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22-ORD-251

November 21, 2022

In re: Kurt Wallace/Jefferson County Public Schools

Summary: Jefferson County Public Schools (“JCPS”) did not violate the Open Records Act (“the Act”) when it did not provide records that do not exist.

Open Records Decision

Kurt Wallace (“the Appellant”) submitted multiple requests to inspect records to JCPS regarding the Jefferson County Site Based Decision Making Council Appeals Board (“the Appeals Board”). First, after the close of business on August 31, 2022, he submitted a request to JCPS seeking 15 categories of records related to the Appeals Board, including articles of incorporation, a charter, tax identification numbers, employment contracts, insurance policies, financial records, complaints, oaths of office of Appeals Board members, and a “Certificate of Good Standing.” He also asked for information, such as the name and contact information of the Appeals Board’s presiding officer, its address, and documents “showing the council is an independent public agency.” In a timely response, JCPS explained the Appeals Board was created by Board of Education by policy and is separate from the Board of Education. JCPS also provided the names of the Appeals Board members. However, JCPS stated “there have been no complaints against” the Appeals Board, and it does not have a tax identification number, articles of incorporation, employees, or insurance policies. Accordingly, JCPS did not possess any records responsive to the request.

On September 16, 2022, the Appellant submitted a second request to JCPS seeking “records showing the demographic ethnicity” of JCPS, records “showing the ethnic composition of the [Site Based Decision Making Council] at JCPS Phoenix School of Discovery and the demographic ethnicity of the student population” at the same school, and records “showing the ethnic composition of” the Appeals Board. In

a timely response, JCPS provided the requested demographics for all JCPS students and for the Phoenix School of Discovery. However, JCPS stated it did not possess a document reflecting the ethnicity of the Phoenix School of Discovery's SBDM Council or the Appeals Board. This appeal followed.¹

Once a public agency states affirmatively that a record does not exist, the burden shifts to the requester to present a *prima facie* case that the requested record does or should exist. See *Bowling v. Lexington-Fayette Urb. Cnty. Gov't*, 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, the Appellant has not made a *prima facie* case that JCPS possesses requested records that were not provided. He cites no statute or other authority demonstrating that the Appeals Board requires articles of incorporation, a charter, a tax identification number, or insurance policies. Moreover, JCPS explains the Appeals Board does not have employees or any funds, and therefore, it has no employment contracts or invoices. Regarding his second request for demographics, JCPS provided the demographical information for the requested schools but claimed it does possess a record showing the ethnicity of the Phoenix School of Discovery's SBDM Council or of the Appeals Board. The Appellant does not make a *prima facie* case that JCPS should possess a document reflecting the ethnicity of the members of those entities.

Throughout much of the Appellant's correspondence, he refers to a JCPS policy requiring minority representation on the SBDM Council and the Appeals Board. But even if such a policy exists, it does not mean that JCPS is required to create a record documenting the minority status of the members. Rather, such a policy would only require the entities to be comprised of a certain number of minorities. The Act does not require public agencies to gather information not regularly kept as part of its records. See *Dep't of Revenue v. Eifler*, 436 S.W.3d 530, 534 (Ky. App. 2013). Moreover, the Appellant's request for "proof" that membership of these entities complies with policy does not "precisely describe" the records sought, as is required when a person seeks copies of records by mail. See KRS 61.872(3)(b); see also 15-ORD-

¹ After receiving responses to both requests, the Appellant emailed various JCPS officials, including the Superintendent, alleging the JCPS had not complied with the Act. A JCPS attorney responded to these emails on behalf of the various officials and reiterated JCPS's responses to the requests. At all times, JCPS stated it did not have records responsive to the Appellant's requests. To the extent the Appellant objects to a JCPS attorney responding to his requests instead of the JCPS records custodian, the attorney was acting under the authority of JCPS's records custodian and did not violate the Act by responding on behalf of JCPS. See KRS 61.880(1) ("The response shall be issued by the official custodian or under his or her authority").

020 (“a request for ‘proof’ that [an agency] complied with a statute does not describe a readily identifiable class or type of records”).

The Appellant has not made a *prima facie* case that JCPS should possess the requested records. Accordingly, JCPS did not violate the Act when it did not provide records it does not possess.

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.

Daniel Cameron
Attorney General

s/ Marc Manley
Marc Manley
Assistant Attorney General

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Distributed to:

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