

Ky. Op. Atty. Gen. 08-ORD-056, 2008 WL 802635 (Ky.A.G.)

Office of the Attorney General
Commonwealth of Kentucky

08-ORD-056

March 18, 2008

In re: Glenn S. Hayden/Graves County School District

Summary: The Graves County School District complied with Open Records Act by affirmatively advising requester that the requested records did not exist and gave an explanation as to what steps were taken to attempt to locate responsive records and why certain responsive records did not exist. The fact that advertisement that is required for business/community leader nominees has been lost, misplaced, or no longer exists suggests the presence of a management of records issue.

Open Records Decision

The question presented in this appeal is whether the Graves County School District (School District) violated the Open Records Act in the disposition of Glenn S. Hayden's open records request for certain records related to selection of business/community leader nominees to serve on the local planning committee. For the reasons that follow, we find the School District complied with Open Records Act by affirmatively advising requester that the requested records did not exist and gave an explanation as to what steps were taken to attempt to locate responsive records.

By letter dated November 30, 2007, Mr. Hayden requested a copy of the following records from the District:

Per KAR 1:001, Kentucky School Facilities Planning Manual: copy of the "advertisement that is required for business/ community leader nominees from whom the local school board of education must select two representatives." Please include the dates and identify which newspapers announced these advertisements. Period involved: July 1, 2004 to present date (Nov. 30, 2007).

Per KAR 1:001, Kentucky School Facilities Planning Manual, nominees must provide a letter of agreement to serve. Please include all copies of these letters by each nominee. Period involved: July 1, 2004 to present date (Nov. 30, 2007).

By letter dated December 4, 2007, Regina A. Jackson, attorney for the District, denied Mr. Hayden's request, advising him in relevant part:

In regard to your request for a copy of the advertisement for business/community leader nominees to serve on the local planning committee and your request for copies of the letters for each business/community leader nominee indicating their willingness to serve, the School District has made a diligent search and cannot locate any such documents.

In his letter of appeal, he requested this office to review why the Graves County School District had failed to provide or locate the requested records.

After receipt of notification of the appeal, Ms. Jackson provided this office with a response to the issues raised in the appeal. In her response, she explained:

In 08-ORD-031, the Office of the Attorney General stated in Footnote 3 that should Mr. Hayden elect to initiate a separate appeal concerning these two requests, the Office of the Attorney General would expect the Graves County School District to document the specific steps it took in attempting to locate responsive records. In regard to these requests, the Kentucky School Facilities Planning Manual, [702 KAR 1:001](#), provides as follows concerning the composition of a school district's local planning committee:

***2** Advertisements shall be made for business/ community leader nominees from whom the local board of education shall select two (2) representatives. Nominees must provide a letter of agreement to serve. In the event nominations are not received, the local board of education shall select the community/business leaders.

The Superintendent of the Graves County School District, Brady Link, believes that in either late 2005 or early 2006, an advertisement was placed on the Graves County Board of Education website for business/ community leader nominees. However, after reviewing the facility planning documents maintained in his office, he has not been able to locate a printed copy of the advertisement and does not know if a copy was in fact ever printed. Additionally, Mr. Link directed Eddie Wright, the Instructional Technical Director, who oversees maintenance of the School District website, to determine if he could locate any such advertisement that may have been stored electronically. After making a diligent search of relevant electronic files, Mr. Wright could not locate an electronic copy of any such advertisement.

In regard to Mr. Hayden's request for letters of agreement to serve submitted by business/community leader nominees, no nominations were received. Thus, no such letters exist. Because no nominations were received, the Graves County Board of Education selected the community/business leaders.

We find that the School District discharged its statutory duty under the Open Records Act by notifying Mr. Hayden that no advertisements or letters of agreement existed and offered an adequate explanation why. On this issue, the Attorney General has frequently observed:

[A] public agency cannot furnish access to records which do not exist. See, for example, OAG 83-111; OAG 87-54; OAG 91-112; OAG 91-203; 97-ORD-17. We have also recognized that it is not our duty to investigate in order to locate documents which do not exist or have disappeared. OAG 86-35. Thus, at page 5 of OAG 86-35 we observed, "This office is a reviewer of the course of action taken by a public agency and not a finder of documents . . . for the party seeking to inspect such documents."

In 1994 the Open Records Act was amended. The Act now provides "that to ensure the efficient administration of government and to provide accountability of government activities, public agencies are required to manage and maintain their records according to the requirements of [[KRS 171.410 to 171.740](#), dealing with the management of public records, and [KRS 61.940 to 61.957](#), dealing with the coordination of strategic planning for computerized information systems]." [KRS 61.8715](#). The General Assembly has thus recognized "an essential relationship between the intent of [the Open Records Act]" and statutes relating to records management. Id.

Since these amendments took effect on July 15, 1994, the Attorney General has applied a higher standard of review to denials based on the nonexistence of the requested records. In order to satisfy its statutory burden of proof, an agency must, at a minimum, offer some explanation for the nonexistence of the records.

***3** 97-ORD-116, p. 1, 2.

Thus, in order to satisfy its statutory burden of proof that an adequate search was undertaken, a public agency must, at a minimum, document what efforts were made to locate the records. In the instant appeal, the School

District, in its supplemental response provided to this office, advised that the Superintendent believed in either late 2005 or early 2006, that an advertisement was placed on the Graves County Board of Education website for business/community leader nominees. After reviewing the facility planning documents maintained in his office, he further advised that he was unable to locate a printed copy of the advertisement and did not know if a copy had, in fact, ever been printed. In addition to the above, the Superintendent directed the Instructional Technical Director, who oversees maintenance of the School District's website, to see if he could locate any such advertisement that may have been stored electronically and, after a diligent search of relevant electronic files, no electronic copy of any such advertisement could be located. In our view, the School District conducted a search which could be reasonably calculated to locate records responsive to the requests, but that the search was non-productive. Despite the fact that it yielded no results, this was a search method which could have reasonably been expected to produce the records requested. The records access issues raised in this appeal are factual, and not legal, in nature. We find no violation here.

Likewise, in its supplemental response to this office, the School District explained that it had no letters of agreement to serve submitted by business/community leader nominees, because no nominations were received. Obviously a public agency cannot furnish access to records which do not exist. The agency discharges its duty under the Open Records Act by affirmatively so advising the requester of that fact. 06-ORD-264. We therefore affirm the School District's denial of Mr. Hayden's request for letters of agreement to serve on the basis of the nonexistence of such records.

The School District advised that an advertisement was placed on the Graves County Board of Education website for business/community leader nominees in either late 2005 or early 2006. The School District has an obligation relative to proper records management and retention. The fact that advertisement has been lost, misplaced, or no longer exists suggests the presence of a management of records issue. Our review of the *Records Retention Schedule - Local Governments - Common Records*, a copy of which is enclosed, indicates that Publication of Legal Notices is a scheduled record found at Records Series L4944, is a permanent record, and should be retained by the agency. [FN1] It may consist, *inter alia*, of:

(Publication area means the city, county, district or other local area for which an advertisement is required by law. May include a copy of the printed advertisement, the billing for the advertisement, the request to the newspaper to advertise and affidavit of publisher. The record series documents that all legal notice requirements have been met according to [KRS 424.010](#) through [KRS 424.990](#)). (V)

*4 [KRS 61.8715](#) provides:

[T]o ensure the efficient administration of government and to provide accountability of government activities, public agencies are required to manage and maintain their records according to the requirements of . . . [[KRS 61.870](#), et seq., the Kentucky Open Records Act, [KRS 171.410](#) to [171.740](#), relating to public records management, and [KRS 61.940](#) to [61.959](#), relating to strategic planning for computerized information systems.]

The General Assembly has thus recognized an "essential relationship" between the intent of the Open Records Act and statutes relating to proper records management and maintenance. [KRS 61.8715](#). It is, however, for the Department for Libraries and Archives, and not the Attorney General, to assist the School District in determining whether it is fully discharging its duty to manage and preserve records containing "adequate and proper documentation of the organizational functions, policies, decisions, procedures, and essential transactions of the agency and designed to furnish information necessary to protect the legal and financial rights of the government and of persons directly affected by the agency's activities." [KRS 171.640](#). Accordingly, pursuant to [KRS 61.8715](#), we have referred the matter to the Department for Libraries and Archives for review under KRS

Chapter 171.

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court pursuant to [KRS 61.880\(5\)](#) and [KRS 61.882](#). Pursuant to [KRS 61.880\(3\)](#), the Attorney General should be notified of any action in circuit court, but should not be named as a party in that action or in any subsequent proceeding.

Jack Conway
Attorney General

James M. Ringo
Assistant Attorney General

[FN1]. We reviewed the *Records Retention Schedule - Public School District Model* and found no retention schedule for advertisement records, thus we rely on the general retention schedule for *Records Retention Schedule - Local Governments - Common Records*, Records Series L4944.

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