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22-ORD-158

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In re: Dennis J. Dolan/Kentucky Department of Education

Summary: The Kentucky Department of Education (the "Department") violated the Open Records Act ("the Act") when it invoked KRS 61.872(5) to delay access to records, but failed to produce records on the promised date or explain the cause of additional delay. Although the requester has made a *prima facie* case that responsive records should exist, the Department has explained the adequacy of its search.

Open Records Decision

On April 14, 2022, Dennis Dolan ("Appellant") submitted a request to the Department containing two subparts. First, the Appellant requested a copy of "the fee simple property deed that has been provided to the chief state school officer pursuant to 702 KAR 4:050 for Ballard High School." Second, the Appellant requested "a copy of all records pertaining to a drainage easement located on Ballard High School." The Appellant provided the name of the grantor and grantee of the easement, the date the easement was granted, and the specific deed book and page number where the easement is recorded in the office of the Jefferson County Clerk.

In a timely response, the Department claimed that the request implicated a "substantial number of records located in voluminous files" that were in storage. Invoking KRS 61.872(5), the Department stated that it "will issue a follow-up response regarding [the] request on or before May 20, 2022," but the Department committed to producing records on a rolling basis as they became available.[1] On May

[1] The Department also claimed that the files would implicate information that is exempt from inspection under the Family Educational Rights and Privacy Act ("FERPA") and Kentucky's

20, 2022, the date on which the Department claimed responsive records would be available, the Department sent a notice to the Appellant and claimed it was still "in the process" of retrieving the records from storage. The Department then stated that it would "issue a follow-up response" on or before June 24, 2022. The Department did not explain why it would require an additional month to produce the requested records. The Appellant then initiated this appeal on May 21, 2022, claiming that the Department has subverted the Act for unreasonably delaying access to records.

Upon receiving a request to inspect records, a public agency must decide within five business days whether to grant the request, or deny the request and explain why. KRS 61.880(1). A public agency may also delay access to responsive records beyond five business days if such records are "in active use, storage, or not otherwise available." KRS 61.872(5). A public agency that invokes KRS 61.872(5) to delay access to responsive records must also notify the requester of the earliest date on which the records will be available, and provide a detailed explanation for the cause of the delay. This Office has previously found that a public agency subverts the intent of the Act, within the meaning of KRS 61.880(4), when it delays access to a public record beyond five business days without explaining the cause of additional delay. *See, e.g.*, 22-ORD-002; 21-ORD-099. Moreover, in 21-ORD-011, this Office found that a public agency's repeated failure to provide records on the date it claimed such records would be available subverted the intent of the Act.

On appeal, the Department explains that it believed the requested records would be in three boxes of records stored with the Kentucky Department of Libraries and Archives (the "KDLA"). Thus, on April 22, the Department notified KDLA that the Department needed access to the records in storage. However, on May 5, KDLA notified the Department that KDLA had "temporarily suspended records pickups." KDLA did not state when its temporary suspension would end.

On May 18, the Department contacted KDLA again to determine whether the temporary suspension had been lifted, and when the Department could have access to its records in storage. The next day, KDLA advised the Department that there had been no update. Thus, at 9:25 a.m. on May 20, the day the Department had told the Appellant that records would be available, the Department issued to the Appellant a "follow-up" response and stated records would be available by June 24. The Department did not explain to the Appellant that KDLA had "temporarily suspended" access to records in storage. Rather, the Department simply stated that it was "still in the process" of retrieving the records from storage.

equivalent, KFERPA. However, the Department admits on appeal that the requested records were not educational records, so FERPA does not apply.

Approximately three hours after the Department notified the Appellant that he must now wait until June 24, KDLA notified the Department that KDLA would pull the three boxes of records the Department requested from storage. The Department did not inform the Appellant of that significant update. On Saturday, May 21, the Department began reviewing 221 files containing approximately 1,700 records and concluded its review on May 26. But the Department was unable to locate records responsive to the Appellant's request. Then, on May 26, and after this appeal had been initiated, the Department issued its "final response" to the request. The Department, for the first time, explained to the Appellant the difficulties in obtaining the records from storage. The Department also explained the parameters of its search, but that the search yielded no responsive records.

The Department argues that, under the totality of the circumstances, its delay was justified. It is true that the Department immediately notified KDLA that the Department required access to its files in storage and that KDLA prevented the Department's access to its records. However, under KRS 61.872(5), the Department was required to provide "a detailed explanation of the cause . . . for further delay." Thus, while the Department did not itself *cause* unreasonable delay, it nevertheless violated KRS 61.872(5) when it failed to *explain* the cause of further delay.

Having now obtained the boxes from storage and searched them, the Department claims that it does not possess responsive records. Once a public agency states affirmatively that it does not possess responsive records, the burden shifts to the requester to present a *prima facie* case that requested records do exist in the possession of the public agency. *See Bowling v. Lexington-Fayette Urb. Cnty. Gov.*, 172 S.W.3d 333, 341 (Ky. 2005). If the requester is able to make a *prima facie* case that the records do or should exist, then the public agency "may also be called upon to prove that its search was adequate." *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 848 n.3 (Ky. 2013) (citing *Bowling*, 172 S.W.3d at 341).

To make a *prima facie* case that the requested records exist and that the Department should possess them, the Appellant provides a copy of a fee simple general warranty deed executed in 1967, an easement executed in 1998, and a special warranty deed executed in 2000. Both deeds and the easement relate to Ballard High School and appear to be the same records the Appellant had requested. The Appellant states that he obtained these documents from the Jefferson County Clerk. The Appellant further argues that the Department should possess its own copy of these records because of two administrative regulations. First, and regarding the deeds, "[t]he district shall provide the Division of Facilities Management with a notarized copy of the executed deed and title insurance certificate within thirty (30) days after

closing of property purchase." 702 KAR 4:050 §4(9). Second, and regarding the easement, "[p]rior to the execution of a proposed easement upon school property . . . the local school district's written board order shall be forwarded to the department for review and approval." 702 KAR 4:090 §2.

In response, the Department argues that the deed to the property on which Ballard High School sits was executed in 1967, but 702 KAR 4:050 was not promulgated until 1975. Therefore, 702 KAR 4:050 §4 did not apply to the deed executed in 1967, and the regulation does not establish a *prima facie* case that the Department should possess a copy of that deed. Moreover, 702 KAR 4:050 § 4 establishes the procedure when a local school board is "contracting for the purchase of a school site, site expansion, or other real property." Thus, while 702 KAR 4:050 existed at the time the special warranty deed was executed in 2000, it is not clear that the Department's approval was necessary for that conveyance. That is because the special warranty deed was executed by Jefferson County to convey the property in fee to the Jefferson County School Board in consideration for the Board retiring the bonds used to purchase the school. In other words, the 2000 special warranty deed appears to reflect a conveyance of an existing school property from a county government to a local school board. The Office cannot definitively conclude whether 702 KAR 4:050 § 4 applies to the special warranty deed executed in 2000.[2]

Regarding the easement, however, 702 KAR 4:090 § 2 states that "the local school district's written board order [approving the easement] shall be forwarded to the department for review and approval." Thus, 702 KAR 4:090 § 2 suggests that the Department should possess records of its approval of the easement. The Appellant provides proof that the operative language in 702 KAR 4:090 § 2 was promulgated in 1990, eight years before the easement was executed in 1998.

Considering the records that the Appellant has obtained from other sources, and that 702 KAR 4:090 § 2 suggests the Department should possess records relating to its approval of the easement, the Appellant has made a *prima facie* case that the Department should possess responsive records. Thus, the Department must prove the adequacy of its search. *City of Fort Thomas*, 406 S.W.3d at 848 n.3. Here, the Department explains that "three full storage boxes of permanently retained school district property files dating back to 1951 were requested to be pulled from storage and provided to the [Department] for review as a result of [the] request. These three

[2] *See, e.g.*, 22-ORD-137 n. 1 (finding that "this Office cannot consider ancillary questions of law . . . when reviewing a denial of a request to inspect records"); 21-ORD-170 n. 2 (same); 20-ORD-160 n. 3 (same).

boxes contain permanently retained property files for all Kentucky public school districts." The Department further explained that these boxes contained 221 files and approximately 1,700 individual records. Because the Department explained that it has searched all of its property files for every school district, it has adequately explained the sufficiency of its search. Therefore, the Department did not violate the Act when it did not provide records that do not exist in its possession.

In sum, the Department violated the Act by failing to explain the additional delay necessitated by KDLA's temporary suspension of record pick-ups. However, the Department did not violate the Act when it, after a sufficient search, could not provide records to the Appellant that do not exist in its possession.

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court under KRS 61.880(5) and KRS 61.882 within 30 days from the date of this decision. Under 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.

Daniel Cameron
Attorney General

s/Matthew Ray
Matthew Ray
Assistant Attorney General

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Distributed to:

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