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-260

December 6, 2024

In re: Jerrol Summerville/Graves County School District

Summary: Because the requester has made a *prima facie* case that a public record should exist, the Graves County School District ("the District") violated the Open Records Act ("the Act") when it failed to explain the adequacy of its search for the record. The District also violated the Act when it stated that a portion of the request was "unclear" rather than inform the requestor that it does not possess records responsive to that portion of the request. The District did not violate the Act when it did not produce records it does not possess.

Open Records Decision

Jerrol Summerville ("the Appellant") submitted an eight-part request to the District seeking to inspect a variety of records related to particular district employees and certain District policies.[1] In response to subpart 1, the District stated that "this document could not be located." In response to subpart 4, the District stated, "The requested records would be maintained by" the Kentucky Department of Education. And in response to subparts 6 through 8, the District stated, "It is unclear what specific policies you are seeking; however, all [District] policies are available for review online." This appeal followed.[2]

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[1] Specifically, the Appellant sought: (1) a particular employee's "letter of resignation"; (2) minutes of the Graves County School Board approving an employee's contract for specified periods of time; (3) "schedules" for District positions including "stipends" and "extended days" from each school year from 2020 to the present; (4) the job descriptions of two District employees; (5) the minutes approving the job descriptions of two employees; (6) the policies that permit employees to "resign their positions," "remain on the payroll of the [District]," "have no position with the [District]," and "retain their previous position's stipends and extended days"; (7) the policy "that allows employees with maximum extended days (54) to also be a vendor of consulting services to the [District]"; and (8) the policy "describing the procedure for verification of extended days worked.

[2] The Appellant has not appealed the District's responses to subparts 2, 3, and 5 of his request.

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On appeal, the District maintains that it does not possess the "job descriptions" identified in subpart 4 of the request nor does it possess the "letter of resignation" identified in subpart 1. Regarding the letter of resignation, the District says it "did conduct a 'diligent search' of its records and" it did not find a copy of the identified employee's "letter of resignation." 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 is able to make 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).

First, regarding the job descriptions of two District employees, the Appellant has not established a *prima facie* case that the District possesses the identified job descriptions. Rather, he argues the District must possess the job descriptions because these individuals have retained District benefits. But merely asserting that additional records should exist does not establish a *prima facie* case that they do. *See, e.g.*, 24-ORD-017; 23-ORD-294; 23-ORD-042. Therefore, the District did not violate the Act when it did not provide "job descriptions" it does not possess.[3]

Turning now to the "letter of resignation," to make a *prima facie* case that the record exists, the Appellant cites KRS 161.780(1), which requires a teacher seeking to terminate his or her contract to "giv[e] two (2) weeks *written notice* to the employing superintended." The Appellant asserts the District employee at issue was a principal. "The term 'teacher' for the purpose of [KRS 161.780] shall mean any person for whom certification is required as a basis of employment in the public schools of the state, with the exception of the superintendent." KRS 161.720(1). "Principals fall within this category because they are required to be certified by the Education[ ] Professional Standards Board." *Fankhauser v. Cobb*, 163 S.W.3d 389, 406 (Ky. 2005) (citing KRS 161.020(1)(a)). Thus, by pointing to KRS 161.780(1), which required the employee at issue to submit written notice of termination of his or her contract, the Appellant has presented sufficient information to suggest the record should exist. As such, the burden shifts to the District to explain the adequacy of its search, which it has failed to do.

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[3] The District, in its original response and on appeal, states that the "job descriptions" are in the possession of the Kentucky Department of Education. *See* KRS 61.872(4) ("If the person to whom the application is directed does not have custody or control of the public record requested, that person shall notify the applicant and shall furnish the name and location of the official custodian of the agency's public records.").

An adequate search for records is one using methods reasonably designed to find responsive records. *See, e.g.*, 95-ORD-096. Reasonable search methods include reviewing the files pertaining to the general subject matter of the request, and the files of employees either specifically mentioned in the request or whose job duties are related to the subject matter of the request. *See, e.g.*, 19-ORD-198. To carry its burden of explaining how its search was adequate, an agency must, at a minimum, specifically describe the types of files or identify the employees whose files were searched. *See id*. But here, the District only states that it "did conduct a 'diligent search' of its records" and did not locate the record. The District did not describe the files it searched or identify which employees' files were searched. Just as a requester cannot make a *prima facie* case that records do or should exist merely by asserting that they do, an agency cannot meet its burden of proving it diligently searched for a record merely by asserting that it did.

At bottom, the Office cannot find that the "letter of resignation," in fact, exists. Adjudicating such factual questions is beyond the Office's purview under KRS 61.880(2). The Office can, however, determine whether a requester has made a *prima facie* case that a record should exist. And once such a showing is made, the agency must explain the adequacy of its search. *City of Fort Thomas*, 406 S.W.3d at 848 n.3. Because the Appellant presented evidence that a written notice of the employee's termination of the contract should exist, the District was required to describe the methods it used to search for it. The District's *ipse dixit* assertion that it conducted a "diligent search" does not meet its burden. For that reason, it violated the Act.

Finally, regarding the requested policies, the District maintains that the Appellant failed to "identify with 'reasonable particularity' those documents which he wishes to observe" because he merely identified "a laundry list of topics that he desires a policy for."[4] The District further asserts that, although some portions of the requests for policies could "include information that could be contained in, inferred from, or governed by multiple different policies, rules, or statutes," it "is unable to produce records that it does not have." The District's original response stated only that "[i]t is unclear what specific policies [the Appellant is] seeking."[5] The District did not state that it does not possess specific responsive policies. If responsive records do

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[4] In 04-ORD-028, this Office applied a standard of "reasonable particularity" to requests for on-site inspection of records. That standard has since been abandoned. *See, e.g.*, 22-ORD-255 n.1; 19-ORD-182; 13-ORD-015; 10-ORD-189.

[5] Here, the Appellant sought to inspect records in person. In such cases, the request need only "describe[e] the records to be inspected." KRS 61.872(2)(a). Such a description is sufficient if it is "adequate for a reasonable person to ascertain the nature and scope of [the] request." *Commonwealth v. Chestnut*, 250 S.W.3d 655, 661 (Ky. 2008). By requesting policies related to six topics or types of conduct, the Appellant has adequately described records for purposes of an in-person inspection.

not exist, an agency must affirmatively state that such records do not exist. *See Bowling*, 172 S.W.3d at 341; *see also* 24-ORD-182. On appeal, the District now states it does not possess policies responsive to the Appellant's request, which it did not state in its original response. Thus, the District's original response, which instead directed the Appellant to its entire collection of policies, violated the Act.[6]

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

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Distributed to:

Jerrol Summerville
Chelsea Holt, Graves County Schools
Ronnie Holmes, Chair, Graves County School Board
Matthew Madding, Superintendent, Graves County Schools
Jesse Wright, Board Attorney, Graves County School Board

[6] The Appellant agrees that no policies responsive to his request exist.

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