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

22-ORD-169

August 24, 2022

In re: Richard Hall/Marshall County School Board

Summary: The Marshall County School Board (the "Board") violated the Open Records Act ("the Act") when it did not respond to a request within five business days, and when it delayed access to records without invoking KRS 61.872(5) or providing a detailed explanation for the cause of delay. The Office cannot decide factual disputes about whether additional records should exist.

Open Records Decision

On May 25, 2022, Richard Hall ("Appellant") resubmitted two requests to the Board for copies of records that he claims he previously submitted. The Appellant claims to have submitted his first request for all communications between a specific person and any school district employees on May 6, 2022. The Appellant claims to have submitted his second request on May 19, 2022, and sought "emails and reports written" by a specific person, about that person, or submitted to that person.[1] The Appellant further specified that his second request included a specific report involving that person.

On May 26, 2022, the Board responded and claimed it found 12,526 emails responsive to the Appellant's first request and that each email would need to be reviewed for any necessary redactions. The Board further claimed that it was

[1] Although the email chain that the Appellant provides shows that he submitted his first request on May 6, and that he subsequently narrowed the scope of that request on May 9, the email chain does not show that the Appellant submitted his second request on May 19. None of the emails provided show any correspondence between the parties on May 19, 2022.

"[p]rocessing a sampling of 60 days" to get a "better idea of the amount of time expected" to review and redact the remaining records.[2] On June 13, 2022, the Appellant agreed to the Board's plan and requested "the last 60 days of the 2021/2022 school year" be the first set of records produced. On the same day, the Board replied and stated its chief information officer "is on vacation this entire week . . . and can take care of that as soon as he gets back."[3] On June 15, 2022, the Appellant initiated this appeal.

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.

Here, the Board issued a response to the Appellant within five business days of receiving his resubmitted requests, but that response did not address the Appellant's second request for all emails or reports pertaining to the identified person. The Board's initial response did not grant the Appellant's second request, or deny the request and explain why. Thus, the Board violated the Act when it failed to respond to the Appellant's second request within five business days.

The Board responded to the Appellant's first request within five business days and indicated that there are 12,526 emails responsive to that request.[4] In that response, the Board sought to delay access to those emails beyond five business days. Yet, the Board did not expressly invoke KRS 61.872(5), state the earliest date the records would be available, or provide a detailed explanation for the cause of the delay. Therefore, the Board violated the Act.

---

[2] When considering an agency's invocation of KRS 61.872(5) to delay access to records, this Office has noted that releasing records in batches is one way a public agency can show its good faith in attempting to produce records without unreasonable delay. *See e.g.*, 21-ORD-080; 21-ORD-045.

[3] This Office has previously found that an employee's vacation does not excuse a public agency's timely processing of requests under the Act. *See, e.g.,* 20-ORD-024; 98-ORD-161.

[4] In its May 26, 2022 initial response, the Board claimed it would provide a 60-day period of the 12,526 email records to Appellant at his selection. On June 13 the Appellant requested the last 60 days of the 2021-2022 school year. In its June 20, 2022 response, the Board indicated it is still working on the first batch of records but again provided no date even the first batch of records would be available to the Appellant.

On June 20, 2022, after the appeal was initiated, the Board provided the Appellant with two emails responsive to his second request. The Board claimed its chief information officer "performed an electronic search" for the person the Appellant had identified and no records other than the two emails were located. The Board further stated it could not provide an electronic copy of the specific report the Appellant requested in his second request because that report "does not appear to exist electronically in the District." In response to the Board's claim that the report does not exist "electronically," the Appellant claimed he was "informed by school board members that the document in question was presented to them then destroyed." In response to the Appellant's claim that the report existed and had been destroyed, the Board claimed that it could not locate the report in any of its records, it had searched its electronic records a second time, and it could "verify that [it has] not received a records destruction certificate on this matter."

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).

Here, to make a *prima facie* case that the requested report exists, the Appellant claims two Board members informed him that they saw the report and it was later destroyed. The Appellant also questions how an "outside advisor" could be "in a school district for multiple weeks" and the only records created regarding his presence are two emails. But the Appellant's mere assertion that two Board members told him they saw this report, and his speculation that more records should exist, is not sufficient to establish a *prima facie* case. Simply put, the Office cannot resolve factual disputes between parties who claim additional records should exist and agencies that insist the records do not. *See, e.g.*, 18-ORD-106; 03-ORD-061; OAG 89-81.

In sum, the Board violated the Act when it failed to respond to the Appellant's second request within five business days, and when it failed to invoke KRS 61.872(5) properly with respect to the Appellant's first request. The Office cannot resolve the factual dispute of whether the requested report actually exists, and the Appellant has not made a *prima facie* case that the report should exist.

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

#219

Distributed to:

Richard Hall
Jill Monroe
Trent Lovett
Randy Travis
Martin Johnson

An Equal Opportunity Employer M/F/D