



COMMONWEALTH OF KENTUCKY
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23-ORD-233

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In re: Denise Gillman/Oldham County Schools

Summary: Oldham County Schools (“the District”) violated the Open Records Act (“the Act”) when it invoked KRS 61.872(5) to delay access to records without notifying the requester of the earliest date on which the records would be available. However, the District’s delay of ten days to provide responsive records was reasonable. The District did not violate the Act when it did not provide a record that does not exist.

Open Records Decision

On May 12, 2023, Denise Gillman (“Appellant”) submitted a request to the District seeking 17 categories of records related to the District’s finances. In a timely response on May 19, the District stated it was “working diligently to meet the deadline” to respond to the request, but “[d]ue to the number of items” the Appellant requested, the District asked for “an extension period to the supply the requested records.” The Appellant asked the District when she could expect responsive records, but the District responded that it would send the records when the total request was “complete,” which it expected would be “the middle of next week.”

On May 26, 2023, the District provided some responsive records. However, in response to the Appellant’s request for “the total compensation paid to classroom teachers in 2022-2023,” it claimed no records exist because “payroll codes are separated by funding source.” Because “[c]lassroom teachers are paid from multiple funding sources,” the District did not possess a record reflecting the “total compensation paid to teachers.” In response to the Appellant’s first six requests for documents reflecting “the total amount of funds” required to support various raises and expenditures for the 2023-2024 school year, the District claimed the responsive

documents were “drafts” because they had not yet been approved by the Board. This appeal followed.

Upon receiving a request for records under the Act, a public agency “shall determine within five (5) [business] days . . . after the receipt of any such request whether to comply with the request and shall notify in writing the person making the request, within the five (5) day period, of its decision.” KRS 61.880(1). However, if a requested record is “in active use, storage, or not otherwise available,” a public agency may delay inspection if it states the earliest date on which the record will be available and provides a detailed explanation for the cause of delay. KRS 61.872(5). Here, the District did not state the earliest date on which the records would be available. Accordingly, it did not comply with KRS 61.872(5). However, given the breadth of the Appellant’s request, which sought records in 17 categories, the District’s delay of ten business days to produce the responsive records in its possession was not unreasonable.

On appeal, the District maintains it properly withheld records responsive to the Appellant’s first six requests for records relating to funding for raises and other expenditures because its final budget for the school year had not been adopted at the time of the request. Nevertheless, the District has now provided the Appellant with the draft versions of those budget proposals. Accordingly, any dispute regarding these records is now moot. *See* 40 KAR 1:030 § 6.

Although the District claims the tentative draft budget it provided to the Appellant contains several categories of information related to teacher compensation, the District reiterates that it does not possess a record responsive to the Appellant’s request for the “total compensation” of teachers during the 2022–23 school year. The District states it would have to create a record to reflect the “total compensation” for teachers. Once a public agency states affirmatively that it does not possess any responsive records, the burden shifts to the requester to present a *prima facie* case that the requested records do or should exist in the agency’s custody or control. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov’t*, 172 S.W.3d 333, 341 (Ky. 2005). If the requester establishes a *prima facie* case that records do or should exist in the agency’s custody or control, “then the agency may also be called upon to prove that its search was adequate.” *City of Ft. 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, the Appellant claims all compensation information is maintained in “Munis Self-Service (MSS),” which is the software used

by the District’s financial department. The District’s website describes this software as allowing individual employees to check their “total compensation.”¹ While the District’s website informs teachers they are able to check *their* total compensation, it does not state the software is capable of generating a report that reflects the total compensation of *all* teachers in one record. The District claims it is unable to do so, and no record reflecting the total compensation of all teachers exists. Although the District could perhaps locate the total compensation of each teacher individually and add them together, the Act does not require a public agency to gather information not regularly kept as part of its records to satisfy a request. *See Dep’t of Revenue v. Eifler*, 436 S.W.3d 530, 534 (Ky. App. 2013). Accordingly, the Appellant has not made a *prima facie* case that a record documenting the total compensation for all teachers during the 2022–23 school year exists, and the District did not violate the Act when it denied the Appellant’s request on that basis.

A party aggrieved by this decision may appeal it by initiating an 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

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Distributed to:

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¹ See <https://www.oldham.kyschools.us/departments/finance/munis-payroll-information> (last accessed Sept. 5, 2023).