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25-ORD-036

February 6, 2025

In re: Tracy Frye/Greenup County Board of Education

Summary: The Greenup County Board of Education ("the Board") violated the Open Records Act ("the Act") when it failed to respond to a request within five business days of receiving it and when it failed to respond to all portions of the Appellant's request. The Board failed to carry its burden to show the withheld records were education records exempt under FERPA or KFERPA. The Board violated the Act by failing to provide the name and location of the official records custodian of the agency in actual possession of some requested records. And the Board did not violate the Act when it did not provide records it does not possess.

Open Records Decision

On December 17 and 18, 2024, Tracy Frye ("Appellant"), on behalf of her clients, submitted two multipart requests seeking a variety of records related to the children[1] of her clients.[2] In a response dated January 9, 2025, the Board stated that it would not provide videos of a classroom at McKell Elementary School. Further, because the Appellant had filed a lawsuit against the Board in which she had requested the tapes as part of a request for production, the Board claimed her request "is now governed by the Kentucky Rules of Civil Procedure." This appeal followed.

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1 Both requests sought records related to a specific child and were submitted by the Appellant on behalf of that child's parent or parents.

2 The requests sought, in relevant part, "school-issued telephone numbers of" four individuals; "written documents, emails or text messages" sent "to or from any employee, agent, or administrator" of the Greenup County Schools or sent to "any third party, the Cabinet for Health and Family Services, or police/law enforcement" related to the specified child; "all written documents, photographs, video footage, and audio recordings" related to the specified child; "written documents, communications, photographs, video recordings, audio recordings, investigative reports, termination notices, and legal proceedings with regard to the employment of" four Greenup County School employees; and "all records regarding state and federal funding received by McKell Elementary for children with disabilities."

Upon receiving a request for records under the Act, a public agency "shall determine within five (5) [business] days . . . after the receipt of any such request whether to comply with the request and shall notify *in writing* the person making the request, within the five (5) day period, of its decision." KRS 61.880(1) (emphasis added). If an agency denies in whole or in part the inspection of any record, its response 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.* A public agency cannot simply ignore portions of a request. *See, e.g.*, 21-ORD-090.

The Board's original denial was submitted on January 9, 2025, more than five business days following the submission of both Appellant's requests. The Board does not claim that it timely responded in writing to the requests.[3] Moreover, the Board's denial only addresses the requested videos and ignores the other portions of the Appellant's requests. Thus, the Board violated the Act when it failed to timely respond to the requests and when its original denial only addressed one requested record and ignored others.

On appeal, the Board abandons its original basis for denial. Instead, it has provided a portion of the requested records and withheld others.[4] This appeal is now moot as to the records produced by the Board. *See* 40 KAR 1:030 § 6. But the Office will address the Board's new grounds for denying the inspection of records still not produced.

To start, the Board asserts that it does not possess "school-issued telephone numbers" for the identified individuals and that it possesses no records regarding "federal funding received by McKell elementary for children with disabilities." 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 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). Here, Appellant has not made a *prima facie* case that

[3] Instead, the denial references a verbal discussion regarding production of the videos, in the first week of January, subject to a non-disclosure agreement.

[4] Contemporaneously with its response to this appeal, the Board submitted complete responses to the Appellant's requests on January 17, 2025.

these records exist. Accordingly, the Board did not violate the Act when it could not provide these records.

Next, the Board relies on the Family Educational Rights and Privacy Act and Kentucky's equivalent statute to withhold "written documents, emails or text messages" sent "to or from any employee, agent, or administrator" of the Greenup County Schools or sent to "any third party, the Cabinet for Health and Family Services, or police/law enforcement" related to the specified child and "all written documents, photographs, video footage, and audio recordings" related to the specified child.

The Family Educational Rights and Privacy Act ("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, other than to" specified individuals under conditions not relevant here (emphasis added). Likewise, under the Kentucky Family Education Rights and Privacy Act ("KFERPA"), KRS 160.700 to 160.730, "[e]ducation records of students in the public educational institution in [Kentucky] are deemed confidential and shall not be disclosed, or the contents released, except under the circumstances described in KRS 160.720." KRS 160.705(1). Under KRS 160.720, "[p]arents . . . may consent to the release of written documents by completing and signing forms devised by the educational institution identifying the records to be released, the date of the release, the party to whom the release is granted, and the purpose of the request." KRS 160.720(1).

In its response, the Board states only that the records are education records that are exempt under FERPA and KFERPA. However, the Appellant states she is an attorney representing the parents of the students identified in the respective requests. Both FERPA and KFERPA allow parents to authorize the release of their child's education records. But the Board does not claim that the Appellant lacks the written consent of her clients, the parents of the identified students. Under KRS 61.880(2)(c), "[t]he burden of proof in sustaining the action shall rest with the agency." The Board has not explained why it is withholding educations records in response to a request from the attorney of the parents of the students whose education records are at issue. Thus, the Board has failed to adequately explain why these records were properly withheld under FERPA or KFERPA.

Finally, in response to the request for "written documents, communications, photographs, video recordings, audio recordings, investigative reports, termination notices, and legal proceedings with regard to the employment of" four Greenup County School employees, the Board asserts that responsive law enforcement records are not in its possession, but are, instead, in possession of the Greenup County Schools Division of Law Enforcement, which it claims[5] is a separate agency from the Board.[6] Under KRS 61.872(4), "[i]f 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." Here, however, the Board's January 17, 2025, response to the Appellant, which the Board provided to the Office as part of its response on appeal, does not inform the Appellant that it is not the agency in possession of the requested law enforcement records or provide her with the contact information for the law enforcement agency's official records custodian.[7] Accordingly, the Board violated the Act when it did not inform the Appellant that her request for law enforcement records was sent to the wrong agency, or otherwise provide her with the contact information for the correct agency's official records custodian.

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[5] It is debatable whether the Board's assertion is true. The Board is the public agency that runs Greenup County Schools. *See* KRS 160.290(1) ("Each board of education shall have general control and management of the public schools in its district. . . ."). Further, it is the responsibility of the Board to provide school resource officers (SROs) for each of its schools under KRS 158.4414, and the Board is allowed to establish its own police department under KRS 158.471. The Board admits that "it employs its own police department, [the] Greenup County Schools Division of Law Enforcement." Thus, to the extent that the Board has established its own police department, the Board would have control and possession of that department's records. But because the Board did not comply with KRS 61.872(4) here, it is not necessary for the Office to determine whether the Board's Division of Law Enforcement is a separate agency from the Board itself.

[6] The Board states that it had produced records that can be found in the individuals' personnel files. Therefore, any dispute regarding those records is moot. *See* 40 KAR 1:030 § 6.

[7] Alternatively, the Board stated that the requested records are exempt under KRS 61.878(1)(h). Although the Board claims not to be the agency in possession of these records, to the extent it does possess the records, the Board failed to properly invoke KRS 61.878(1)(h) to withhold them. KRS 61.878(1)(h) exempts "[r]ecords of law enforcement agencies or agencies involved in administrative adjudication that were compiled in the process of detecting and investigating statutory or regulatory violations if the disclosure of the information would harm the agency by revealing the identity of informants not otherwise known or by premature release of information to be used in a prospective law enforcement action or administrative adjudication." KRS 61.878(1)(h). The Supreme Court of Kentucky has held that when a public agency relies on KRS 61.878(1)(h) to deny inspection, it must "articulate a factual basis for applying it, only, that is, when, because of the record's content, its release poses a concrete risk of harm to the agency in the prospective action." *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 851 (Ky. 2013). The Board states only that "[t]here are ongoing criminal investigations into the listed individuals." But the Board did not identify any harm posed by release of the records. Thus, to the extent the Board possesses these records, its response was insufficiently specific to invoke KRS 61.878(1)(h).

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:

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