian instructed the Appellant to use a specific form to complete his request and to send that request to the District's attorney instead of the records custodian. Thus, the Appellant challenges the District's instruction to complete a particular form and send it to a particular person. See KRS 61.880(4) (allowing a person to seek the Office's review when an agency has subverted the Act, short of denial, by misdirecting the person). Accordingly, the Office has jurisdiction to review the Appellant's request and the District's response. See KRS 61.880(2)(a); KRS 61.880(4).

Under KRS 61.872(2)(c), "[a] public agency shall not require the use of any particular form for the submission of an open records request." This Office has also found that a public agency misdirects requesters, within the meaning of KRS 61.880(4), when the agency requires the use of a particular online form to submit requests under the Act. See, e.g., 22-ORD-167. Here, the District's response required the Appellant to submit his request using a specific "Open Records Request form" the District attached to its response. Accordingly, the District subverted the Act, within the meaning of KRS 61.880(4), when it misdirected the Appellant to a particular form he was not required to use.

The Appellant also claims that the District violated the Act when it required his request be submitted "directly addressed" to its attorney. "Any resident of the Commonwealth shall have the right to inspect public records." KRS 61.872(2)(a). "The official custodian may require a written application, signed by the applicant and with his or her name printed legibly on the application, describing the records to be inspected." *Id.* A public agency's "response shall be issued by the official custodian or under his or her authority, and it shall constitute final agency action." KRS 61.880(1) (emphasis added). This Office has found that an agency does not violate the Act when a person acting under the authority of the records custodian *responds* to a request. See, e.g., 22-ORD-175. But "who may *respond* to a request" is a different question than "to whom must the requester *send* his request."

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<sup>3</sup> The copies of the Appellant's request and the District's response that the Appellant provided on appeal did not state the date he submitted his request to the District. Rather, the time stamp stated "4 days ago" instead of an actual calendar date, and it is not clear when the Appellant took the screenshots that captured the copy of his request and the District's response. The District, in its response on appeal, submitted the original email chain, with dates and times, related to the Appellant's request that is the subject of this appeal.

On appeal, the District explains that the Appellant has filed a notice of “intent to file a claim” against the District. Because the Appellant has indicated an intent to sue the District or its employees, the District’s attorney has instructed its employees to not communicate with the Appellant.<sup>4</sup> In 21-ORD-164, the Office considered a similar issue. The Office found the agency did not violate the Act when it relied on a court order to refuse to respond to the requester’s request for records. In that decision, the requester (an inmate) had already sued the agency and began harassing it by sending multiple requests to inspect records. The Boone Circuit Court entered an order commanding the requester to cease communications with the agency, which was the adverse party in the pending litigation. Because the agency was acting pursuant to a court order, this Office found the agency did not violate the Act when it refused to respond to the request.

But the facts of this case are distinguishable. Here, the Appellant has only threatened litigation, so he is not yet an adverse party in litigation. Moreover, it does not appear from this administrative record that any court has entered a “no contact” order against the Appellant. Although the Act permits an agency to issue its response “under the authority” of the records custodian, such as an attorney representing the records custodian, the Act does not allow an agency to demand a request be sent to a person other than the agency’s official records custodian. Here, the Appellant submitted his request to the District’s records custodian, but she required the Appellant to resubmit his request directly to the District’s attorney. Thus, the District subverted the Act, within the meaning of KRS 61.880(4), when it misdirected the Appellant to a person other than the District’s records custodian.<sup>5</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 days from the date of this decision. Under KRS 61.880(3), the Attorney General shall be notified

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<sup>4</sup> In a follow-up response on August 15, the District’s attorney cited *Clark v. Wells Fargo Bank*, No. 6:20-cv-00253, 2020 WL 3038072 (D. Or. June 5, 2020), for the proposition that, when adverse parties are engaged in litigation and one party is represented by counsel, the other party must directly communicate with counsel instead of directly with the adverse party.

<sup>5</sup> The Office notes, however, that when the District’s attorney issued the District’s follow up response on August 15, he instructed the Appellant to send his requests to the records custodian and *copy* the District’s attorney on such communications. Thus, the District recognizes that it cannot prevent the Appellant from submitting requests to its records custodian. Of course, for the reasons already explained, the District cannot require the Appellant to *copy* the District’s attorney on any request submitted to the records custodian any more than the District can require the Appellant to *send* the request to the District’s attorney. Rather, if the records custodian wants the District’s attorney to act “under” her “authority” to respond to a request, then she should forward future requests to the District’s attorney without responding to them herself.

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](mailto: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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