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21-ORD-178

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In re: Mike O'Donnell/Bullitt County Board of Education

Summary: The Bullitt County Board of Education ("Board") violated the Open Records Act ("the Act") when it failed to conduct an adequate search for records, but did not violate the Act when it denied a request for information that did not constitute an existing public record.

Open Records Decision

On August 10, 2021, Mike O'Donnell ("Appellant") requested all e-mails sent to or from six specified Bullitt County Schools e-mail accounts between August 1 and August 10, 2021, "that discuss the mandatory masking of students." The Appellant also requested "the created date and time of the letter sent by the [Board] on Monday, August 9, 2021 that outlined the mask mandate." In response, the Board stated that no e-mails existed as described by the Appellant. Furthermore, the Board denied the information concerning the letter as "[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended" under KRS 61.878(1)(j), and as "information . . . subject to the attorney/client privilege." This appeal followed.

On appeal, the Board asserts that it found no responsive e-mails by searching for the keywords "mask" and "mandatory masking." However, the Appellant has produced a copy of one e-mail sent by him, which is responsive to the request and should have been in the Board's possession. Based on that information, the Board has conducted a more comprehensive search and

located 52 responsive e-mails, which it has subsequently provided to the Appellant.[1]

Once a public agency states affirmatively that it does not possess any responsive records, the burden shifts to the requester to present a *prima facie* case that the requested records do exist. *Bowling v. Lexington-Fayette Urban Cty. Gov't,* 172 S.W.3d 333, 341 (Ky. 2005). If the requester establishes a *prima facie* case that records do or should exist, "then the agency may also be called upon to prove that its search was adequate." *City of Ft. Thomas v. Cincinnati Enquirer,* 406 S.W.3d 842, 848 n.3 (Ky. 2013) (citing *Bowling,* 172 S.W.3d at 341). Therefore, to support a claim that additional documents exist, the Appellant must produce some evidence that calls into doubt the adequacy of the agency's search. *See, e.g.*, 95-ORD-96. The Appellant has made such a showing here, and the Board has discovered several responsive records as a result. Thus, the Board violated the Act by initially failing to conduct an adequate search for records. *See, e.g.,* 20-ORD-013 (finding that an agency violated the Act when its "search was clearly insufficient to locate all responsive records").

Regarding the Appellant's request for the date and time the letter was created, the Board denied the request as seeking a "draft."[2] The threshold issue, however, is whether the Appellant's request describes an existing public record that can be inspected. KRS 61.872(2). The Act does not require public agencies to fulfill requests for information, but only requests to inspect records. *Id.*; *see also Dept. of Revenue v. Eifler,* 436 S.W.3d 530, 534 (Ky. App. 2013) ("The ORA does not dictate that public agencies must gather and supply information not regularly kept as part of its records."). Here, the Appellant requested the date and time a document was created, as opposed to requesting to inspect the document itself. On its face, the request seeks information rather than a public record.

On appeal, however, the Appellant argues that his request was not for information, but for metadata stored in the Board's computers. In his request,

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[1] The Board has redacted certain sensitive information from the e-mails, including students' names, phone numbers, and e-mail addresses. Those redactions are not at issue in this appeal.

[2] Although the Board refers to this information as a "draft," it incorrectly cites to KRS 61.878(1)(j). Drafts are exempt from disclosure under KRS 61.878(1)(i), a separate and distinct exemption which applies to "[p]reliminary drafts, notes, [and] correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency[.]"

the Appellant indicated that the requested information could "be found by right clicking on the original document and selecting 'Properties.'" But the mere fact that the information can be found does not mean that it exists as a "public record" under KRS 61.870(2). *See, e.g.,* 14-ORD-124 (finding that information did not constitute a "public record" subject to the Act when it was only capable of being viewed on the agency's computer screen in a transitory manner).

In 19-ORD-091, this Office considered whether metadata retained in public computers was itself a "public record" subject to the Act. Based on the evidence in that administrative record, this Office concluded that some metadata could be "public records" under KRS 61.870(2). Moreover, according to the Commonwealth Office of Technology[3], the creation date of an electronic file constitutes metadata that "is available through the file system as a query – the information can be *created as a new record* but does not exist as an independent . . . record that may be accessed in a standard format." *See* 19-ORD-091 (emphasis added) (ellipses in original).

In other words, to the extent metadata could even be considered a "public record" under KRS 61.870(2), producing such metadata in a record capable of inspection is likely a "nonstandardized request." *See* KRS 61.874(2)(b) (defining "nonstandardized request" as seeking any electronically formatted public record not in "American Standard Code for Information Interchange (ASCII) format" or, if kept by the public agency in "a format other than ASCII, and this format conforms to the requestor's requirements.") In determining whether the "other format" in which the record is kept remains "nonstandardized," this Office has found it significant whether the agency "maintain[s] a pre-existing query, filter, or sort capable of extracting the records as requested." *See, e.g.,* 12-ORD-028. And if the request is a nonstandardized request, then under KRS 61.874(3) a public agency has discretion whether "to produce a record in a nonstandardized format[.]"

There is no indication in this record that the Board has created a pre-existing query to extract the metadata the Appellant seeks. Nor does the Act require a public agency to create a record to satisfy a request. *See, e.g.,* OAG 76-375; 12-ORD-026. To produce the requested metadata in a record capable of inspection, the Board would have to create a new record, which the Act does

[3] In 19-ORD-091, in response to questions by this Office to decide the novel issue of whether metadata constitutes a public record, the Commonwealth Office of Technology provided an explanatory affidavit describing various types of metadata in detail.

not require of it. Accordingly, the Board did not violate the Act when it denied the Appellant's request for information or metadata.[4]

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

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Distributed to:

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[4] Because the Board was not required to create a record, it is not necessary to address the Board's arguments under KRS 61.878(1)(i) or the attorney-client privilege. However, it is significant that the original date and time when an electronic document is created is information pertaining to a first draft. First drafts, edits, and changes to a document are exempt from the Act under the exception for "preliminary drafts" in KRS 61.878(1)(i). *See* 21-ORD-089.