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

23-ORD-081

April 5, 2023

In re: Christopher Joyner/Murray Independent School District

Summary: The Murray Independent School District ("District") violated the Open Records Act ("the Act") when it denied a request to inspect emails without explaining how the claimed exemptions apply to them. It also violated the Act when it failed to respond to one part of a request. However, the District did not violate the Act when it denied a request for it to create a record.

Open Records Decision

On February 22, 2023, Christopher Joyner ("the Appellant") submitted a request to the District seeking copies of various public records. First, he sought all emails sent to, or received by, a named employee during a three-day period in March 2022. Second, he sought any emails exchanged between that employee and employees of Kids Company from March 16 to May 1, 2022.[1] Third, he sought "rental costs" and "financial records concerning the purchase of copy machine paper and printer cartridges for the device used to print" the requested records. Fourth, he sought a "log of the records provided under this request."

[1] The Appellant mistakenly referred to the entity as "Kids Corner." However, due to the underlying dispute between the Appellant and the District giving rise to his request, the District construed his request as seeking emails associated with Kids Company. Moreover, although the Appellant stated he sought responsive emails exchanged "between March 16 and May 1" without specifying a year, the District interpreted the request as seeking emails in 2022, the year of the underlying dispute. The Appellant has not challenged the District's interpretation of his request. However, the Appellant has raised numerous claims about his underlying dispute with the District's treatment of his daughter's tutor. The Office expresses no opinion about that underlying dispute in this forum. Rather, KRS 61.880(2)(a) authorizes the Attorney General to review only requests to inspect public records and public agencies' responses thereto to determine compliance with the Act.

In a timely response, the District provided one email responsive to the first part of the request, and withheld 462 emails under KRS 61.878(1)(i) and (j). Similarly, the District withheld 44 emails responsive to the second part of the request under KRS 61.878(1)(i) and (j). The District did not respond at all to the Appellant's request for "rental costs" or "financial records" regarding the purchase of copying paper and ink. However, it denied the Appellant's request for a "log of the records" provided in response to the request because no such record exists and the District would have to create such a log to respond to the request. This appeal followed.

Upon receiving a request to inspect public records, a public agency must determine within five business days whether to grant the request or deny it. KRS 61.880(1). If the agency chooses to deny the request, it "shall include a statement of the specific exception authorizing the withholding of the record and a brief explanation of how the exception applies to the record withheld." *Id*. Here, although the District cited and quoted the text of KRS 61.878(1)(i) and (j), it did not explain how those exemptions applied to the 462 emails withheld. Rather, it stated only that "[f]urther explanation of the information covered by this exemption would serve to the undermine the legislative intent behind" KRS 61.878(1)(i) and (j). The District did not describe at all the content of the emails, other than to assure the Appellant that the emails did not discuss him or his family.

This Office has previously found that most internal communications among employees of public agencies, such as chat messages or emails, constitute preliminary drafts or notes under KRS 61.878(1)(i). *See, e.g.*, 22-ORD-176 n.6 (Microsoft Teams messages constitute "notes"); 22-ORD-262 (internal emails constitute "drafts" or "notes"); *see also* 23-ORD-056 . However, internal communications such as these are only "preliminary" if they refer to future events and discuss potential options associated with those future events. Emails describing events in the past that are similar to a witness's written statement may not be "preliminary." *See, e.g.*, 23-ORD-024. Accordingly, because KRS 61.880(1) required the District to briefly explain how KRS 61.878(1)(i) and (j) apply to the internal communications it withheld, it must, at a minimum, describe in general terms the subject matter of the emails. *See, e.g.*, 22-ORD-262; 23-ORD-056. Here, the District did not describe the subject matter of the emails at all, other than to say they do not contain a reference to the Appellant and his family. Thus, the District violated KRS 61.880(1) when it failed to give a "brief explanation" of how the claimed exemptions applied to the withheld emails.[2]

[2] This Office's finding that the District failed to adequately describe the contents of the emails does not mean the emails are not, in fact, exempt. As stated previously, most internal communications may properly be categorized as preliminary "drafts" or "notes." External communications may also constitute correspondence with private individuals that is not "intended to give notice of final action of a public agency," and is therefore also exempt under KRS 61.878(1)(i). However, the District carries the burden of sustaining its action. KRS 61.880(2)(c). Because the District has failed to describe the contents of the emails, the Office cannot conclusively determine whether all the emails are exempt.

The District also violated the Act when it failed to respond at all to the Appellant's request to obtain copies of "rental costs" and "financial records" related to the purchase and use of copying paper and printer ink. If the District does not possess copies of records responsive to this part of the Appellant's request, it must affirmatively say so. *See, e.g.*, 21-ORD-113. If, however, the District does possess responsive records, it must provide them for inspection or cite an exemption to the Act authorizing it to withhold them and explain how the exemption applies. KRS 61.880(1). The District cannot simply ignore portions of a request. *See, e.g.*, 23-ORD-023; 21-ORD-090.[3]

However, the District did not violate the Act when it denied the Appellant's request for "a log of records" it provides in response to his request. The Act permits inspection of public records that exist, but it does not require a public agency to create a record in response to a request. *See, e.g.*, 11-ORD-026. The District could not, at the time of the request, be in possession of a log containing records produced in response to a request that it had just received. To comply with this part of the request, the District would have to create a new record. The Act does not require it to do so, and therefore, it did not violate the Act when it denied this part of the request.

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/ Marc Manley
Marc Manley
Assistant Attorney General

#112

[3] The Appellant also claims the District improperly charged him an excessive fee to provide records responsive to a previous request, by providing many records that were actually unresponsive. However, any dispute involving that request is not properly before the Office. Under KRS 61.880(2)(a), a person seeking this Office's review of a public agency's disposition of his request must provide a copy of that request and the agency's response to it. The Appellant has not provided a copy of the request or the District's response that resulted in him receiving nonresponsive records.

Distributed to:

Christopher Joyner
William C. Adams, III