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24-ORD-063

March 15, 2024

In re: Gay Adelman/Jefferson County Board of Education

**Summary:** The Jefferson County Board of Education (“the Board”) violated the Open Records Act (“the Act”) when it failed to give a detailed explanation of the cause for delay and the earliest date when requested records would be available as required under KRS 61.872(5). The Board subverted the intent of the Act, within the meaning of KRS 61.880(4), by unreasonable delay of more than three months and by engaging in excessive extensions of time.

***Open Records Decision***

On November 13, 2023, Gay Adelman (“Appellant”) requested “copies of all emails to and from [the former school superintendent] containing ‘deeper learning’ or ‘resource teacher’ during the month of May, 2017.” On the fifth business day after receiving the request, the Board replied that the Appellant’s request would “require additional processing time” because the records “are voluminous [and] contain a mixture of exempt and non-exempt information that must be reviewed and redacted.” The Board stated the records would be available “no later than January 19, [2024].” On February 5, 2024, in response to an inquiry from the Appellant, the Board stated that, “[d]ue to the volume of results for that search, as well as the volume of [the Appellant’s] other requests,” the Board was “running behind” and would provide the records “as soon as possible.” On February 16, 2024, the Appellant again contacted the Board to ask when the records would be available. Having received no response to her inquiry as of February 23, 2024, the Appellant initiated this appeal.

Under KRS 61.880(1), a public agency must decide within five business days whether to grant a request or deny it. This time may be extended under KRS 61.872(5) when records are “in active use, in storage or not otherwise available” if the agency gives “a detailed explanation of the cause . . . for further delay and the place, time, and earliest date on which the public record will be available for inspection.” In light of this provision, the Attorney General has recognized that persons requesting large volumes of records should “expect reasonable delays in

records production.” 12-ORD-228. However, a vague statement about the “volume” of a request is not a “detailed explanation” under KRS 61.872(5). *See, e.g.*, 22-ORD-164; 17-ORD-194. Furthermore, the redaction process required under KRS 61.878(4) is an ordinary part of fulfilling an open records request. Although extensive redactions may take so much time that the records cannot be produced within five business days, the agency must explain why the stated length of the delay is necessary. *See, e.g.*, 22-ORD-166; 21-ORD-045. Thus, the cursory statement contained in the Board’s initial response failed to provide the “detailed explanation” required by KRS 61.872(5). Likewise, in its second response, the Board failed to give either a detailed explanation of the cause for further delay or a revised date by which the records would be available. Therefore, the Board violated the Act.

Under KRS 61.880(4), a person who “feels the intent of [the Act] is being subverted by an agency short of denial of inspection, including but not limited to . . . delay past the five (5) day period described in” KRS 61.880(1) or “excessive extensions of time,” may appeal to the Attorney General as if the record had been denied. A public agency subverts the intent of the Act within the meaning of KRS 61.880(4) when it fails to make a final disposition of a request on the date to which it has committed under KRS 61.872(5) and fails to give a detailed explanation of the cause for further delay. *See, e.g.*, 23-ORD-079; 21-ORD-228.

Shortly after the Appellant initiated this appeal, the Board advised her it had missed its self-imposed deadline of January 19, 2024, due to a “substantial unanticipated increase in records requests.”<sup>1</sup> On appeal, the Board claims its delay is justified because between July 1, 2023, and February 23, 2024, it has received 1,041 open records requests, including 181 from the Appellant.<sup>2</sup> However, without more, the volume of unrelated requests does not justify a delay in producing records, even if some of those requests are from the same individual. *See* 22-ORD-134.

In determining whether a delay is reasonable, the Office considers such factors as the number, location, and content of the requested records. *See* 21-ORD-045. “Weighing these factors is a fact-intensive inquiry.” *Id.* Here, the Board argues its delay of more than three months is reasonable because the emails “must be searched, processed into a format capable of redaction, and then manually redacted to shield exempt information or information protected under the Family Educational Rights

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<sup>1</sup> The Board stated the requested records “should be available to [the Appellant] no later than March 8, 2024.” The record on appeal does not indicate whether the Board provided any documents to the Appellant by that date.

<sup>2</sup> Although the Board claims it is “entitled” to deny the Appellant’s request under KRS 61.872(6) on the grounds that it “places an unreasonable burden in producing public records [or] that repeated requests are intended to disrupt other essential functions of the public agency,” the Board did not deny the request on that basis and has not attempted to support such an argument with clear and convincing evidence. Accordingly, this decision does not address the applicability of KRS 61.872(6).

and Privacy Act” (“FERPA”). It is true that the content of the records may be particularly relevant where the records contain information that is confidential under laws, such as FERPA, that carry consequences for a public agency’s failure to adhere to strict confidentiality. *See* 21-ORD-045. However, the Board has provided no information about the number of records implicated by the request or the time required to review each email. A public agency bears the burden of proof to sustain its action in an open records appeal. KRS 61.880(2)(c). Here, the Appellant requested one person’s emails containing either of two phrases during one calendar month. The Board has not met its burden of proof to justify a delay of more than three months. Thus, the Board has subverted the intent of the Act, within the meaning of KRS 61.880(4), by delaying access to the requested records and engaging in excessive extensions of time.

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.

**Russell Coleman**

Attorney General

/s/ James M. Herrick

James M. Herrick

Assistant Attorney General

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Distributed to:

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