



## COMMONWEALTH OF KENTUCKY OFFICE OF THE ATTORNEY GENERAL

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**26-ORD-289**

June 29, 2026

In re: Jessica McIntosh/Madison County Board of Education

**Summary:** The Madison County Board of Education (“the Board”) did not violate the Open Records Act (“the Act”) when it withheld records under KRS 61.878(1)(i) and (j) that relate to an ongoing investigation, or when it provided all other responsive records in its possession.

### ***Open Records Decision***

Jessica McIntosh (“Appellant”) submitted a three-part request to the Board for records related to her employment with the Board.<sup>1</sup> Specifically, the Appellant sought: (1) “[r]ecords of written/verbal complaints made by [the Appellant] on and after 8-25-25 involving improper conduct by a supervisor and others on, after and prior to 8-25-25: all available documents, photographs, writings and materials, including materials electronically stored, transmitted or handwritten, and all other related evidence or statements considered during the investigation, including any records concerning any actions taken or to be taken prior to or following the complaint”; (2) “[r]ecords of Board minutes qualifying [the Appellant] to be paid for various roles”; and (3) “[a]ll timesheets and detailed pay records of [the Appellant] since date of hire, including assigned job codes and titles.” The Board denied the first part of the request because the “documents, if in existence, are exempt from disclosure under KRS 61.878(1)(i) and (j).”

The Board granted the second part of the request and provided responsive records. The Board granted the third part of the request but invoked KRS 61.872(5) because the records are “currently in storage” and notified the Appellant that it “anticipates that the requested records will be available on or before May 14, 2026.”

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<sup>1</sup> The Appellant’s request is dated April 16, 2026, but the Board’s response indicates it was received by the Board on May 4, 2026. The Appellant does not dispute the timeliness of the Board’s response.

On May 13, 2026, the Board provided records responsive to the third part of the request. On appeal, the Appellant alleges the Board violated the Act in two ways: first, by withholding records under KRS 61.872(1)(i) and (j) that should be disclosed under KRS 61.878(3); and second, by not providing additional records in its possession that are responsive to the second and third parts of the request. The Office will address each claim in turn.

First, the Appellant challenges the Board's reliance on KRS 61.878(1)(i) and (j) to withhold records and asserts the records are not exempt under KRS 61.878(3). KRS 61.878(1)(i) exempts from inspection "[p]reliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency." KRS 61.878(1)(j) exempts from inspection "[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended." The Appellant does not dispute that KRS 61.878(1)(i) and (j) apply to the records withheld. Rather, she asserts that the records must be disclosed under KRS 61.878(3) because they relate to her.

Under KRS 61.878(3), "[n]o exemption in this section shall be construed to deny, abridge, or impede the right of a public agency employee, including university employees, an applicant for employment, or an eligible on a register to inspect and to copy any record including preliminary and other supporting documentation that relates to him or her." However, "a public agency employee . . . shall not have the right to inspect or to copy any examination or any documents relating to ongoing criminal or administrative investigations by an agency." *Id.* (emphasis added). On appeal, the Board explains that "there is a pending and on-going administrative investigation" related to the requested records. As proof, the Board provides copies of a "Charge of Discrimination" and the Board's "Position Statement." Because the records relate to an ongoing investigation, the Board properly relied on KRS 61.878(1)(i) and (j) to withhold them.

Next, the Board states that it does not possess any additional records responsive to the second and third parts of the request that it has not already provided to the Appellant. 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 record does or should exist, then the public 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's bare assertion that a public agency should or must possess the requested records is not adequate to make a *prima facie* case that the agency does, in fact, possess the records. *See, e.g.*, 22-ORD-040.

On appeal, the Appellant attempts to make a *prima facie* case that the Board should possess additional records responsive to the second part of her request. The Appellant asserts that the Board only provided "minutes from a single Board meeting which documents only [her] initial hire as a school bus driver in 2021." The Appellant further asserts that she "performed additional roles with different qualifications at different rates from 2021 to 2026" and that "[u]nder KRS 161.011(2) and (5) and Board Policy 03.21, appointments and personnel actions must be documented in writing and recorded in Board minutes before an employee may be paid the assigned rate for a position."

KRS 161.011 provides definitions of "classified employee" and "seniority" job classifications, and also sets forth the requirement of written contracts and written personnel policies. Under KRS 161.011(2), "[t]he commissioner of education shall establish by January 1992, job classifications and minimum qualifications for local district classified employment positions" and "no person shall be eligible to be a classified employee or receive salary for services rendered in that position unless he or she holds the qualifications for the position as established by the commissioner of education." Under KRS 161.011(5), "[l]ocal districts shall enter into written contracts with classified employees" and the "[c]ontracts with classified employees shall be renewed annually except contracts with" two types of employees that it lists, neither of which are relevant here. The Appellant does not explain how these definitions apply to the records in the current appeal. The Appellant did not provide a copy of the Board's policy 03.21 that she claims requires the Board to possess additional records it did not provide.<sup>2</sup>

In response, on appeal, the Board explains that the Appellant is "under contract as a bus driver and her initial hire documentation was provided as requested." The Board further explains that "[n]on-contract hourly work as a bus driver instructor and cleaning busses is not subject to board approval" and that "no records exist concerning non-contract employment." Thus, the Appellant failed to make a *prima facie* case that the Board does or should possess any additional records that it has not

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<sup>2</sup> Available on the Board's website, there are multiple sections of Board Policy 03.21. The Appellant has not identified the section of the policy requiring the Board to maintain the records she requested. As such, it is unclear to which section the Appellant is referring, or how it relates to the present appeal.

already provided to her.<sup>3</sup> Accordingly, the Office is unable to find that the Board violated the Act when it provided all responsive records that exist within its possession

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**  
**Attorney General**

/s/ Matthew Ray  
Matthew Ray  
Assistant Attorney General

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Distributed to:

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<sup>3</sup> To the extent that the Appellant asserts she did not receive the responsive records the Board claims it provided to her, or that the records she received are different from those she requested, this would be a factual dispute between the parties. 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 regarding whether a requester received a public agency's response to a request); 22-ORD-010 (the Office is unable to resolve a factual dispute between the parties regarding whether the records that have been provided are different from those records sought); 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").