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23-ORD-336

December 18, 2023

In re: Rob Mattheu/Boyle County Board of Education

Summary: The Boyle County Board of Education (“the Board”) violated the Open Records Act (“the Act”) when it required a requester to submit a request using a specific form. The Board also subverted the Act, within the meaning of KRS 61.880(4), when it imposed an excessive fee for reproducing electronic records and misdirected the requester to a website containing policies that were not requested.

Open Records Decision

On October 19, 2023, Rob Mattheu (“the Appellant”) emailed the school district Superintendent a request to inspect various records related to the Board’s implementation of a policy on the removal of books from school libraries. Specifically, he asked for: (1) all emails sent or received by 16 individuals containing 11 keywords; (2) all “policies, procedures, memorandums, forms, and e-mails related to the process and criteria used to determine which books would be removed from libraries in relation to Senate Bill 150, as well as who makes these decisions”; and (3) “the policies and process for challenging the removal of materials from libraries.” On October 25, 2023, the Superintendent responded by asking the Appellant to “submit the attached open records request form” to “ensure” that the Board “provide[s] all of the items” the Appellant requested.¹ The Appellant immediately resubmitted his request on the form the Superintendent provided, which the Superintendent received the following day.

The Superintendent then issued a response five business days later, on November 2, 2023, stating it was “not possible” to provide the requested records within the five-day period established under KRS 61.880(1) “due to the volume of

¹ The form the Superintendent provided is a copy of the Attorney General’s standardized open records request form. See KRS 61.876(4).

information requested.” The Superintendent stated the records “will be available by November 30, 2023.”² A few days later, the Superintendent emailed the Appellant and stated the request would “yield approximately 3,900 pages at \$0.10 per page plus postage” if the Appellant wanted the records mailed to him because the Board “cannot produce this request electronically.” The Superintendent asked the Appellant if he wanted the Board “to proceed” in processing the request.

The Appellant then questioned the Board’s claim it could not produce the records electronically. He noted emails are already in electronic form and can be converted to other electronic formats. He also questioned why the requested policies were not posted on the Board’s website and suggested they should be easy to produce for inspection. The Superintendent then provided a website link to all the Board’s policies rather than the specific policy the Appellant requested. The Appellant then notified the Superintendent that the requested policy was not among the policies on the Board’s website and continued questioning why other records could not be provided electronically. Having received no further response to his inquiries, the Appellant initiated this appeal on November 15, 2023.

The Appellant alleges the Board violated the Act in three ways. First, he claims the Board violated the Act when the Superintendent asked him to resubmit his request using a specific form. Second, he claims the Board imposed an excessive fee for charging \$0.10 per page when he sought records in electronic format. Finally, he claims the Board has failed either to provide the requested policies or to affirmatively state they do not exist.³

Regarding the first claim on appeal, the Appellant is correct that a “public agency shall not require the use of any particular form for the submission of an open records request.” KRS 61.872(2)(c). In response, the Board claims it was not requiring the Appellant to use a particular form. Rather, the Board states the Appellant’s emailed request did not contain a statement regarding how he qualified as a “resident of the Commonwealth” under KRS 61.870(10), and it merely wanted the Appellant to cure this alleged deficiency. *See* KRS 61.872(2)(a) (providing that an application to inspect records must contain a statement as to how a person qualifies as a “resident of the Commonwealth,” and that the official custodian may ask the requester to

² Although the Superintendent’s November 2, 2023, response did not expressly invoke KRS 61.872(5), state whether the records were “in active use, storage, or were not otherwise available,” or describe the reason for delay, the Appellant admitted it would take some time for the Board to gather records and is not challenging the Board’s delay.

³ The Appellant also claims the Board has failed to post on its website the contact information of its official records custodian or its policies and procedures for requesting records. However, he only raised this issue after he submitted his appeal, and it is not clear from the record whether it is properly preserved. Regardless, the Board currently has this information on its website, and therefore, any dispute regarding this issue is now moot. *See* <https://www.boyle.kyschools.us/board> (last accessed Dec. 18, 2023)

provide such a statement if it is lacking). However, the Superintendent's initial response made no reference to the Appellant's residency qualifications. The Superintendent's response stated, "Please submit the attached open records request form so [the Board] can ensure that [it] provide[s] all of the items [the Appellant has] requested." Moreover, the Appellant's request contained a signature block with a residential address in Louisville, indicating he qualified as a "resident of the Commonwealth" under KRS 61.870(10)(a). The Board's argument that it merely sought to obtain the Appellant's residency qualifications appears to be a *post hoc* rationalization for its original demand for him to use a specific form. As such, the Board violated the Act when it required the use of a particular form for the Appellant to submit his request.

The Board also subverted the intent of the Act when it charged an excessive fee to reproduce electronic records and when it misdirected the Appellant to its website that did not contain the requested records. Under KRS 61.880(4), "[i]f a person feels the intent of [the Act] is being subverted by an agency short of denial of inspection, including but not limited to the imposition of excessive fees . . . or the misdirection of the applicant, the person may complain in writing to the Attorney General, and the complaint shall be subject to the same adjudicatory process as if the record had been denied."

With respect to the fees the Board charged, it acknowledges the records exist in electronic format. However, it states it is unable to redact the records in electronic format, and therefore, must print them and manually redact the records. However, the Kentucky Court of Appeals has expressly held that public agencies may not pass the cost of redacting requested records on to the requester. *See Commonwealth, Dep't of Ky. State Police v. Courier Journal*, 601 S.W.3d 501, 508 (Ky. App. 2020). The Office has recently applied this holding in several decisions involving redactions to voter registration rolls made by county clerks. *See, e.g.*, 23-ORD-173; 23-ORD-178; 23-ORD-213; 23-ORD-231. Because the basis for the fee imposed is the need to facilitate redactions, rather than to actually reproduce the requested records, the Board subverted the intent of the Act by imposing an excessive fee.

The Board also subverted the intent of the Act by misdirecting the Appellant to its website and requiring him to conduct his own search for the requested policies. The Office has previously found that a public agency does not comply with requests to inspect records merely by directing requesters to conduct their own search on the agency's website. 17-ORD-177; 12-ORD-111; 09-ORD-077.⁴ Here, the Board directed

⁴ In contrast, an agency may provide a website link to a file sharing service for data files too large to be transmitted by email. That is because the file sharing service contains electronic copies of the actual records requested and the requester need not conduct his own search for responsive records. Merely directing a requester to the agency's website is no different than placing him in a file room and telling him to search the room for the records he seeks.

the Appellant to a website containing all the Board's policies, not just the policy he requested. Moreover, the Appellant performed his own search on the website and discovered it did not contain the policy he sought. Thus, the Board's direction to its website actually misdirected the Appellant away from the policy he sought. Either the Board possesses the requested policy or it does not. If it does, it must produce it or explain why an exception applies to deny the Appellant's access. KRS 61.880(1). If it does not, it must affirmatively state no policy exists. *See Univ. of Ky. v. Hatemi*, 636 S.W.3d 857, 867 (Ky. App. 2021); *see also* 20-ORD-041 (finding a public agency has a "duty to inform the requester in clear terms that it [does] not have the records"). The Board did neither, and therefore, it violated the Act.

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 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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Distribution:

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