COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

RUSSELL COLEMAN
ATTORNEY GENERAL

1024 CAPITAL CENTER DRIVE
SUITE 200
FRANKFORT, KY 40601
(502) 696-5300

24-ORD-122

May 16, 2024

In re: Joe Dennis/Oldham County School District

Summary: The Oldham County School District ("the District") did not violate the Open Records Act ("the Act") when it could not provide records that do not exist or records that are nonresponsive to the request.

Open Records Decision

On April 8, 2024, Joe Dennis ("Appellant") submitted requests to the District for various records related to two school employees. At issue in this appeal are the Appellant's requests for all "employment records" of the two employees, including "investigative file[s]" and "statements" related to any investigations or complaints against them, including "documents and communications, including but not limited to email, text, and instant messaging, of complaints filed and responses" from any other investigating agencies; settlement agreements involving them; and "inquiries or investigations into other legal proceeding to which" the employees were parties.

In response, the District provided 196 pages of records, with certain personally identifiable information redacted under KRS 61.878(1)(a). The District also stated that "portions of the investigative file are being withheld pursuant to KRS 61.878(1)(s), which exempts from inspection 'communications of a purely personal nature unrelated to any governmental function.'" Citing 20-ORD-129 and 23-ORD-085, the District claimed "'communications of a personal nature' 'are not public records' because these records are not 'prepared, owned, used, in the possession of or retained by a public agency' within the meaning of KRS 61.870(2)," and because "they were not 'used for an administrative purpose,' prepared by the public agency, or owned by the public agency." This appeal followed.

The Appellant claims he was denied access to "investigative information including but not limited to the suspects[']statements, the victims[']statements, the accusation, final disposal and all evidence used to base a decision, suspects[']text messages to students (which the school either looked at to document or have in their

possession concerning [one former employee] and internal communications of investigators and staff." In response, the District states it has provided the Appellant with all the responsive records in its possession, except for the redactions made under KRS 61.878(1)(a). Once a public agency states affirmatively that no further records exist, the burden shifts to the requester to present a *prima facie* case that the requested record exists. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov't,* 172 S.W.3d 333, 341 (Ky. 2005). Here, the Appellant claims the specified records must exist because the District conducted investigations of the two employees. However, the District explains, "no investigative file was created" for either matter because "any reports or investigations . . . were verbal communications within the District." Thus, to the extent the Appellant may have established a *prima facie* case that additional records exist, the District has rebutted that presumption by explaining why no such records exist.

The Appellant also claims it "appears that Oldham County Schools communicated or filed reports with the Cabinet [*sic*] for Child Protective Services which would be documented on the schools [*sic*] computer server." However, the Appellant provides no evidence that such reports exist. A requester's bare assertion that an agency possesses requested records is insufficient to establish a *prima facie* case that the agency actually possesses them. *See, e.g.*, 22-ORD-040. Rather, to present a *prima facie* case that the agency possesses or should possess the requested records, the requester must provide some statute, regulation, or factual support for his contention. *See, e.g.,* 21-ORD-177; 11-ORD-074. As the Appellant has provided only a bare assertion, he has not presented a *prima facie* case that the described reports exist.

Finally, the Appellant claims the District has improperly withheld text messages allegedly sent to students by one of the former employees. The District's initial response to the Appellant's request was ambiguous, inasmuch as it stated the text records were not "public records" because the District did not prepare, own, use, possess, or retain them, but simultaneously claimed the District was withholding them under KRS 61.878(1)(s). On appeal, the District continues to invoke both the definition of "public records" under KRS 61.870(2) and the exception under KRS 61.878(1)(s). But the exceptions to the Act under KRS 61.878(1), by the terms of the statute itself, only apply to "public records." Therefore, if the text messages are not public records, they are not subject to the Act and the District need not invoke KRS 61.878(1)(s). Accordingly, the threshold issue is whether the text messages in dispute are public records.

As defined in the Act, "public record" includes "all books, papers, maps, photographs, cards, tapes, disc, diskettes, recordings, software, or other documentation regardless of physical form or characteristics, which are *prepared, owned, used, in the possession of or retained by a public agency."* KRS 61.870(2)

(emphasis added). As stated in 24-ORD-099, "a record is a 'public record' if it is the property of a public agency. A record is the property of a public agency, and is therefore a 'public record,' if the agency owns, possesses, or retains it. Further, a record can become the property of a public agency if it is used or prepared by the public agency for an official purpose." A private communication may become a public record if a public agency uses it "as evidence . . . in a disciplinary hearing or for any other administrative purpose." 20-ORD-109. Here, the Appellant claims the text messages sent to students by the former employee are public records because the Oldham County High School principal and the Oldham County Schools superintendent "saw the text messages and [as the Appellant] would assume documented them in their investigation." While the District does not dispute that the messages were *seen* by those two individuals, it asserts the District "did not possess or consider those text messages as part of its investigation and therefore . . . they were not 'used for an administrative purpose,' prepared by the public agency, or owned by the public agency." The fact that private communications were viewed by administrative officials, without more, does not make them "public records" under the Act.

Nevertheless, the District continues to cite KRS 61.878(1)(s), asserting that "communications of a personal nature are being withheld" and "these text messages were not released to" the Appellant. An agency cannot "withhold" a record, or refuse to "release" it, unless the agency *possesses* it. If the District in fact possesses a copy of the text messages, they are "public records" under the Act irrespective of whether they were considered part of the investigation, because they are "in the possession of or retained by a public agency." KRS 61.870(2).[1] Further, if the District "used" the text messages as part of a disciplinary process, then such records would also be "public records" even if the District does not currently possess them. *See, e.g.*, 24-ORD-119 n.2; 23-ORD-057. Thus, if the District used or possesses the text messages, then the question becomes whether those public records are exempt from public disclosure.

Under KRS 61.878(1)(s), public records are exempt from disclosure if they are "[c]ommunications of a purely personal nature unrelated to any governmental function." Here, the Appellant claims the former employee was a coach who sent allegedly inappropriate messages to students on the team he supervised. A high school teacher or coach may be presumed to be performing a governmental function when he communicates with students under his charge. The Appellant further claims, and the District does not deny, that the text messages formed part of the

[1] Further, in its initial response to the request, the District described the "personal communications" as "portions of the investigative file." That description is inconsistent with the District's assertion on appeal that the text messages were not considered "part of its investigation," as well as its assertion that "no investigative file was created." Although the District does not explain this contradiction, it is not uncommon for an agency on appeal to correct or clarify misstatements made in its initial response.

initial impetus for the District's investigation of the employee. A public agency bears the burden of proof at all times in an open records appeal. *See* KRS 61.880(2)(c). Under these facts, the District has not met its burden of proof that the text messages in question were "unrelated to any governmental function" under KRS 61.878(1)(s).[2]

However, the District maintains it did not consider the text messages as part of its investigation. A close review of the Appellant's requests to the District indicates that he did not specifically ask for text messages sent to students by the former employee. Rather, he requested the employee's "personnel file and employment records," "complaints against or involving him," "investigative file(s)," "supervisor file(s)," "documents associated with any personnel actions involving" him, and "statements provided from [him] to any principal, assistant principal, athletic director, or any other member of the [District] related to any investigation or complaint." Thus, in light of the District's claims that no investigative file was created and that the text messages were not considered as part of its investigation of the employee, any text messages the employee may have sent to the students are not responsive to the Appellant's requests.[3] Therefore, the District did not violate the Act when it did not provide the text messages to the Appellant.

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

#215

---

[2] Because the District has not raised KRS 61.878(1)(a) as a basis for withholding the text messages, the Office expresses no opinion as to whether the disclosure of those records would constitute a clearly unwarranted invasion of personal privacy. Similarly, because the District has not asserted that the text messages are "education records," the Office expresses no opinion as to whether the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, applies to these records.

[3] This conclusion is consistent with the District's assertion on appeal that "no other records responsive to the requests exist."

Distributed to:

Mr. Joe Dennis
Eric G. Farris, Esq.
Suzanne Hundley, Chair
Jason Radford, Superintendent