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24-ORD-109

April 30, 2024

In re: Caleb Ballard/Christian County Public Schools

Summary: Christian County Public Schools ("CCPS") subverted the Open Records Act ("the Act") when it originally imposed a fee for copies of electronic records beyond the actual cost of reproduction, but has since corrected the violation by providing the records free of charge. CCPS did not violate the Act when it provided records redacted in accordance with KRS 61.878(1)(k) and the Family Educational Right to Privacy Act ("FERPA") in lieu of providing the original records. The Office cannot resolve the factual dispute between the parties about whether a CCPS employee was present to permit a requester's inspection of records in-person.

Open Records Decision

On March 28, 2024, Caleb Ballard ("Appellant") submitted eight requests to CCPS for copies of ten categories of records related to its "zero tolerance vaping policy" and a specific grant. On April 4, 2024, CCPS responded by stating it had prepared 164 pages of records responsive to all but two categories of the requested records. However, the names of students would be redacted from those records under KRS 61.878(1)(a) and FERPA. CCPS denied production of the remaining two categories because it did not possess any records responsive to those parts of the Appellant's request.[1] On April 5, 2024,

[1] CCPS states affirmatively that it denied two subparts of the Appellant's request because it does not possess any additional records responsive to these parts of his requests. Once a public agency states affirmatively that it does not possess any additional records, the burden shifts to the requester to present a *prima facie* case that additional records do exist. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov't*, 172 S.W.3d 333, 341 (Ky. 2005). CCPS additionally denied these parts of the requests because they are requests for information, rather than requests for public records, and are outside the scope of the Act. The Act does not

the Appellant initiated this appeal, claiming CCPS did not produce records in a timely manner because it was closed at the agreed upon time to "pick up" the records. He also claims CCPS denied him the opportunity to "view the original" records and is "attempting to charge" him for "electronic copies" of the records.

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). If an agency grants a request to receive copies of public records by mail or email, then it may withhold the records until it receives the appropriate copying fee. *See* KRS 61.872(3)(b). The appropriate copying fee must be reasonable and "shall not exceed the actual cost of reproduction, including the costs of the media and any mechanical processing cost incurred by the public agency, but not including the cost of staff required." KRS 61.874(3). When records are stored electronically and are easily accessible by the agency, then the agency does not incur an "actual" cost to reproduce the records electronically. *See, e.g.*, 23-ORD-178. This is true even if the agency prints the requested records to facilitate redactions, because KRS 61.878(4) requires public agencies to separate exempt information from nonexempt information and they cannot pass to the requester the cost of making redactions. *Id.*; *see also Dep't of Ky. State Police v. Courier Journal*, 601 S.W.3d 501, 508 (Ky. App. 2020). If a person believes a public agency has subverted the intent of the Act by imposing an excessive copying fee, he or she may seek the Attorney General's review under KRS 61.880(4) as if the request had been denied.

Here, on March 28, 2024, the Appellant submitted eight requests for ten different categories of records. On April 4, 2024, CCPS notified him of its decision to grant inspection of 164 pages of responsive records. However, CCPS stated it would not email the records to the Appellant until he paid a copying fee of $16.40, which represents $0.10 per page. CCPS admits on appeal that all the requested records were originally in electronic format, although they were located in several different computers and software programs. As such, it printed all the responsive records to facilitate redactions and initially attempted to pass that cost on to the Appellant. Thus, like the agency in 23-ORD-178, CCPS subverted the intent of the Act by attempting to impose the

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require public agencies to create records, answer questions, or provide information. Rather, the Act requires a public agency to make public records available for inspection. KRS 61.872; *Dep't of Revenue v. Eifler*, 436 S.W.3d 530, 534 (Ky. App. 2013).

costs of redactions on to the Appellant, which amounts to an excessive copying fee under KRS 61.880(4). Nevertheless, CCPS has now corrected its error by providing copies of the redacted records to the Appellant free of charge.

In its response to the Appellant's request, and as an alternative to the $16.40 copying fee, CCPS also informed the Appellant he could inspect the redacted records in person at the "central office," but he could not "review the originals because they are in active use, storage, or otherwise unavailable."[2] As such, CCPS did not delay the Appellant's access because it notified him that the records were available for inspection on April 4, which was five business days after the Appellant submitted his request. The reason the Appellant did not receive copies of the records within five business days is because, as explained, CCPS erroneously attempted to charge him a copying fee for electronic records. However, the Appellant's delay in accessing the records was also compounded by a miscommunication between the parties at a time CCPS was actually closed for spring break.[3]

Although CCPS was closed for spring break, an employee agreed to meet "until 9:20 a.m." on April 5, 2024, to allow the Appellant to inspect the records. The Appellant asserts the employee who agreed to meet him was not present when he arrived, and the building was closed when he went to pick up the records. On the other hand, CCPS claims its employee, who was actually scheduled to be off work due to spring break, was nevertheless present until 9:30 a.m. to provide the records to the Appellant, who allegedly did not appear

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[2] A public agency may delay access to responsive records beyond five business days if such records are "in active use, storage, or not otherwise available." KRS 61.872(5). A public agency that invokes KRS 61.872(5) to delay access to responsive records must also notify the requester of the earliest date on which the records will be available, and provide a detailed explanation for the cause of the delay. Although CCPS invoked the language of KRS 61.872(5), that statute is not relevant to this appeal because CCPS prepared the records for inspection within five business days.

[3] Extended breaks during the public school year cause unusual issues under the Act. The Office has held that these breaks are not "legal holidays," and therefore, do not extend the time under KRS 61.880(1) for school districts or local boards of education to respond to a request to inspect records. *See, e.g.*, 24-ORD-020. However, a person's right to inspect records in person at an agency may only be exercised "[d]uring the regular office hours of the public agency." KRS 61.872(2)(a). Thus, while breaks in the school year may not qualify as "legal holidays," they also are not part of a school district's "regular office hours." Indeed, records may be "unavailable" if they are locked away in a closed school building during a break in the school year. The Office encourages the public and school districts to act reasonably during these periods of the school year by recognizing both the public's right to timely access public records and the staffing situations that often arise during breaks in the academic calendar, which are typically announced well in advance.

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until 10:00 a.m.[4] Thus, a factual dispute exists between the parties as to whether the requested records were actually made available to the Appellant at the agreed upon time.

The Office has regularly found it is unable to resolve factual disputes between the parties to an appeal under KRS 61.880(2)(a), including disputes about whether the requested records were actually made available to the requester. *See, e.g.,* 23-ORD-220 (the Office cannot resolve a factual dispute as to if a requester received a public agency's response to their request); 22-ORD-010 (the Office is unable to resolve a factual dispute between the parties as to whether the records that have been provided are different from those records sought but not provided); 19-ORD-083 (stating this Office cannot "resolve the factual dispute between the parties regarding the disparity between records which have been provided and those sought but not provided"). Similarly, here, the Office cannot resolve the factual dispute between the parties as to whether CCPS actually made the records available to the Appellant because the Office cannot make a factual finding about when the parties agreed to meet and whether either party failed to appear at the mutually agreed time. As a result, the Office cannot find that CCPS violated the Act.

Finally, the Appellant claims that CCPS violated the Act when it denied his right to inspect "the original records." As such, the Appellant appears to be claiming the redactions CCPS made were improper. CCPS redacted the "[s]tudent names and identifying information" from the original records under "KRS 61.878(1)(a) and (k) to comply with" FERPA "and the Kentucky Educational Right to Privacy."[5]

20 U.S.C. § 1232g(b)(1), a subsection of federal law commonly referred to as FERPA, provides:

> (1) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other

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[4] It is unclear how CCPS knows the Appellant did not arrive until 10:00 a.m. on April 5, 2024.

[5] KRS 61.878(1)(a) exempts from inspection "[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy[.]" Because the Office affirms the redactions under FERPA, it is unnecessary to determine whether the redactions could also be sustained under KRS 61.878(1)(a).

> than directory information, as defined in paragraph (5) of subsection (a)) of students without the written consent of their parents to any individual, agency, or organization [with certain limited exceptions not relevant here].

Here, it is undisputed that CCPS is an educational agency under FERPA. CCPS states that it only redacted "[s]tudent names and identifying information" from the records. Student names and identifying information clearly are "personally identifiable information," the release of which FERPA prohibits. KRS 61.878(1)(k) exempts "[a]ll public records or information the disclosure of which is prohibited by federal law," such as FERPA. Thus, CCPS did not violate the Act when it provided records redacted in accordance with KRS 61.878(1)(k) and FERPA, in lieu of providing the original unredacted records.

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.

Russell Coleman
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/s/ Matthew Ray
Matthew Ray
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Distributed to:

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