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23-ORD-093

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In re: Robert Moore/Fayette County Public Schools

Summary: Fayette County Public Schools (“FCPS”) violated the Open Records Act (“the Act”) when it delayed access to records without notifying the requester of the earliest date on which the records would be available. However, FCPS did not violate the Act when it denied a request seeking information rather than public records, or otherwise declined to create an electronic record tailored to the parameters of the request.

Open Records Decision

On March 9, 2023, Robert Moore (“the Appellant”) submitted a request to inspect records to FCPS containing multiple subparts. First, he sought “[a]ll emails, including attachments, sent to or from” four identified employees “between December 1, 2022 and March 9, 2023” containing the keywords “Hanover, technology, study, review, audit, salary, hay [sic], additive, or pay.”¹ He also sought “the current salary of employees in the Information and Analytics department,” including the salary of the Chief Information and Analytics Officer and any employee under his supervision, “broken down by type of pay” such as “base pay, extended day pay, and hay [sic] or administrative additive.” Finally, he sought “[a]ny changes to the salaries” of the same employees “between January 1, 2022, and March 9, 2023.”

¹ It is not clear whether the Appellant intentionally sought emails containing the word “hay,” or if this was a typographical error in his request. Throughout all of his correspondence with FCPS, the Appellant referred to “hay” pay. It is relevant, however, because the last name of one of the identified employees, Hayden, contains “hay.” As will be explained, FCPS located over 10,000 emails responsive to the Appellant’s request as framed. Thus, FCPS may have located so many responsive emails because every email containing the employee’s name or email address may have been responsive to a keyword search for “hay.”

In a timely response on March 16, 2023, FCPS provided records responsive to other parts of the Appellant's request that are not at issue in this appeal. However, it stated it "needed an extension" to respond to the remainder of the Appellant's request because "some personnel" who were necessary to review the records were "out of the office" the week it received the request. The Appellant agreed to give FCPS a one-week extension to March 23, 2023. FCPS also provided a file the Appellant described as "a list of salaries" for employees. In addition to granting FCPS the requested extension, the Appellant also advised that the file containing the "list of salaries" was "unusable," and asked FCPS to use its software to generate a report containing the requested information. Alternatively, if FCPS could not generate such a report, he asked for it to "provide the same information in landscape format."

On March 22, 2023, FCPS notified the Appellant "it ha[d] pulled a high volume of emails" in response to his first request. FCPS claimed the volume of emails "would be unreasonably burdensome" under KRS 61.872(6).² But instead of denying the request as unreasonably burdensome, FCPS claimed it needed "an extension of a month" to review them for possible redactions. Furthermore, FCPS denied the Appellant's request for any "changes" to salaries because "there [were] no responsive records." The Appellant responded and asked FCPS to provide the number of emails it located before he would agree to another extension. He also asked FCPS to clarify whether it was stating no records relating to salary changes existed because there were no changes to salaries, or because there were no records documenting such changes. He advised that his own salary had changed during the requested period, and therefore, changes to the salaries of the identified employees had occurred. FCPS responded and stated it had located "over 10k" emails, but it was not denying the request. Instead, it sought additional time to review them. Regarding the Appellant's request for it to clarify whether records related to salary changes existed, FCPS stated, "If records do not exist in the format as requested, the agency is not required to create documents." However, FCPS provided a document containing "employee step [pay] increases."

The Appellant challenged FCPS's claim it had located over 10,000 emails exchanged during the three-month scope of the request. Nevertheless, he agreed to permit an extension of "one month from today," resulting in a deadline of April 23, 2023. With respect to his request for records documenting salary changes, the Appellant objected to being provided "nearly 200 pages" of records relating to various changes in salary for whom he claimed was "every employee in the district." He continued to assert that the software used by FCPS is capable of generating a report

² FCPS actually cited "KRS 61.878" as the basis for its claim that the request was unreasonably burdensome, but the correct citation is KRS 61.872(6), which states, "If the application places an unreasonable burden in producing public records . . . the official custodian may refuse to permit inspection of the public records or mail copies thereof." However, because FCPS did not deny the request as unreasonably burdensome, it is unnecessary to discuss KRS 61.872(6) further.

containing the salary information he sought, and offered to “reword” his original request to more precisely describe the requested records. In response, FCPS stated a “month is 30 business days,” which would result in a deadline of May 11, 2023, to produce the requested records. Moreover, FCPS stated its software was not capable of producing reports based on the specifics of the Appellant’s request. To determine whether any employee experienced a “change in salary” separate from the increases in step payments would require FCPS to audit every employee’s personnel file. Even then, the records would not constitute a “report” of salary changes according to the parameters of the Appellant’s request. This appeal followed.

On appeal, the Appellant asks this Office to determine whether the “one month” extension to which he agreed constitutes a calendar month or a “business month,” constituting 30 business days. But the Office need not answer that question. Rather, when requested records are in “active use, storage, or are otherwise unavailable,” the agency must notify the requester of the “earliest *date* on which” the records will be available and give a detailed explanation for the cause of delay. KRS 61.872(5). In its first response, FCPS requested an extension of “one week,” and later, sought an extension of “one month.” Neither a week nor a month constitutes a “date.” Rather, a “date” is comprised of a day, month, and year. Because FCPS failed to notify the Appellant of “the earliest date on which” the records would be available, it violated the Act.³ *See, e.g.*, 20-ORD-042.

The Appellant also challenges FCPS’s denial of his request for “any changes to salaries” of certain employees. As an initial matter, the Office notes that the Appellant’s original request sought information, not “public records.” The Act requires public agencies to make ascertainable public records available for inspection, but does not require public agencies to answer requests for information. *See* KRS 61.872 (requiring the requester to “describe[e] the records to be inspected”); *see also Dep’t of Revenue v. Eifler*, 436 S.W.3d 530, 534 (Ky. App. 2013) (“The ORA does not dictate that public agencies must gather and supply information not regularly kept as part of its records.”). A request for “any changes to salaries” does not describe actual public records to be inspected, but rather, seeks information. *See, e.g.*, OAG 90-19 (recognizing a request for the salaries of employees and a list of travel

³ The Appellant does not directly challenge the length of the delay, but rather, has sought clarity regarding the date on which he can expect to receive responsive records. To determine whether the length of any delay under KRS 61.872(5) is reasonable, this Office considers a number of factors, including “the number of the records, the location of the records, and the content of the records. *See, e.g.*, 01-ORD-140; OAG 92-117. In this analysis, the content of the records may be relevant if the records contain both exempt and nonexempt information. *Id.*” 22-ORD-176. Here, a delay until May 11, or approximately two months after receiving the request, is not unreasonable considering the number of responsive records involved—more than 10,000 emails, some of which contain information exempt from inspection. However, FCPS should have determined in the first instance that the records would be unavailable until May 11 and notified the Appellant of that fact in its original response, as opposed to continuing to ask for extensions. *See id.*

expenditures was an improper request for information, but the agency violated the Act for ignoring the request instead of responding and denying the request as one seeking information). Accordingly, FCPS could have denied the Appellant's request outright as one seeking information.

However, throughout the parties' subsequent correspondence, the Appellant revised his request and sought "logs" or "reports" documenting "salary changes" that he believed could be generated by FCPS's software. FCPS advised that it did not possess reports conforming to the parameters of the Appellant's request. Instead, it provided the Appellant with public records documenting changes in the salaries of multiple employees. In doing so, FCPS did not violate the Act.

The Appellant argues that information contained within FCPS's software database constitutes electronic records. Although the database is itself a public record, *see, e.g.*, 21-ORD-241, the information contained within a database is not an independent public record. Because databases are electronic records, KRS 61.874 applies, which differentiates between electronic records in "standard format" and electronic records in a "nonstandardized" format. KRS 61.874(2)(b) defines electronic records in "standard format" as records maintained in "American Standard Code for Information Interchange (ASCII) format." Any request for electronic records that are not maintained in "standard format" is a "nonstandardized request." *Id.* And "[i]f a public agency is asked to produce a record in a nonstandardized format, *or to tailor the format to meet the request of an individual* or a group, the public agency may *at its discretion* provide the requested format and recover staff costs as well as any actual costs incurred." KRS 61.874(3) (emphasis added). This Office has found that if an agency does not maintain a pre-existing "query, filter, or sort[ing mechanism] capable of extracting the requested information," the request may be denied in the agency's discretion under KRS 61.874(3). 12-ORD-028; *see also* 21-ORD-178; 05-ORD-116.

On appeal, FCPS explains it does not possess a pre-existing query capable of extracting the salary information of its employees in the format the Appellant has requested. Accordingly, it did not violate the Act when it declined to exercise its discretion and create a report tailored to the specifics of the Appellant's request.

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 emailed to OAGAppeals@ky.gov.

Daniel Cameron
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s/ Marc Manley
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