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23-ORD-011

January 26, 2023

In re: Crystal Young/Clark County Public School District

Summary: The Clark County Public School District (“the District”) did not violate the Open Records Act (“the Act”) when it could not provide access to records that do not exist.

Open Records Decision

On December 14, 2022, the District received a request from Crystal Young (“Appellant”) to inspect certain surveillance video recordings from Conkwright Elementary School that were recorded on various dates from October 4 to November 30, 2022. In a timely response, the District stated that “one video (or series of videos)” from October 24, 2022, was available for inspection, but the other requested recordings were unavailable because “the District’s surveillance videos are deleted after fourteen (14) days unless saved within that period of time.” The District explained that the October 24 footage was available because it had been “specifically retained for further review.” This appeal followed.

Once a public agency states affirmatively that records do not exist, the burden shifts to the requester to present a *prima facie* case that the requested records exist or should exist. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov’t*, 172 S.W.3d 333, 341 (Ky. 2005). Here, the Appellant argues the requested footage from November 29 and 30, 2022, should still exist because the District received her request less than 14 days after the video was recorded. On appeal, however, the District explains that the surveillance footage at Conkwright Elementary is “automatically deleted” after 14 days “unless specifically retained.” Thus, a District employee must take affirmative action within 14 days of the date of the recording to prevent its automatic deletion from occurring.

Under KRS 160.705(2)(a), video “recordings of school activities” must be retained “for a minimum period of one (1) week.” However, if the recordings “include, or allegedly include injury to students or school employees,” they must be retained “for a minimum of one (1) month.” KRS 160.705(2)(b). The applicable records retention schedule and the District’s own records management policy provide for the same retention period. However, if the footage pertains to an incident under “investigation,” it must be retained until the “investigation and legal activity” are completed.¹ Accordingly, the applicable retention schedules authorized the District to destroy any video recordings after one week, unless they included or allegedly included an injury or related to an incident under investigation. The District explains it retained the October 24 footage because that footage related to the investigation of a complaint by the Appellant. However, the remaining requested footage was automatically deleted after 14 days because it did not relate to an investigation or an alleged injury.

Nevertheless, the Appellant claims the District was obligated to retain any footage she requested, including the footage from November 29 and 30, 2022, if it still existed at the time the District received her request. However, the record reflects the District received the Appellant’s request on December 14, 2022, the fourteenth day after November 30, 2022. The Act allows a public agency five business days to process an open records request after receiving it. *See* KRS 61.880(1). Here, the District received a request for recordings maintained on a school’s video equipment that had already deleted those recordings by the time the District received the request.

Moreover, even if the Appellant is correct that the District should have ordered the school to cease its automatic deletion of videos immediately upon receiving the Appellant’s request, that does not mean the District actually did so. The Appellant has not presented a *prima facie* case that the requested recordings still exist and are available for inspection, and the District has explained the recordings do not exist because they have been destroyed. *See Eplion v. Burchett*, 354 S.W.3d 598, 603 (Ky. App. 2011) (holding that, when records no longer exist because they have been destroyed, the requester is entitled to a written explanation that the records were destroyed). Accordingly, the District did not violate the Act.

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

¹ “Retain Master Copy one (1) week. Destroy if there is no recording that includes, or allegedly includes, injury to students or school employees. Retain Master Copy one (1) month for those recordings that include, or allegedly include, injury to students or school employees. Then destroy. . . . If there is an incident being investigated, retain until investigation and legal activity is complete, then destroy.” *See* Public School District Records Retention Schedule, “Facilities Surveillance Video/Audio Recordings,” Series L6463, available at <https://kdla.ky.gov/records/retentionschedules/Documents/LocalRecordsSchedules/PublicSchoolDistrictRecordsRetentionSchedule.pdf> (last accessed Jan. 18, 2023).

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/ James M. Herrick
James M. Herrick
Assistant Attorney General

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Distributed to:

Ms. Crystal Young
Rebecca G. McCoy, Esq.
Superintendent Dustin Howard
Chairman William Taulbee