



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-239

November 15, 2024

In re: Tanyqua Oliver/Fayette County Public Schools

Summary: Fayette County Public Schools (“FCPS”) did not violate the Open Records Act (“the Act”) when it denied a request for a copy of school surveillance video under KRS 61.878(1)(k) and 20 U.S.C. § 1232g when the video recorded multiple students. FCPS also did not violate the Act when it did not provide records it does not possess or when it requested that the Appellant make an appointment to inspect records in person.

Open Records Decision

Tanyqua Oliver (“Appellant”) submitted a request to FCPS seeking “all evidence collected and to be used against [a particular student] or sent to any other public agency” related to an incident at Jessie Clark Middle School on September 12, 2024. The Appellant specified that responsive records include “notarized abatements, witness list[s], video footage, testimony, [and] notes.” In response, FCPS informed the Appellant that it had provided all records related to the incident except video footage. Regarding the video footage, FCPS stated, pursuant to the Family Educational Rights and Privacy Act (“FERPA”), that it cannot produce copies of video footage containing students’ identities, but the specified “student’s parent may inspect the footage with the appropriate personnel.” FCPS then provided contact information for an FCPS employee who would coordinate a time for inspection of the footage. This appeal followed.

FERPA, 20 U.S.C. § 1232g, is incorporated into the Act under KRS 61.878(1)(k). Under 20 U.S.C. § 1232g(b)(1), “[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information . . .) of students without the written consent of their parents to any individual, agency, or

organization,” excepting certain individuals not relevant here. FERPA precludes the disclosure of education records containing personally identifiable student information to third parties without prior parental written consent. Video footage of students is an education record containing such information. *See, e.g., Medley v. Bd. of Educ. of Shelby Cnty.*, 168 S.W.3d 398, 404 (Ky. App. 2004); 22-ORD-073; 99-ORD-217 (finding that FERPA prevents even the parent of a student recorded on video from inspecting such recording when the video also captured other students).

The applicability of FERPA to a particular record must be determined on a case-by-case basis. FCPS explains that the footage at issue here captures the conduct of the identified student and a second student. FCPS states that it cannot provide a copy of the footage to the Appellant because it constitutes an education record of the other student seen in the video. The Appellant argues that she seeks the footage maintained by FCPS’s law enforcement personnel. The Appellant argues that the copy given to FCPS is an education record, but the video footage in the possession of FCPS’s law enforcement personnel is not an education record.

“If a law enforcement unit of an institution creates a record for law enforcement purposes and provides a copy of that record to a school official for use in a disciplinary proceeding, that copy is an ‘education record’ subject to FERPA if it is maintained by the school official.” *United States v. Miami Univ.*, 294 F.3d 797, 814 (6th Cir. 2002) (cleaned up). However, “education records do not lose their status as education records and remain subject to the Act, including the disclosure provisions, while in the possession of the law enforcement unit.” *Id.* (cleaned up). FCPS explains that the video footage in question was “created by the District—and not the District’s police department—and a copy was provided to the District’s police department at its request.” That copy is an education record that does “not lose [its] status as [an education record] . . . while in the possession of the law enforcement unit.” Accordingly, the Board did not violate the Act when it denied the Appellant’s request for a copy of the video footage.

The Appellant also claims more responsive records, “such as written or recorded statements from administrators and teachers” exist but were not provided. FCPS maintains that it has provided all responsive, non-exempt records. Once a public agency states affirmatively that a record does not exist, the burden shifts to the requester to present a *prima facie* case that the requested record does or should exist. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov’t*, 172 S.W.3d 333, 341 (Ky. 2005). If the requester makes a *prima facie* case that the records do or should exist, then the public agency “may also be called upon to prove that its search was

adequate.” *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 848 n.3 (Ky. 2013) (citing *Bowling*, 172 S.W.3d at 341). Here, the Appellant has not made a *prima facie* case that FCPS possesses additional records responsive to her request. Accordingly, FCPS did not violate the Act when it did not provide records it does not possess.

Finally, the Appellant argues FCPS violated the Act when it did not allow her to immediately inspect the video footage when she visited the agency. FCPS states that it has asked the Appellant to schedule an appointment to coordinate her review of the video footage. Although any person has the right to inspect records in person at the public agency during normal business hours, KRS 61.872(3)(a), the Office has found that a public agency does not violate the Act when it merely attempts to plan ahead for the requester’s visit and have the responsive records readily available for his inspection. *See, e.g.*, 24-ORD-044; 20-ORD-013. Of course, a public agency cannot prevent a person from exercising the right of inspection by making appointments difficult. *See, e.g.*, 15-ORD-182 (finding a violation when an agency continually canceled appointments); 93-ORD-48 (finding a violation when the agency limited the hours for inspection from 8:00 a.m. to 11:00 a.m. for all requesters despite the agency not closing until 4:30 p.m.). But here, FCPS states it merely requested that the Appellant schedule a time to inspect the requested records so they could be gathered and placed in a secure location for his inspection. There is no evidence that FCPS has placed unreasonable restrictions on the Appellant’s right to inspection or that it has a pattern of canceling the Appellant’s appointments. Thus, FCPS did not violate the Act when it asked the Appellant to schedule an appointment for her review of the video footage.¹

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.

¹ The Appellant raises several claims related to the accuracy of education records in the possession of FCPS and alleged violations of FERPA. But those issues are beyond the scope of the Office’s review. *See, e.g.*, 23-ORD-048 n.1 (noting the Office “cannot adjudicate ancillary legal disputes in the context of an appeal brought under KRS 61.880(2)”; 22-ORD-244 n.3 (same).

Russell Coleman
Attorney General

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

#413

Distributed to:

Tanyqua Oliver
Andria Jackson
Demetrus Liggins
Alex Garcia
Carmine Iaccarino