COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

RUSSELL COLEMAN
ATTORNEY GENERAL

1024 CAPITAL CENTER DRIVE
SUITE 200
FRANKFORT, KY 40601
(502) 696-5300

24-ORD-209

September 26, 2024

In re: Blake Gober/Pulaski County School District

Summary: The Pulaski County School District ("the District") did not violate the Open Records Act ("the Act") when it determined a request posed an unreasonable burden under KRS 61.872(6).

Open Records Decision

Blake Gober ("Appellant"), submitted a request to the District for all internal and external communications "between, from[,] or to [District] staff [or] the board" that reference the "Education Opportunities Constitutional Amendment (Ballot Question 2)"; "Amendment 2"; "Question 2"; "Yes on 2" or "No on 2." In response, the District denied the request as unreasonably burdensome under KRS 61.872(6) because the request "did not identify with 'reasonably particularity' the documents that [he] wish[ed] to review." The District explained that, as written, the request sought 18,473 emails from 2,123 District employees. The District also stated that the requested records would need to be reviewed and redacted for exempt information before they could be produced.[1] Finally, the District invited the Appellant to narrow the parameters of his request, stating it would work with him to fulfill such a subsequent request. This appeal followed.

Under KRS 61.872(6), a public agency may deny a request to inspect records "[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." However, an agency must substantiate its denial "by clear and convincing evidence." *Id.* When determining whether a particular request places an unreasonable burden on an agency, the Office

[1] Specifically, the District stated the requested records are potentially exempt under KRS 61.878(1)(a), (j), (k), and (l); the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g; the Kentucky Family Education Rights and Privacy Act ("KyFERPA"), KRS 160.700 to 160.730; and the Health Insurance Portability and Accountability Act of 1996 ("HIPAA").

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 a request implicating thousands of physical files pertaining to nursing facilities to be 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, the Office has found that a public agency may demonstrate an unreasonable burden if it does not catalog 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). When a request does not "precisely describe" the records to be inspected, KRS 61.872(3)(b), the chances are higher that the agency is incapable of searching its records using the broad and ill-defined keywords used in the request.

To start, the District claims the Appellant has not precisely described the records to be inspected. A description is precise "if it describes the records in definite, specific, and unequivocal terms." 98-ORD-17 (internal quotation omitted). This standard may not be met when a request does not "describe records by type, origin, county, or any identifier other than relation to a subject." 20-ORD-017 (quoting 13-ORD-077). Requests for any and all records "related to a broad and ill-defined topic" generally fail to precisely describe the records. 22-ORD-182; *see also* 21-ORD-034 (finding a request for any and all records relating to "change of duties," "freedom of speech," or "usage of signs" did not precisely describe the records); *but see Univ. of Ky. v. Kernel Press, Inc.*, 620 S.W.3d 43, 48 n.2 (Ky. 2021) (holding a request was proper when it sought "all records detailing [the] resignation" of a specific employee). A request that does not precisely describe the records "places an unreasonable burden on the agency to produce often incalculable numbers of widely dispersed and ill-defined public records." 99-ORD-14.

In 23-ORD-006, the Office found a request for correspondence to or from certain named individuals within a specific time frame and containing certain keywords "precisely describe[d]" the records requested. But here, the Appellant has not narrowed his request to particular individuals, nor has he specified a time frame for the records he seeks. Instead, the Appellant seeks all communications that have ever been sent by, to, or between all District employees. Further, although the Appellant did provide responsive keywords, some of those keywords expand, rather than narrow, the scope of responsive records. The District explains that communications with the phrase "Amendment 2" includes emails concerning the Second Amendment of the United States Constitution. Such emails are common in the context of "instruction on US History, the US Constitution, and current events." Similarly, communications with the phrase "Question 2" includes emails discussing "Question 2" in the context of student homework, tests, or other school-related

activities. Accordingly, the Office agrees that the Appellant has not precisely described the records he seeks.

Moreover, the District explains, because of the Appellant's request for emails concerning "Question 2," responsive records include "education assessment related questions . . . among staff or between students and staff" that must be examined under the mandatory privacy provisions of FERPA and KyFERPA. Review of records for redaction under FERPA requires "personal knowledge [that] precludes delegation of that function to different personnel." 15-ORD-015. In 14-ORD-109, a school system sustained its denial under KRS 61.872(6) where the request implicated over 6,200 emails subject to mandatory review and redaction under FERPA and KyFERPA. *See also* 11-ORD-173 (involving over 8,500 emails subject to redaction under FERPA and KyFERPA).[2] Similarly, the District here has carried its burden under KRS 61.872(6) that reviewing over 18,000 responsive emails and their attachments places an unreasonable burden on the agency.

In sum, the Appellant has failed to precisely describe the records he seeks. Further, the District has explained why the requested records are subject to mandatory review and redaction under FERPA and KyFERPA. Accordingly, the District did not violate the Act when it denied the Appellant's request.

A party aggrieved by this decision may appeal it by initiating an 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 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.

Russell Coleman
Attorney General

/s/ Zachary M. Zimmerer
Zachary M. Zimmerer
Assistant Attorney General

[2] In addition, the District explains that it is likely many emails may contain privileged communications with its attorney in the course of the attorney's rendition of legal services, which would also be exempt from inspection. *See* KRE 503; KRS 61.878(1)(l); *see also* 22-ORD-174 (discussing the attorney-client privilege).

#366

Distributed to:

TJ Roberts
Cindy Price
Larry G. Bryson