

19-ORD-232

December 23, 2019

In re: Gay Adelman/ Education Professional Standards Board

Summary: The Education Professional Standards Board (“EPSB”) did not violate the Open Records Act (“the Act”) in denying a request for a copy of an audio recording of a public hearing that was not a “public record” under KRS 61.870(2) because it was not “prepared, owned, used, in the possession of or retained by” the agency. Rather, a court reporter made the recording at her own initiative and expense to assist in preparing a written transcript of the hearing. She did not maintain the recording at the instance of EPSB or its custodian. EPSB’s initial response procedurally violated KRS 61.880(1) for failing to state, unequivocally, that no recording existed in the possession or control of the agency, but EPSB cured this deficiency.

Open Records Decision

The question presented is whether EPSB violated the Act in denying the November 13, 2019, request made by Gay Adelman (“Appellant”) for “a copy of the audio recording of the EPSB hearing ... on 11/12/19.” Based upon the following, this Office finds EPSB’s initial response procedurally deficient. Ultimately, EPSB cured that deficiency with a subsequent and timely response, though it is unclear if EPSB would have cured this deficiency but for Appellant’s continued correspondence. The Attorney General highlights this point to remind agencies that the burden should not be on the requester to make agencies comply

with the Act. Nevertheless, the Attorney General finds EPSB met its obligations under the Act within the requisite three business days.

Appellant directed her request to Deanna Durrett, General Counsel and Official Records Custodian, Kentucky Department of Education ("KDE"), who received it on November 14, 2019. KDE Deputy General Counsel Chelsea F. Young responded that day, stating "KDE does not have the requested record at this time." Upon receiving EPSB's response, Appellant directed supplemental correspondence to EPSB later that day, and asserted that EPSB's original response "is deficient insofar as it fails to confirm or deny the existence of the requested recording and how and when I can obtain a copy." She referenced Records Series 06822 of the State Agency Records Retention Schedule-EPSB in support of her argument and reminded EPSB of its obligation to conduct a reasonable search and to produce the requested recording, or provide a specific statutory exemption for why EPSB would not produce it.

On November 15, 2019, the day after receiving Appellant's request, Ms. Durrett unequivocally reiterated the basis for EPSB's denial - it lacked possession. Citing KRS 61.870(2), she asserted that a public agency cannot provide a requester with access "to a record that it does not have or that does not exist. Thus, the agency has discharged its duty under the Open Records Act by affirmatively so stating within three business days." She also noted that a transcript would be completed by December 31, 2019. Finally, she clarified that "EPSB's records retention schedule is not applicable to a record that is not yet maintained by the agency." This appeal followed.

On appeal, the Appellant did not dispute the timeliness of EPSB's response. However, she disputed EPSB's position that it has no statutory obligation to produce a copy of the recording or set forth a statutory basis for denial. Appellant also stated that EPSB mischaracterized Appellant's correspondence seeking clarification of EPSB's response as a "request for information" because KRS 61.872(5) contemplates exactly that - a detailed explanation of the cause for delaying production of the audio recording of the public hearing. She further emphasized that she did not request a copy of the hearing transcript; she requested a copy of the recording. Quoting KRS 61.870(2), she maintained that, at a minimum, EPSB "used" the audio recording of the public hearing and, barring any relevant statutory exception, it must be disclosed

regardless of whether EPSB currently has “actual personal custody or control” of the recording. KRS 61.870(5).

A response by a public agency violates KRS 61.880(1), “if it fails to advise the requesting party whether the requested record exists,” but a public agency discharges its duty under the Act in stating unequivocally that certain records do not exist, following a reasonable search, and explaining why, if appropriate. 04-ORD-205, p. 4; 98-ORD-154; 09-ORD-145; 12-ORD-065. Because EPSB initially equivocated and stated that it lacked possession of the recording “at this time,” and provided no statutory or legal basis for further delay, its initial response was deficient. 19-ORD-150, p. 3. EPSB ultimately cured this deficiency after continued correspondence with Appellant. Moreover, existing legal authority validates EPSB’s final denial of the request.

At issue is whether the public agency prepared, owned, used, possessed, or retained the record sought and, if so, whether the records are open to public inspection. 99-ORD-202, p. 2; 09-ORD-073. In other words, the Act only applies to records that are in existence *and* in the possession or control of a public agency. 99-ORD-202, p. 5; 16-ORD-224. “It does not impose an obligation on agencies to create, procure, or retrieve a record to accommodate a request. This is *not* to say that a public agency can somehow secret away public records on private premises, and thus avoid the requirements of the Open Records Act.” *Id.* (emphasis added)¹ Here, the parties do not dispute the existence of a recording. They dispute whether the recording is subject to public inspection.

If EPSB had acquired the recording during the normal course of business and it currently possessed a copy, or if the court reporter had recorded the hearing at EPSB’s direction and was compensated for this purpose with public

¹ This Office has consistently recognized that “lack of actual possession is not a sufficient basis for denying access to records” if the records being sought are being held “at the instance of and as custodian on the [public agency’s] behalf[.]” 08-ORD-206, pp. 7, 13. *See* 00-ORD-207(settlement agreement in physical custody of insurance carrier); 04-ORD-123; 05-ORD-015; 06-ORD-147; 08-ORD-206. “In the end, it is the nature and purpose of the document, not the place where it is kept, that determines its status as a public record.” 04-ORD-123 (quoting *City of Louisville v. Brian Cullinan*, Nos. 1998-CA-001237-MR and 1998-CA-001305-MR (Ky. App. 1999)) (unpublished). This Office’s holding today does not depart from this line of authority; rather, the instant case is distinguishable as the requestor did not seek records of a “public agency,” nor did the private court reporter hold the recording “at the instance of and as custodian on [EPSB’s] behalf.” *See* 96-ORD-41; 98-ORD-90; 09-ORD-073; 16-ORD-224.

funds, that recording would be “accessible as [a] non-exempt public record[.]” 99-ORD-202, p. 2; 18-ORD-236. However, the Attorney General is “not empowered to declare, in the context of an open records appeal, that [EPSB’s] failure to require that the records be submitted to it, and managed and maintained as public records, constitutes a violation of the Open Records Act.” *Id.* See 06-ORD-201; 12-ORD-098; 15-ORD-190; 18-ORD-236.

In responding to this appeal, EPSB elaborated upon its position. EPSB clarified that, “[a]s is EPSB’s practice,” it hired a private court reporter to prepare a written transcript of the November 12, 2019, public hearing. The court reporter, who is not a “public agency” under KRS 61.870(1), recorded the hearing for use in producing the written transcript. “Because the court reporter ‘records’ the hearing and uses the audio recording to create an accurate transcript, the recording is the court reporter’s property and is not a record within the EPSB’s possession at any time. The court reporter then submits an official transcript to EPSB.”

In this case, a court reporter, on her own initiative, opted to make an audio recording of the hearing to assist her in preparing the written transcript for which EPSB will compensate her. See 06-ORD-195 (private individual generated the recordings in dispute “at his own initiative” and expense, and the agency never owned, used, possessed, or retained, the recordings). The audio recording created by a private individual to assist in her creation of the requested transcript is not a public record subject to disclosure.

Under the circumstances presented, EPSB did not violate the Act in denying Appellant’s request for a copy of the recording. It was not prepared at the direction of EPSB nor is the court reporter holding the recording “at the instance of and as custodian on [the agency’s] behalf.” See 99-ORD-202; 06-ORD-201. However, this Office reminds EPSB, and all public agencies, that it is the duty of an agency subject to the Act to sufficiently justify its denial of records at the outset of the request, and the burden is not on the requester to remind an agency of that obligation. See KRS 61.880(1); 61.880(2)(c).

Either party may appeal this decision by initiating action in the appropriate circuit court per KRS 61.880(5) and KRS 61.882. 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 proceeding.

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