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25-ORD-101

April 9, 2025

In re: Rob Mattheu/Union County School District

Summary: The Union County School District (“the District”) violated the Open Records Act (“the Act”) when it denied a request to inspect board of education members’ emails because the requested emails were from email accounts the District had held out as used by the board members to conduct official business.

Open Records Decision

Rob Mattheu (“Appellant”) submitted a request to the District in which he requested all emails sent to or from seven email addresses between January 1, 2025, and March 5, 2025, which contained any of 23 keywords. In response, the District granted the request as to three email addresses. But the District denied the request with respect to the remaining four email addresses, which it said were created by the individual email account holders, and not by the District. Thus, according to the District, the emails sent to or from those four accounts are owned by the individuals, not the District, and are therefore not public records within the meaning of KRS 61.870(2). This appeal followed.

On appeal, the Appellant alleges that the emails he requested are public records, within the meaning of KRS 61.870(2), because the four email addresses at issue belong to members of the District’s board of education and because the email addresses are listed as the appropriate contact information for the board members on the District’s website.¹

¹ See Board Members, available at https://www.union.kyschools.us/apps/pages/index.jsp?uREC_ID=491280&type=d&pREC_ID=1021046 (last visited April 1, 2025).

Public records include “all books, papers, maps, photographs, cards, tapes, discs, 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). Because public records are records, regardless of form or characteristic, in which a public agency has some form of property stake or right, the first stage of analysis under the Act is to determine whether the person or entity having custody of the records meets the definition of public agency under KRS 61.870(1). Relevant here, a public agency includes “[e]very state or local government officer.” KRS 61.870(1)(a). The four email addresses the District asserts it does not control belong to the District’s board members. As members of a local board of education, each of them is a state officer subject to the Act. *See Bd. of Ed. of Louisville v. Society of Alumni of Louisville Male High Sch.*, 239 S.W.2d 931, 933 (Ky. 1951).

As such, each individual board member is simultaneously both a private citizen and a “public agency.” However, this does not mean that all records in the possession of the board members are public records under KRS 61.870(2). As just one example, no one could seriously argue that a board member’s electric or water bill is a “public record” just because he or she is a “public agency” and possesses the utility bill. Thus, the records that are and are not public records within the meaning of KRS 61.870(2) must be distinguished. The Office has previously stated that, in deciding whether a state or local officer’s record is a public record, “[o]nly in this context is it reasonable to consider the record’s content and whether it relates to so-called ‘public business.’ Not because the record’s content has bearing on whether it meets the definition of ‘public record’ under KRS 61.870(2), but because its content is relevant to determine in which capacity the state or local officer was acting when the record was prepared or received—in an official or private capacity.” 24-ORD-118 n.7. If the record was prepared by the state or local official in his or her official capacity, then the record was “prepared by” or is “in the possession” of a “public agency.” If the record was prepared by the state or local official in his or her private capacity, then the record was “prepared by” or is “in the possession of” a private citizen.

This Office cannot assume that state or local officers possess public records on their private electronic devices or in their private email accounts. Rather, the burden is on the appellant to make a *prima facie* case that the records he or she seeks were prepared by a state or local officer in his or her official capacity.² To make a *prima*

² This analysis mirrors how the Office and the courts analyze requests for records under the Act when the public agency states that it does not possess any records responsive to a request. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov’t*, 172 S.W.3d 333, 341 (Ky. 2005).

facie case that the requested records were prepared by the state or local officer in his or her official capacity, an appellant must provide some factual support for that contention. A bare assertion of belief unadorned by any factual support will fail to make a *prima facie* case that the requested records were prepared by the state or local officer in his or her official capacity.

Turning now to the merits of this appeal, the Appellant directs the Office to the District's website, which lists the email addresses identified in the request for each board member. According to the Appellant, this indicates to the public "that those email addresses" should be used "to contact them on school board matters." In response, the District states only that the "information is not in our possession" and the "accounts are owned by the individuals and not our school district." The record in this appeal clearly shows that the District has represented to the public that the email addresses are used by the board members to communicate with constituents and others regarding official business. As such, the Appellant has made a *prima facie* case that the identified email addresses are used by the board members in their official capacities. Accordingly, the District violated the Act³ when it denied the request for emails from those accounts solely on the basis that they are owned by the individual board members and not the District.⁴

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.

³ This holding is limited solely to state and local officers who themselves meet the definition of "public agency." See KRS 61.870(1)(a). Not all state or local government employees are "public agencies" under the Act. As the Office has previously stated, "communications in which a public agency has no property interest are not public records subject to inspection." 24-ORD-118.

⁴ The fact that the emails are located on accounts not owned by the District does impact the search the District's official records custodian can conduct. In the absence of the board members' express consent, the District's official records custodian cannot search their email accounts to determine whether any emails relate to "public business" and therefore warrant inspection. Allowing such an intrusion into private communications would implicate both Section 10 of the Kentucky Constitution and the Fourth Amendment to the U.S. Constitution because individuals possess a personal privacy interest in the data stored on their privately-owned cell phones. Cf. *Commonwealth v. Reed*, 647 S.W.3d 237, 250 (Ky. 2022) (recognizing that "individuals have a reasonable expectation of privacy in their cell phone's cell-site location information"); *Riley v. California*, 573 U.S. 373, 401 (2014) (holding "a warrant is generally required before" searching a person's cell phone). In such situations, an official records custodian may only request that a state or local officer who owns the email account at issue conduct his or her own search for responsive records.

Russell Coleman
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/s/ Zachary M. Zimmerer
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#113

Distributed to:

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