COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

RUSSELL COLEMAN
ATTORNEY GENERAL

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

26-ORD-271

June 11, 2026

In re: Kimberly Mucker-Johnson/Kentucky Department of Education

Summary: The Kentucky Department of Education ("the Department") did not violate the Open Records Act ("the Act") by denying a request for records it does not possess after its searches did not locate any records, nor did the Department err in withholding an email communication made exempt by the attorney-client privilege. The Department violated KRS 61.880(1) by failing to notify the requester initially that a certain record was never created rather than being exempt.

Open Records Decision

On March 20, 2026, Kimberly Mucker-Johnson ("the Appellant") submitted a five-part request to the Department for records pertaining to Education Professional Standards Board ("EPSB") Case No. 20-03725.[1] In a timely response, the Department stated regarding part 1 of the request that it does not possess the "Agenda for the February 2023 EPSB . . . meeting which specifically lists Case No. 20-03725." However, the Department provided the Appellant with a copy of the agenda for the February 2023 meeting, which lists "under 'Approval of Consent Items' the subheading 'A. Approval of Revised October 10, 2022, EPSB Meeting Minutes.'" The

[1] The Appellant requested the following: (1) "The February 2023 EPSB . . . meeting agenda item specifically listing Case No. 20-03725, including any staff report, cover sheet, or summary document submitted to board members in advance of that meeting"; (2) "Hollan's Written Communication Initiating the Amendment," *i.e.*, "Any memorandum, letter, or written request authored or submitted by EPSB [A]ttorney Cody Hollan to the EPSB . . ., board chair, or executive director between December 1, 2022 and February 28, 2023, requesting that the board revise, reconsider, or amend its prior action on Case No. 20-03725, from 'Attorney review' to 'hearing'"; (3) "All emails sent or received by Cody Hollan to or from any EPSB . . . member, [chair], or executive director between December 1, 2022 and February 28, 2023, referencing Case No.20-03725"; (4) "All drafts, versions, or copies of the cover letter bearing the date October 11, 2022 associated with Case No. 20-03725, including any document reflecting edits, revisions, or creation metadata"; and (5) "Any internal memorandum, email, notes, or written communication created after December 1, 2022 in which any EPSB staff member, attorney, or board member acknowledged, discussed, or addressed the fact that no EPSB . . . meeting was held on October 11, 2022."

Department explained the consent item "revised the meeting minutes of the October 10, 2022, EPSB meeting to amended [*sic*] the status of" Case Nos. 2003725 and 2104283 "from 'Attorney Review' to 'Refer to Hearing.'" The Department also provided the Appellant with copies of the record that EPSB members received pertaining to Consent Item A and the minutes of the February 2023 EPSB meeting. Regarding "any staff report, cover sheet, or summary document submitted to board members in advance of that meeting," the Department advised it was denying access under KRE 503, which is incorporated into the Act by KRS 61.878(1)(l), because those records "contain attorney-client privileged information," such as "legal advice to clients."

Following a search of EPSB Attorney Cody Hollan's email, the Department advised it did not locate any existing communications responsive to parts 2 and 3 of the Appellant's request.[2]

Regarding part 4 of the request, the Department stated that the Appellant did not describe the records with adequate specificity for the Department to identify and locate the October 11, 2022, "cover letter."[3]

Regarding communications between EPSB attorneys responsive to part 5 of the request, the Department explained it was denying access under KRS 61.878(1)(l) and KRE 503 because those records consist of communications "between attorneys who represent the same client for purposes of facilitating the rendition of professional legal services for that client." Specifically, the Department withheld "an email

---

[2] On appeal, the Department correctly notes there is a discrepancy between the description of Item 2 found in the original request and the description provided in the letter of appeal. Specifically, the original request sought "[a]ny memorandum, letter, or written request authored or submitted by EPSB attorney Cody Hollan *to the EPSB, . . . board chair, or executive director* between December 1, 2022, and February 28, 2023" (emphasis added), asking the Board to "revise reconsider, or amend its prior action" regarding Case No. 20-03725 "from 'Attorney review' to 'hearing.'" On appeal, the Appellant expands the scope of part 2 by asking more broadly for "[a]ny written communication" from Mr. Hollan between those dates, regarding that subject matter without any limitation regarding the listed recipients of any such correspondence. The Office's review under KRS 61.880(2) is confined to the Appellant's original request made under KRS 61.880(1) and the Department's original response to it.

[3] The Department cites prior decisions by the Office, all of which predate *Commonwealth v. Chestnut*, 255 S.W.3d 655, 661 (Ky. 2008), holding that, in contrast to KRS 61.872(3)(b) (requiring a requester to "precisely describe" the records that must be "readily available"), "nothing in KRS 61.872(2) contains any sort of particularity requirement." *Id*. at 661. Declining to "add a particularity requirement where none exists," the Court held that a request is adequately specific if the description would enable "a reasonable person to ascertain the nature and scope of . . . the request." *Id.* To the extent decisions by the Office that predate *Chestnut* may have applied a "reasonable particularity" standard to requests for onsite inspection of records, *Chestnut* implicitly overruled those decisions. 17-ORD-077; 15-ORD-075. Here, the Department appears to have relied on KRS 61.872(3)(b), albeit implicitly. However, the Office does not resolve the question of whether the Department properly invoked KRS 61.872(3)(b) because, as discussed later, that issue has been rendered moot on appeal.

communication between EPSB attorneys discussing the clerical error and the actions" it would be taking to remedy that error. This appeal followed.

On appeal, the Appellant challenges the Department's failure to provide details regarding who conducted the necessary search for existing records responsive to parts 2 and 3 of the request, which systems were searched, and what other "reasonable terms or locations were used" in addition to four search terms it listed in the original response. In addition, the Appellant claims "it is not credible that no communications exist" between Mr. Hollan and EPSB decisionmakers regarding her case status. Attempting to make a *prima facie* case that the Department possesses responsive records, the Appellant notes that the minutes of the EPSB's February 2023 meeting "reflect a vote amending the case action for Case No. 20-03725 – a vote that required an agenda item, a triggering communication, and supporting materials" and emphasizes that, on or about December 30, 2022, she filed "a written motion, a copy of which is attached as Exhibit A, placing [Mr.] Hollan and Hearing Officer George Seay on notice of the October 10/11 date discrepancy and the misclassification of the board's action."

Regarding part 4 of the request, the Appellant states that she provided the specific date and case number to help identify the record, as well as the kind of letter she was requesting, and maintains that a record a public "agency drafted, served, litigated from, and used as a hearing exhibit is an identifiable record."

Lastly, the Appellant challenges the Department's reliance on KRE 503, incorporated into the Act by KRS 61.878(1)(l), to justify denying part of part 1 and to justify denying part 5 of the request entirely. She contends the Department's "own description of the withheld materials shows they contain factual and procedural content, not just legal advice."

When a public agency receives a request for public records, that agency must decide within five business days "whether to comply with the request" and notify the requester, in writing, "of its decision." KRS 61.880(1). If the requested records exist but a statutory exception applies to justify withholding the records, the agency must cite the statutory exception and explain how it applies to records or portions thereof being withheld. KRS 61.880(1). Conversely, if the records do not exist, then the agency must affirmatively state following a diligent search that such records do not exist. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov't*, 172 S.W.3d 333, 341 (Ky. 2005).

On appeal, the Department states that it does not possess a summary document as described in part 1 of the request. Therefore, the Department initially violated KRS 61.880(1) by failing to determine that no case summary responsive to part 1 exists and notify the Appellant of that fact instead of denying access to a

nonexistent record. However, the Department ultimately remedied this error, and it did not violate the Act by denying parts of the request seeking records that do not exist.

The Department maintains that it does not possess records responsive to parts 2 and 3 of the request. Once a public agency states affirmatively that it does not possess a requested record, the burden shifts to the requester to make a *prima facie* case that the record does or should exist. *See Bowling*, 172 S.W.3d at 341. If the requester makes a *prima facie* case that the agency does or should possess the record, "then the agency may also be called upon to prove that its search was adequate." *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 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.

Here, the Appellant relies upon facts that she believes justify her presumption that the Department possesses existing records responsive to parts 1 to 3 of the request. Namely, she explains the relevant EPSB proceedings, asserts that it is unreasonable that no records would have been created, and provides evidence of the notice she submitted to the subject of her request. But this does not make a *prima facie* case that the emails exist. Rather, the Appellant's case is more like a bare assertion that responsive records must have been created.

However, even assuming the Appellant made a *prima facie* case that the Department possesses responsive communications, the Department has rebutted that presumption. *See Eplion v. Burchett*, 354 S.W.3d 598, 603 (Ky. App. 2011) (holding that "when it is determined that an agency's records do not exist, the person requesting those records is entitled to a written explanation for their nonexistence"). Specifically, the Department explains that it conducted a diligent search of Mr. Hollan's email account for any emails he sent to EPSB members or the EPSB Chair, in addition to any emails he received from those parties, from December 1, 2022, to February 28, 2023, that mentioned either of two different iterations of her name or that referenced "20-03725" or "2003725." Accordingly, the Office finds the Department did not violate the Act by denying the Appellant's request for nonexistent records.

Regarding its response to part 4 of the request, the Department disputes the Appellant's contention that it "denied" part 4 but, regardless of semantics regarding the correct name by which to identify the "cover letter," which it refers to internally as a "Charges Letter," the Department states it "will cure this error and provide

nonexempt records in its possession." Upon receipt of the additional information describing the contents of the letter provided on appeal, the Department located it and provided a copy with its appeal response. Thus, any of the related issues have been rendered moot. *See* 40 KAR 1:030 § 6 ("If the requested documents are made available to the complaining party after a complaint is made, the Attorney General shall decline to issue a decision in the matter.").

The remaining question is whether the Department violated the Act by withholding an email thread consisting of a discussion between attorneys regarding the representation of their client under the attorney-client privilege, which is codified at KRE 503. The attorney-client privilege exempts from disclosure "confidential communication[s] made for the purpose of facilitating the rendition of professional legal services to [a] client." KRE 503(b). KRS 61.878(1)(l) operates in tandem with KRE 503 to exclude from disclosure public records that are protected under the attorney-client privilege. *Hahn v. Univ. of Louisville*, 80 S.W.3d 771 (Ky. App. 2001). "A communication is 'confidential' if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." KRE 503(a)(5). The privilege applies to communications between a client or representative of a client and the lawyer, KRE 503(b)(1), as well as between representatives of the client, KRE 503(b)(4). "Representative of the client" is defined broadly to include a "person having authority to obtain professional legal services, or to act on advice thereby rendered on behalf of the client." KRE 503(a)(2)(A).

Here, the Department explains the records being withheld under KRE 503 consist of an email discussion "between attorneys who represent the same client for purposes of facilitating the rendition of professional legal services for that client." Specifically, the Department states it was withholding "an email communication between EPSB attorneys discussing the clerical error and the actions" it would be taking to remedy that error. The Department reiterates on appeal the confidential and privileged nature of this email communication and that the record lacks any facts or evidence to refute its position. Accordingly, the Department did not violate the Act by withholding the subject email pursuant to KRE 503.

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/ Michelle D. Harrison
Michelle D. Harrison
Assistant Attorney General

#277

Distributed to:

Kimberly Mucker-Johnson, Appellant
Todd G. Allen, General Counsel, KDE
Nicholas J. Cacopardo, Staff Attorney I, KDE
Erin Gaines, Executive Administrative Secretary, KDE
Jason H. Hernandez, Deputy Executive Director, Education and Labor Cabinet