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26-ORD-229

May 22, 2026

In re: Gerald Chapman/Owensboro Public School System

**Summary:** The Owensboro Public School System (“the OPSS”) did not violate the Open Records Act (“the Act”) when it opted to create a record in response to a request for records that are not within its possession, custody, or control. The Office is unable to resolve the factual dispute between the parties as to whether the records provided are responsive to the request.

***Open Records Decision***

Gerald Chapman (“Appellant”) submitted a request to the OPSS for “a complete and current inventory of all literature, books, e-books, audiobooks, and other reading materials intended for students held in each school’s library or media center.”<sup>1</sup> The OPSS granted the request and provided the requested records via a Google Drive hyperlink.<sup>2</sup> Unsatisfied with the OPSS’s response, the Appellant replied with a notice of noncompliance and listed his grievances. The OPSS responded that the Appellant’s “request was for a ‘complete and current inventory’ of our literary materials” and [t]hat is what has been provided.” The OPSS affirmatively stated that “[a]ll of the items . . . you requested have been” provided if it possessed them.<sup>3</sup> This appeal followed.

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<sup>1</sup> The Appellant indicated the scope of his request included but was not limited to the title, author, ISBN number, format, school location, any internal age/grade/reading level designation used by the district or school, and any digital platform identifiers.

<sup>2</sup> The OPSS noted that students also may have access to additional books provided by the Daviess County Public Library that is not owned by the OPSS.

<sup>3</sup> The OPSS further clarified that the original response “did not include the ISBN numbers and the author names” for one specific school but “[t]hat has been corrected and uploaded to the link” previously provided. The OPSS also affirmatively stated that it “does not maintain any public record stating any internal age/grade level reading designation.”

The Act defines “public record” as “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).

The Appellant takes issue with the format in which he received the requested records. He asserts that the OPSS should have to create an Excel spreadsheet version of the records he requested instead of the Portable Document Format (“PDF”) version of the records the OPSS provided. However, the Appellant does not seek records owned, used, or in the possession of the OPSS. Rather, he seeks records that are owned, used, or in the possession of the OPSS’s third-party vendor.

A public agency “is responsible only for those records within its own custody or control.” *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 856 (Ky. 2013) (citing *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136 (1980)). Once a public agency states affirmatively that a record does not exist, the burden shifts to the requester to make a *prima facie* case that the requested record does or should exist. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov’t*, 172 S.W.3d 333, 341 (Ky. 2005). If the requester makes a *prima facie* case that the records do or should exist, then the public agency “may also be called upon to prove that its search was adequate.” *City of Fort Thomas*, 406 S.W.3d at 848 n.3 (Ky. 2013) (citing *Bowling*, 172 S.W.3d at 341). A requester must provide some evidence to make a *prima facie* case that requested records exist, such as a statute or regulation requiring the creation of the requested record or other factual support for the existence of the record. *See, e.g.*, 21-ORD-177; 11-ORD-074. A requester’s bare assertion that certain records should exist is insufficient to make a *prima facie* case that the records actually do exist. *See, e.g.*, 22-ORD-040.

On appeal, the OPSS explains that the collection of information the Appellant seeks is maintained “within the Follett Destiny platform.” It further explains that “Follett Destiny is a third-party cloud-based platform” to which it “subscribes,” but the OPSS “does not manage, control, or maintain any aspect of the system.” The Office has previously held that an agency does not violate the Act by denying a request for records in the possession of its vendor. *See* 24-ORD-153 (finding records in the possession of the agency’s consulting firm “do not fit the definition of ‘public records’”); 24-ORD-262 (same). Further, the Appellant’s belief that the OPSS would have access to the requested records does not mean the OPSS possesses or retains them within the meaning of the Act. *See, e.g.*, 15-ORD-190 (finding the Kentucky Department of Education did not possess or retain emails stored on local school district-owned

servers, even though the Department had an administrative password that permitted the Department to access the local district's emails).

For his part, the Appellant merely asserts that the OPSS has the ability to export the records in the format he desires. But this alone does not establish that the records in the "Follett Destiny" system are owned, used, or in the possession of the OPSS. Therefore, the Office must conclude that the requested records are not "public records" as defined by the Act.

An agency is not required to create a record to satisfy a request under the Act. *See Dep't of Revenue v. Eifler*, 436 S.W.3d 530, 534 (Ky. App. 2013) ("The [Act] does not dictate that public agencies must gather and supply information not regularly kept as part of its records."); *see also* 22-ORD-242; 18-ORD-184; 18-ORD-021; 17-ORD-089; 12-ORD-026; 11-ORD-091; 10-ORD-187. Here, although the OPSS has explained that the records requested by the Appellant are in the possession of its third-party vendor, it opted to create a record containing the requested information. Because the Act does not require an agency to create a record to fulfill a request, the OPSS did not violate the Act when it did not create that records in the Appellant's preferred format.

Finally, regarding the Appellant's assertion that the records the OPSS provided include "thousands of non-responsive documents," the Office has previously found that it cannot resolve a factual dispute between the parties to an appeal. *See, e.g.*, 22-ORD-010 (declining to resolve a factual dispute that the records received were different from the records requested). The OPSS affirmatively stated the Appellant's "request was for a 'complete and current inventory' of our literary materials and [t]hat is what has been provided," and that "[a]ll of the items . . . you requested have been" provided. Thus, a factual dispute exists between the Appellant and the OPSS as to whether the records he received are responsive to his request. In the end, the Office cannot resolve the factual dispute between the parties and cannot find that the OPSS violated the Act when it provided records it believes to be responsive to the Appellant's request.

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](mailto:OAGAppeals@ky.gov).

**Russell Coleman**  
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/s/ Zachary M. Zimmerer  
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Distributed to:

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