



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-251

September 19, 2023

In re: Adam Lye/Oldham County Board of Education

Summary: The Oldham County Board of Education (“the Board”) did not violate the Open Records Act (“the Act”) when it determined a request posed an unreasonable burden under KRS 61.872(6). The Board violated the Act when it relied on KRS 61.872(3)(b) to deny a request to inspect in person the records it reasonably described. However, the Board did not violate the Act when it denied another request that did not reasonably describe the records to be inspected.

Open Records Decision

On August 7, 2023, Adam Lye (“Appellant”) submitted a request to the Board “to review . . . electronic records” for the period between January 1, 2021, and August 7, 2023, pertaining to three subjects. First, the Appellant requested “[e]mails and other communication records regarding” a lawsuit by a parent against the Board that was settled in April 2023. Second, he requested “[e]mails and other communication records regarding ‘Public Comment’ and/or ‘Public Expression’ at [Board] meetings.” Finally, he requested “[e]mails and other communication records regarding any person(s), including any lists of persons, whose speech or viewpoint was to be limited by [the Board] or whom [the Board] threatened to limit access to school property.”

The Board denied the Appellant’s request for communications regarding the lawsuit under KRS 61.872(6), on the grounds that there were “over 6,500 responsive documents,” the production of which would impose an unreasonable burden by requiring “hours of staff and legal counsel time to review” for material that is exempt under the Act “or other relevant law.” The Board denied the remaining portions of the request under KRS 61.872(3)(b), claiming the Appellant had not precisely described the records he wished to review. This appeal followed.

Under KRS 61.872(6), “[i]f 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, refusal under this section shall be sustained by clear and convincing evidence.” On appeal, the Board explains that before producing the records relating to the lawsuit it must “review each discrete record for responsiveness [and then] engage in an analysis of any appropriate—or legally required—redactions or withholdings of these records.” Here, the Appellant has requested to review over 6,500 emails. A request for large numbers of emails concerning litigation by a student’s parent foreseeably implicates the mandatory privacy provisions of the Family Educational Rights and Privacy Act (“FERPA”), 20 U.S.C. § 1232g, and the Kentucky Family Education Rights and Privacy Act (“KyFERPA”), KRS 160.700, *et seq.* Review of records for redaction under FERPA requires “personal knowledge [that] precludes delegation of that function to different personnel.” 15-ORD-015. In 14-ORD-109, a school system sustained its denial under KRS 61.872(6) where the request implicated over 6,200 emails subject to mandatory review and redaction under FERPA and KyFERPA. The facts of this appeal are indistinguishable from 14-ORD-109. *See also* 11-ORD-173 (involving over 8,500 emails subject to redaction under FERPA and KyFERPA). In addition, it is likely many emails may contain privileged communications between attorneys and a client exchanged in rendering legal services, which would also be exempt from inspection. *See* KRE 503; KRS 61.878(1)(l); *see also* 22-ORD-174 (discussing the attorney-client privilege). Accordingly, the Board did not violate the Act when it denied the first part of the Appellant’s request.

The Board also claims the Appellant failed to “precisely describe” the records he sought in the second and third parts of his request. A person may inspect public records by receiving copies in the mail “after he or she *precisely* describes the public records which are readily available within the public agency” KRS 61.872(3)(b) (emphasis added). But if, as here, the requester seeks to inspect records in person, he need only “describ[e] the records to be inspected.” KRS 61.872(2)(a). As such, the description is sufficient as long as it is “adequate for a reasonable person to ascertain the nature and scope of [the] request.” *Commonwealth v. Chestnut*, 250 S.W.3d 655, 661 (Ky. 2008).

The Appellant described the second group of records as “[e]mails and other communication records regarding ‘Public Comment’ and/or ‘Public Expression’ at [Board] meetings” between January 1, 2021, and August 7, 2023. By restricting the scope of his request to “electronic records,” the Appellant has further narrowed the description of the records to include electronic communications only. Thus, the Appellant has identified a category and format of documents, with searchable keywords and the particular subject matter of Board meetings, while limiting the temporal scope of the request to less than three years. This description is adequate for a reasonable person to ascertain the nature and scope of the request. *See, e.g.*, 22-

ORD-006; 14-ORD-153. Further, the Board admits its technology department has successfully conducted a search using the terms provided by the Appellant.¹ Accordingly, the Board violated the Act when it denied the second part of the Appellant's request when he sufficiently described the records to be inspected.²

The Appellant's third and final request was to inspect "[e]mails and other communication records regarding any person(s), including any lists of persons, whose speech or viewpoint was to be limited by [the Board] or whom [the Board] threatened to limit access to school property." Although this request is limited to electronic communications within a specific date range, it provides no search terms, identifies none of the "persons" to whom it supposedly applies, and specifies no subject matter other than vague relation to an ill-defined topic. A person requesting inspection must "describe the records he seeks so as to make locating them reasonably possible." *City of Ft. Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 855 (Ky. 2013). Here, the Board states its "technology department determined that it did not have enough information from the third request to enable meaningful efforts to identify and collect potentially responsive records."

In prior decisions, the Office has found vague descriptions of records inadequate for a reasonable person to identify the records requested. *Cf.* 21-ORD-034 (finding "[d]ocuments related to freedom of speech, and usage of signs, when signs are not deemed political candidate based or advertisement" was not an adequate description of the records); 21-ORD-017 (finding "all data, records, emails regarding" COVID-19 testing was not an adequate description); 14-ORD-096 (finding "[d]etention EOR's and/or disciplinary reports issued to all inmates as a result of the injuries [the requesting inmate] sustained in [a particular] incident" was not an adequate description when it did not identify the inmates by name). The Appellant's description of "communication records regarding any person(s) . . . whose speech or viewpoint was to be limited by [the Board] or whom [the Board] threatened to limit access to school property" was similarly inadequate to define the nature and scope of his request. Accordingly, the Board did not violate the Act when it denied the third part of the Appellant's request.

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

¹ Although the Board claims the search yielded "over 10,000 results," the fact that the records are voluminous, standing alone, does not render the Appellant's description of the records inadequate.

² The Board has not argued that producing these records would impose an unreasonable burden under KRS 61.872(6), nor has it asserted a need to redact these records under any statute, such as FERPA or KyFERPA.

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

#372

Distributed to:

Dr. Adam Lye
Eric G. Farris, Esq.
Jason Radford, Superintendent