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25-ORD-102

April 15, 2025

In re: Olivia Tipton/Oldham County School District

Summary: The Oldham County School District ("the District") violated the Open Records Act ("the Act") when it failed to issue a timely written response stating that certain records did not exist, or explaining why records were unavailable and giving the earliest date when they would be available for inspection. The District subverted the intent of the Act, within the meaning of KRS 61.880(4), when it did not allow its records to be photographed or copied upon inspection. However, the District did not subvert the intent of the Act when it contacted the requester to schedule an appointment, within five business days, to inspect records. The District did not violate the Act when it could not provide records that do not exist and the requester did not establish a *prima facie* case that additional records exist.

Open Records Decision

This appeal concerns two separate requests to the District for public records. On January 21, 2025, Olivia Tipton ("the Appellant") submitted a request to the District to inspect five categories of records. First, she requested "[a]ll current policies and procedures" for the Buckner Elementary Site-Based Decision Making Council ("the Council"). Second, she requested an ethics agreement and certain acknowledgments signed by the Council for the 2023–24 and 2024–25 school years. Third, she requested "[t]he Board policy Waiver from March 30, 2023, including "additional documents such as school board approval for this waiver." Fourth, she requested "[a]ll committee meeting notifications for the last calendar year or 2023-2024 school year and 2024-2025 school year." Finally, she requested "an outside audit" that recommended the creation of bylaws for the Council. In response, the District asked the Appellant to "share a time" when it would be convenient for her to inspect the records, and the parties agreed to schedule the inspection for January 27, 2025.

The parties disagree about what occurred at the time of the inspection. The Appellant claims "the majority" of the requested records "were not available to view and no explanation was given." The District, however, claims it explained to the Appellant that the "Ethics Agreement for the 2024-2025 school year was not provided as it had not been finalized," "that the Board Policy Waiver from [March] 30, 2023 was waived by" the Council, and that "there are no official notifications" of committee meetings but only emails that "are not placed in the SBDM binders." What is undisputed is that the District did not provide a *written* notification, within five business days after the Appellant's request, that any records were unavailable, were not yet finalized, or did not exist.

Furthermore, according to the Appellant, when she inspected the records that were available, she asked to photograph the records and the District refused to allow her to do so because the documents had not been checked for "personal information" that might require redaction.[1] The Appellant states the District offered to make copies of the records, but refused to do so on the same day because it regarded the request for copies "as a new records request" giving the District five additional days to make the records available. On appeal, the District admits it "requested additional time to ensure any documents copied were not subject to redaction of exemption [*sic*] under the Open Records Act." The District further claims the Appellant made "additional clarifying requests . . . during the inspection," which it "treated . . . as a new Open Records request and stated physical copies would be available . . . on February 3, 2025." However, there is no record of any written request from the Appellant for additional records on January 25, 2025. It is undisputed that the District provided copies of some records to the Appellant on February 3, 2025, and that those records included copies of certain email notifications of committee meetings.

On March 5, 2025, the Appellant emailed the District and stated there were still "missing documents" from her January 21 request, as outlined in her earlier email of January 31, 2025. As to item 1 of the request, she claimed the policies she received were not current. The District stated on March 6, 2025, that they were current. As to item 2, the Appellant stated the "ethics agreement" for the current year had not been provided. In response, the District explained that "[t]he Code of Ethics was not signed this year." As to item 3, the Appellant asked the District to confirm that "no additional documents or approvals exist" regarding the "Board policy Waiver," and the District confirmed that was correct. As to item 4, the Appellant complained she had not received all the emailed meeting notices. In response, the District explained that some committees had not met during the relevant time period, but it provided the emailed meeting notices that existed.

[1] The Appellant states one of the documents she reviewed was partially covered by a folder during her inspection in lieu of redaction.

The Appellant makes several arguments on appeal. First, she argues the District violated KRS 61.872(3)(a) when it asked her to provide a time when she could inspect the District's records in person. Under KRS 61.872(3)(a), a resident of the Commonwealth of Kentucky may inspect public records "[d]uring the regular office hours of the public agency." The Act allows a person to petition the Attorney General to review an agency's action if the "person feels the intent of [the Act] is being subverted by an agency short of denial of inspection." KRS 61.880(4). Under certain conditions, an agency's request that a person schedule an appointment to inspect records can amount to a subversion of the intent of the Act within the meaning of KRS 61.880(4). *See, e.g.,* 15-ORD-182 (agency continually cancelled appointments); 93-ORD-48 (agency limited inspection of records to three hours of its 8½-hour business day). However, KRS 61.872(3)(a) "does not prohibit an agency from coordinating with a requester for a mutually convenient time, in the immediate future and during business hours, [as] a means of facilitating inspection." 20-ORD-013. Thus, "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." 24-ORD-239. Accordingly, the District did not subvert the intent of the Act, within the meaning of KRS 61.880(4), when it asked the Appellant for a convenient time to inspect the records.

Next, the Appellant claims the District did not grant timely inspection of the records. Under KRS 61.880(1), a public agency has five business days after receipt of a request in which to grant or deny inspection of records. Here, the Appellant's inspection occurred on January 27, 2025, the fourth business day after the District's receipt of her request. The Appellant argues this was untimely because the bylaws of the Council "require documents to be available with in [*sic*] 3 days." However, the Attorney General is only authorized under KRS 61.880(2)(a) to adjudicate disputes arising under *the Act*, not issues arising under an agency's bylaws or internal policies. *See, e.g.,* 21-ORD-001 (declining to adjudicate issues unrelated to the Act). To the extent the District granted inspection of records within five business days, it did not violate the Act.

However, the District did not grant inspection of all the requested records within five business days. Rather, it advised the Appellant on January 27, 2025, that some records either did not exist or were not immediately available. Yet it did not do so in writing. "The Act consistently requires agencies to respond in writing to open records requests, even when they are unable to supply the records requested." *Eplion v. Burchett,* 354 S.W.3d 598, 604 (Ky. App. 2011). Further, the District apparently did not understand the Appellant's request for committee meeting notices to include notifications by email; therefore, the emails were not immediately available for the Appellant's inspection on January 27, 2025. If a record is in active use, in storage, or otherwise unavailable, KRS 61.872(5) requires a written response, "within [five] business days, along with 'a detailed explanation of the cause . . . for further delay.'"

Cabinet for Health & Fam. Servs. v. Todd Cnty. Standard, Inc., 488 S.W.3d 1, 3 (Ky. App. 2016) (quoting 11-ORD-074); *see also* 01-ORD-38 (noting "any extension of [the] deadline for disclosure must be accompanied by a detailed explanation of the cause for delay, and a written commitment to release the records on the earliest date certain"). Here, the District did not provide, within five business days, a written response stating which records did not exist and giving a detailed explanation for the delay in producing other records with a statement of the earliest date when they would be available for inspection.[2] Thus, the District violated the Act.

The Appellant further complains that the District refused to allow her to photograph the records she inspected on January 27, 2025. The Act provides that "[u]pon inspection, the applicant shall have the right . . . to obtain copies of all public records not exempted by the terms of KRS 61.878." KRS 61.874(1). In general, a requester has the right to photograph records upon inspection. Only county clerks have been granted statutory authority to "establish procedures . . . restricting the use of devices" to copy public records. KRS 64.019(1). "In the absence of such express authority, a public agency subverts the intent of the Act when it prohibits a requester from photographing its records with a personal device," unless there is a provable risk that the records will be damaged or altered in the process. 22-ORD-267. Here, the District asserts it did not anticipate the request for copies and wanted time to redact any exempt material from the records. However, the Act contemplates that records should be reviewed and redacted "within five business days for every request, unless KRS 61.872(5) applies." 25-ORD-076. Accordingly, "the proper course of action would be to prepare a redacted copy for the Appellant to inspect on the premises." 22-ORD-267 n.1. By refusing to allow the Appellant to use her own device to copy public records "upon inspection," as permitted by KRS 61.874(1), the District subverted the intent of the Act within the meaning of KRS 61.880(4).[3]

Finally, the Appellant claims the code of ethics, or "ethics agreement," signed by the Council for the 2024–25 school year "remains inaccessible." However, the District has explained that the Council did not sign that document for 2024–25. 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). Here, the Appellant has not attempted to do so. Accordingly, the District did not violate the Act when it could not produce a record that does not exist.

The Appellant's second request was submitted on February 19, 2025, seeking three items. First, she requested "Administration policy 02.432, Waiver of Board

[2] The District's position that the Appellant made a new request on January 27, 2025, giving the District an additional five business days to respond, is not supported by the record on appeal.

[3] If any redactions to the inspected documents were necessary, the District has not explained why it would not have been possible to make those redactions while the Appellant was still on the premises.

Policy," for school years 2022–23 and 2023–24. Second, she requested "Powers and Duties of the Board of Education Procedure 01.51, Administrative procedures," for the same period of time. Finally, she requested a copy of an email "sent to all Principals asking them to request waivers from the SBDM councils for AR 4040 in relation to 504's." In a timely response, the District provided what it claims are "all documents responsive to her requests." On March 4, 2025, the Appellant inquired whether the policies and procedures were "still current." In response, the District stated the documents provided "were the previous policies/procedures that were in effect for the years [requested] until July 1, 2024." The District provided links to the current policies and procedures with an effective date of July 1, 2024, but stated it could not "verify if there were any changes."

On appeal, the Appellant claims she only received the policies and procedures for the 2024–25 school year, and therefore did not receive what she requested because "[t]he policy changed." However, the District states "the same policies were in effect during [2022–23 and 2023–24] and no additional procedures are linked to the policies requested." Thus, the District asserts there is no "separate or additional documentation [that] would be responsive to the policies active during the 2022-2023 and 2023-2024 school years." Once a public agency states affirmatively that no further records exist, the burden shifts to the requester to present a *prima facie* case that additional records do exist. *See Bowling,* 172 S.W.3d at 341. A requester's bare assertion that an agency possesses additional responsive records is insufficient to establish a *prima facie* case that the agency, in fact, possesses them. *See, e.g.,* 22-ORD-040. Rather, to present a *prima facie* case that the agency possesses additional records, the requester must provide some statute, regulation, or factual support for this contention. *See, e.g.,* 21-ORD-177; 11-ORD-074. Here, the Appellant produces a policy numbered 1070, with a revision date of July 1, 2022, which she located with an internet search. However, the District explains that policy 1070 is not responsive to the Appellant's request. Thus, the Appellant has not presented a *prima facie* case that a different set of responsive policies and procedures exists. Accordingly, the District's disposition of the Appellant's February 19, 2025, request did not violate the Act.

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 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.

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