COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

DANIEL CAMERON
ATTORNEY GENERAL

CAPITOL BUILDING, SUITE 118
700 CAPITAL AVENUE
FRANKFORT, KENTUCKY 40601
(502) 696-5300
FAX: (502) 564-2894

21-ORD-045

March 12, 2021

In re: Michael Swansburg/Jefferson County Public Schools

Summary: Jefferson County Public Schools ("District") violated the Open Records Act ("the Act") when it failed to give a detailed explanation of the cause for its delay in providing access to approximately 5,000 e-mails. The District also subverted the intent of the Act by claiming that it required four months to process the request.

Open Records Decision

On January 20, 2021, Michael Swansburg ("Appellant") requested from the District copies of all e-mail communications between four District officials and two officials of the Jefferson County Teachers Association over a two-year period. In a timely response, the District stated that the request encompassed over 5,000 e-mails. For that reason, the District explained that it would require more time to review and redact those e-mails in accordance with state and federal law. The District also stated that the records would be available to the Appellant no later than June 1, 2021. This appeal followed.

The Appellant claims that the District has subverted the intent of the Act by delaying his access to the requested records for four months. Under KRS 61.880(4), a person may petition the Attorney General to review an agency's action, short of denial of inspection, if the "person feels the intent of [the Act] is being subverted[.]" One way in which a public agency may subvert the intent of the Act is to delay access to records unreasonably. *See, e.g.*, 20-ORD-137.

Although an agency is ordinarily required to respond to a request, and produce responsive records that are not exempt, within three business days, a public agency may extend that time when certain conditions are met.[1] Specifically, "[i]f the public record is in active use, in storage or not otherwise available, the official custodian shall immediately notify the applicant and shall designate a place, time, and date for inspection of the public records, not to exceed three (3) days from receipt of the application, unless a detailed explanation of the cause is given for further delay and the place, time, and earliest date on which the public record will be available for inspection." KRS 61.872(5).

KRS 61.872(5) requires the public agency to notify the requester that the records are "in active use, storage, or not otherwise available." The statute also places the burden on the agency to give a "detailed explanation of the cause" for further delay. *Id*. But here, the District did not say whether the records were in active use, storage, or were not otherwise available. The District's stated reason for delay was that the request implicated 5,000 e-mails and that it would need to review each e-mail for responsiveness and for information that it might need to redact under federal and state law. In asserting its need for a four-month delay in producing the records, the District did not explain why it needed such a delay, nor did it explain which federal or state law required the information to be made confidential. Without providing the "detailed explanation" required under KRS 61.872(5), the District violated the Act when it failed to describe sufficiently the reason for the delay in its response to the Appellant.

The Appellant also asks this Office to decide whether a four-month delay is reasonable. At the time that he made the request, the Appellant admitted that his request could implicate many records. For that reason, he preemptively agreed to give the District three weeks to comply with the request. Therefore, both parties admit that some delay was reasonable. The question is, how much delay is reasonable? The Act requires that the agency communicate to the requester the "*earliest* date on which the public record[s] will be available for inspection." KRS 61.872(5) (emphasis added).

---

[1] During the current state of emergency, public agencies must respond to requests to inspect records within ten calendar days. *See* Senate Bill 150 §1(8). The District issued its response within ten days and the parties do not dispute the timeliness of the District's response.

In determining whether a delay is reasonable, this Office has previously considered the number of the records, the location of the records, and the content of the records. *See, e.g.*, 01-ORD-140; OAG 92-117. In this analysis, the content of the records may be relevant if the records contain both exempt and nonexempt information. *Id*. The law governing the confidentiality of the records can also be a factor. Some laws *require* confidentiality, and can carry consequences for public agencies that fail to adhere to strict confidentiality. Others do not. *Compare* 20 U.S.C. § 1232g (the Family Educational Rights and Privacy Act ("FERPA"), which ties continued federal funding to confidentiality compliance) *with* KRS 61.878(1)(a) (protecting personally private information but imposing no consequences for the failure to protect that information).[2]

Weighing these factors is a fact-intensive inquiry. Some delays are warranted. *See, e.g.*, 12-ORD-228 (finding a six-month delay to review over 200,000 e-mails was reasonable). Some delays are not. *See, e.g.*, 01-ORD-140 (finding that a delay of two weeks to produce three documents was unreasonable). At all times, however, a public agency must substantiate the need for any delay and that it is acting in good faith. *See* KRS 61.880(2)(c) (placing the burden on the public agency to substantiate its actions).[3] The agency has not met that burden here.

The District claims that it will take "91 business days" for two full-time employees to review the records at a speed of 300 e-mails per week. However, the District has failed to explain why it is only able to process 300 e-mails per week. The District's stated reasons are that employees are telecommuting, and thus they are required to retrieve the records through a virtual private network ("VPN"). The District claims that reviewing documents using the VPN causes a delay. But the District has not explained how such delay, if any, justifies the

---

[2] Consider also the attorney-client privilege, KRE 503, which is incorporated in the Act under KRS 61.878(1)(l). Although there may be no financial consequence to the inadvertent disclosure of privileged material, such disclosure could result in tremendous disadvantage to a public agency engaged in litigation.

[3] One way that a public agency can demonstrate its good faith, especially when it claims such a lengthy delay is required, would be to release batches of processed records on an ongoing basis. If a public agency claims it is only able to process a certain amount of records per week, there is little reason that it should continue to deny inspection of the records it has already processed.

rate of review it has asserted. The District also claims that it is currently responding to multiple, unrelated, and voluminous requests, and that processing those requests also requires the attention of their employees. But the District has not said how many requests it is handling and has not provided any details about those requests to attempt to justify its four month delay in handling this request.[4]

The District also claims that the e-mails may contain information that must be kept confidential under FERPA or the attorney-client privilege. There is some merit in this claim, but still the District has not met its burden to justify how the need to redact such information justifies the four-month delay.

At bottom, the burden is on the District to justify its delay. KRS 61.880(1)(c). To do so, it was required to put forth some evidence to demonstrate why it is unable to process more than 300 e-mails per week. The District has failed to carry that burden under these facts. Thus, the District has subverted the intent of the Act by denying the Appellant's access to the requested records for four months.

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court pursuant to 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 proceedings.

Daniel Cameron
Attorney General

/s/ James M. Herrick

James M. Herrick
Assistant Attorney General

---

[4] This Office has previously found that the impact of other contemporaneous yet unrelated requests to inspect records is "irrelevant" in determining the propriety of an agency's delay. *See, e.g.*, 17-ORD-082. The District has not explained why this Office should make a different finding under these facts.

#48

Distribution:

Michael G. Swansburg, Jr., Esq.
Amanda Herzog, Esq.
C. Tyson Gorman, Esq.