



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

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24-ORD-216

October 4, 2024

In re: Joshua Zeller/Department of Education

Summary: The Department of Education (“the Department”) violated the Open Records Act (“the Act”) when it partially denied a request for records but did not indicate whether any records were being withheld, identify any withheld records, cite an exception to the Act, or explain how the exception applied.

Open Records Decision

On June 24, 2024, Joshua Zeller (“the Appellant”), a teacher employed by a local school district, submitted a request to the Department for “any records and investigation records regarding” an Education Professional Standards Board (“the Board”) matter involving him that was dismissed without a hearing after an investigation by the Board’s attorney. In a timely response, the Department provided the Appellant a copy of the official case file. This appeal followed.

The Appellant claims the Department improperly withheld the attorney’s investigative file. However, the Appellant quotes from the Department’s disposition of a second request he submitted on June 25, 2024, in which he specifically asked for the contents of the investigative file. To appeal a denial of a request for public records, a complaining party must “forward to the Attorney General a copy of the written request and a copy of the written response denying inspection.” KRS 61.880(2)(a). Here, the Appellant provided a copy of the Department’s response to the June 25 request, but he did not provide a copy of that request. “The Attorney General shall not consider a complaint that fails to conform [to] KRS 61.880(2), requiring the submission of a written request to the public agency and the public agency’s written denial, if the agency provided a denial.” 40 KAR 1:030 § 1. Because the Appellant did not perfect his appeal as to the second request, the Office’s jurisdiction is limited to the Department’s disposition of the June 24, 2024, request.

According to the Board’s internal procedures, a case may be referred for attorney review and investigation when it appears the alleged conduct would warrant

sanctions, if substantiated. The assigned attorney “will review the evidence contained in the investigative case file,” “determine what additional evidence is needed to evaluate the case,” gather “all information and evidence reasonably available,” and recommend (a) that the case be referred for hearing, (b) that an agreed order be approved, or (c) “that the case be dismissed for lack of evidence or insufficiency of evidence.”¹ Here, the Appellant’s original request included a specific request for “investigation records.” Thus, the investigation file was within the scope of the request. Furthermore, the Department admits it has not provided the investigation file.

When a public agency receives a request to inspect records, that agency must decide within five business days “whether to comply with the request” and notify the requester “of its decision.” KRS 61.880(1). An agency response denying inspection of public records must “include a statement of the specific exception authorizing the withholding of the record and a brief explanation of how the exception applies to the record withheld.” *Id.* Thus, the agency must first “actually identify the records being withheld” and then “explain how a cited exception applies to the very records that were identified as being withheld.” 21-ORD-168 (citing *Edmondson v. Alig*, 926 S.W.2d 856, 858 (Ky. App. 1996)).

On appeal, the Department explains that the investigative file contains an “investigation memorandum” to the Board, “interviews with potential witnesses,” “notes drafted by the attorney while reviewing the investigator’s materials, student records obtained from the school district, and the attorney’s draft communications.” However, the Department’s response to the request neither identified these records nor indicated that anything was being withheld. Instead, the response merely stated, “The documents in the possession of [the Department] which are responsive to your request are attached.” Accordingly, the Department violated the Act when it failed to identify the records it withheld, cite an exception under the Act justifying its decision to withhold records, and explain how the exception applied to the specific records withheld.²

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

¹ “Procedures Relating to Board Action on an Educator’s Certification,” § 3(III)(F), *available at* <https://www.education.ky.gov/epsb/Documents/EPSPBProcedures.pdf> (last accessed October 4, 2024). *See also* 16 KAR 1:030 (prescribing procedures for educator certificate surrender, revocation, suspension, reinstatement, and reissuance).

² In its response to the Appellant’s second request for the investigative records, the Department invoked the attorney-client privilege and the work product doctrine. However, because the appeal was not perfected as to the second request, the merits of the Department’s response to that request are not ripe for determination.

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/ James M. Herrick
James M. Herrick
Assistant Attorney General

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Distributed to:

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