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22-ORD-042

March 8, 2022

In re: WKRC-TV/Christian County Board of Education

Summary: The Christian County Board of Education ("the Board") violated the Open Records Act ("the Act") when it denied a request for emergency action plans adopted pursuant to KRS 160.445(4)(a). The Board also violated the Act when it failed to respond to a request for written verifications submitted pursuant to KRS 160.445(4)(b), but did not violate the Act when it could not provide copies of records that do not exist.

Open Records Decision

On November 10, 2021, WKRC-TV ("Appellant") requested that the Board provide copies of "all venue-specific emergency action plans (EAP)" and "written verification of the existence of a venue-specific EAP that was submitted to the state board or KHSAA (i.e. any and all records of compliance)." The Board denied the request under KRS 61.878(1)(k) and 61.878(1)(l), and stated that "[t]he requested documents are excluded from the definition of open records by operation of KRS 158.162(2)(e)." The Board also denied the records under KRS 61.878(1)(m), stating that "[t]he release of these records presents a reasonable likelihood of threatening the public safety by exposing a vulnerability and/or exposing the plans in the case of an emergency event." This appeal followed.

Under KRS 158.162, a local board of education must require each school council or principal to adopt an emergency plan establishing "procedures to be followed in case of fire, severe weather, or earthquake, or if a building lockdown as defined in KRS 158.164 is required." KRS 158.162(2)(a). This emergency plan and the accompanying diagram of the facility are "excluded from the application of [the Open Records Act]." KRS 158.162(2)(e).

The Appellant, however, did not request copies of the emergency plans adopted under KRS 158.162. Rather, the Appellant requested copies of "venue-specific emergency action plans" and the accompanying verifications of compliance. Under KRS 160.445(4)(a), "each school that participates in interscholastic athletics [must] develop a venue-specific emergency action plan to deal with serious injuries and acute medical conditions in which the condition of the patient may deteriorate rapidly." These plans must be "in writing [and] posted conspicuously at all venues." KRS 160.445(4)(a)2. Under KRS 160.445(4)(b), "[e]ach school shall submit annual written verification of the existence of a venue-specific emergency action plan to the state board or its agency." Thus, the requested records are not the emergency plans relating to fires, severe weather, earthquakes, or lockdowns that are exempt under KRS 158.162. The requested records are the emergency plans relating to medical emergencies at athletic events that are required to be posted publicly under KRS 160.455(4)(a)2.

On appeal, the Board contends that it cannot provide copies of its plans adopted under KRS 160.445(4)(a) because they are "inextricably intertwined" with its plans adopted under KRS 158.162(2)(a). However, the Board has submitted copies of the plans for this Office's review and has identified the specific pages that are publicly posted at athletic venues pursuant to KRS 160.445(4)(a)(2).[1] These pages contain no plans related to fires, severe weather, earthquakes, or lockdowns, nor any diagrams of facilities. These records only contain the procedures for medical emergencies involving athletes or spectators at athletic events. Under KRS 61.878(4), "If any public record contains material which is not excepted under this section, the public agency shall separate the excepted and make the nonexcepted material available for examination." On appeal, the Appellant has made it expressly clear that it seeks only the publicly posted plans for medical emergencies at athletic events. Accordingly, the Appellant's request is not subject to the exclusion from the Act contained in KRS 158.162(2)(e).

Alternatively, the Board also asserts that its emergency action plans are exempt from the Act under KRS 61.878(1)(m)1.g. The exemption under KRS 61.878(1)(m) applies to "[p]ublic records the disclosure of which would have a reasonable likelihood of threatening the public safety by exposing a

[1] For Christian County High School, the publicly posted plan consists of the last page of the records submitted and bears the title "Emergency Action Plan." For Hopkinsville High School, the publicly posted plan consists of the last two pages of the records submitted and likewise bears the title "Emergency Action Plan."

vulnerability in preventing, protecting against, mitigating, or responding to a terrorist act and limited to" certain listed categories. KRS 61.878(1)(m)1. One of those categories is "[t]he following records when their disclosure will expose a vulnerability referred to in this subparagraph: detailed drawings, schematics, maps, or specifications of structural elements, floor plans, and operating, utility, or security systems of any building or facility owned, occupied, leased, or maintained by a public agency[.]" KRS 61.878(1)(m)1.g. Here, the Board's emergency action plans adopted pursuant to KRS 158.162(2)(a) contain diagrams of facilities showing entrances and access points, which arguably could fall within the scope of KRS 61.878(1)(m)1.g. However, the emergency action plans that are publicly posted pursuant to KRS 160.445(4)(a) contain no such material. As noted above, these plans are not "inextricably intertwined" with the plans adopted pursuant to KRS 158.162(2)(a), but can instead be separated from the exempt material. Therefore, the Board has not met its burden under KRS 61.880(2)(c) to establish that the requested records are exempt from the Act under KRS 61.878(1)(m).

The Board further argues that "the posting requirement [under KRS 160.445(4)(a)2] does not make the [emergency action] plan subject to the Open Records Act." While the Board's statement is true as far as it goes, the emergency action plans are subject to the Act by virtue of the fact that they are public records. *See* KRS 61.870(2) ("'Public record' means all books, papers, maps, photographs, cards, tapes, discs, diskettes, recordings, software, or other documentation regardless of physical form or characteristics, which are prepared, owned, used, in the possession of or retained by a public agency"); KRS 61.872(1) ("All public records shall be open for inspection by any resident of the Commonwealth, except as otherwise provided by KRS 61.870 to 61.884"). Because the emergency action plans adopted under KRS 160.445(4)(a) are not excluded from the application of the Act, they are subject to public inspection. Therefore, the Board violated the Act when it denied the Appellant's request for the posted emergency action plans.

With regard to the "annual written verification" of the emergency action plans required under KRS 160.445(4)(b), the Board states on appeal that no such records exist because "state agency auditors . . . simply ask to review the plans" during Title IX audits instead of requiring "formal submission documentation." Under KRS 61.880(1), upon receipt of an open records request, a public agency must "determine . . . whether to comply with the request [and] notify in writing the person making the request . . . of its decision." If a requested record does not exist, the agency must advise the

requester accordingly. *See, e.g.,* 21-ORD-140 (finding that an agency violated the Act by failing to respond to portions of a request for which no responsive records existed). Therefore, the Board violated the Act when it failed to notify the Appellant that no written verifications existed.

Once a public agency states affirmatively that no responsive records exist, the burden shifts to the requester to present a *prima facie* case that the requested records do exist. *See Bowling v. Lexington-Fayette Urb. Cnty. Gov.,* 172 S.W.3d 333, 341 (Ky. 2005). Here, to the extent that KRS 160.445(4)(b) establishes a *prima facie* case that the written verifications should exist, the Board has explained why no responsive records exist. Therefore, the Board did not violate the Act when it did not provide copies of written verifications of its emergency action plans.

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 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 e-mailed to OAGAppeals@ky.gov.

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/s/ James M. Herrick

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