

**COMMONWEALTH OF KENTUCKY
JEFFERSON CIRCUIT COURT
DIVISION __
CIVIL ACTION NO. 24-CI-_____**

**KENTUCKY PUBLIC RADIO d/b/a
LOUISVILLE PUBLIC MEDIA**

PLAINTIFF

v.

**JEFFERSON COUNTY PUBLIC
SCHOOLS**

DEFENDANT

COMPLAINT

This is an Open Records Act case regarding three open records requests submitted by Louisville Public Media reporter Jess Clark to Jefferson County Public Schools seeking records related to the transportation crisis that began on the first day of the 2023-2024 school year. JCPS is refusing to disclose most of the responsive records based on its insistence that public records produced and stored on its employees' personal cell phones are not public records at all because they were somehow created in the employees' "private capacity." Ex. 1, JCPS Response Letter.

JCPS's position willfully ignores the plain text of the Open Records Act and decades of case law applying it. The Act defines "public records" broadly to mean:

"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). Under the Act, a record’s public status turns on the record’s content, not its location. In other words, “it is the nature and the purpose of the document, not the place where it is kept, that determines its status as a public record.” *City of Louisville v. Cullinan*, No. 1998-CA001237-MR, 1998-CA001305-MR (Ky. App. 1999). That means text messages on public employees’ personal devices related to public business are public records under the Act. *See* KRS 61.870(2). That holding was recently affirmed by the Kentucky Court of Appeals in *Kentucky Open Gov’t Coal., Inc. v. Kentucky Dep’t of Fish & Wildlife Res. Comm’n*, No. 2022-CA-0170-MR, 2023 WL 7095744, *9 (Ky. App. Oct. 27, 2023). This fundamental principle of open records law remains constant whether the requested public records are physically stored on private property or digitally stored on public employees’ personal cell phones.

JCPS is willfully violating the Open Records Act by refusing to produce these vital public records about a genuine crisis at JCPS. It is absurd to assert that text messages among senior JCPS officials about an unfolding transportation crisis that left hundreds of students stranded at schools and on buses until 10 PM, and eventually forced JCPS to cancel six days of class, are not the public’s records.

This Court must order JCPS to produce the responsive records immediately and should find JCPS in willful violation of the Act.

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff Louisville Public Media (“LPM”) is a non-profit organization located at 619 South Fourth Street, Louisville, KY 40202.

2. Defendant Jefferson County Public Schools (“JCPS”) is a “public agency” within the meaning of KRS 61.870(1) and is located at the Vanhoose Education Center 3332 Newburg Road, Louisville, KY 40218.

3. This action is brought pursuant to KRS 61.882 to appeal JCPS’ improper denial of an open records request submitted by LPM reporter Jess Clark and to obtain injunctive relief requiring JCPS to disclose public records willfully withheld in violation of the Open Records Act.

FACTS

I. The JCPS Transportation Disaster

4. JCPS started the 2023 school year with a new bus routing system created by Boston-based consultant, AlphaRoute. Jess Clark, *JCPS ‘transportation disaster’ brings panic as families go hours without knowing kids’ locations*. LOUISVILLE PUBLIC MEDIA, AUGUST 10, 2023.¹

5. The plan, designed to transport over 60,000 kids with just over 600 bus drivers, failed dramatically. *Id.*

6. Students were stranded at school and on buses for hours, some as late as 10 PM. *Id.* Others were stranded for hours on buses without air conditioning in the early-August heat. *Id.* Some were left at bus stops that were not their own and they did not recognize. *Id.*

¹ Available at: <https://www.lpm.org/news/2023-08-10/jcps-transportation-disaster-brings-panic-as-families-go-hours-without-knowing-kids-locations>.

7. Parents were unable to find their young children for several hours. *Id.* Dozens of parents called the police to locate their children because JCPS' help line shut down at 7 PM with hundreds of children still unaccounted for. *Id.*

8. JCPS was forced to cancel the rest of the first week of school and most of the next. Jess Clark, *JCPS cancels another two days of school after bus fiasco on first day*. LOUISVILLE PUBLIC MEDIA, AUGUST 12, 2023.²

9. Over a month later, JCPS Superintendent Marty Pollio presented the school board with proposed solutions to the transportation crisis, but cautioned they could not be implemented until the 2024 school year. Jess Clark, *When will JCPS solve bus crowding and delays? Probably not until next school year*. LOUISVILLE PUBLIC MEDIA, September 27, 2023.

10. Superintendent Pollio announced that JCPS' bus shortage meant "the day of all students being transported to all schools is at the end of that road." *Id.*

II. LPM's Open Records Requests

a. The Transportation Request (submitted August 10, 2023).

11. Ms. Clark submitted her first open records request on August 10, 2023—what should have been JCPS' second day of the school year. That request sought: "all communication and correspondence regarding student transportation on 8/9/23 received or sent from the following: Marty Pollio, Chris Perkins, Donald Robinson, Carolyn Callahan, Katy Deferrari." Ex. 2, The Transportation Request (cleaned up).

² Available at: <https://www.lpm.org/news/2023-08-12/jcps-cancels-another-two-days-of-school-after-bus-fiasco-on-first-day>

12. JCPS General Counsel Amanda Herzog responded on August 17 by producing one document that contained the phrase “student transportation.” *Id.*

13. Ms. Clark followed-up to clarify that her request did not seek only records that contained the phrase “student transportation,” but also those that discussed the topic of student transportation more generally. *Id.*

14. A week later, Ms. Herzog responded and informed Ms. Clark that JCPS had “voluminous” records responsive to her request that “contain a mixture of exempt and nonexempt information which must be reviewed and redacted in accordance with state and federal law.” *Id.* Ms. Herzog stated JCPS would produce the responsive records by September 22.

15. When that day came, Ms. Herzog suddenly informed Ms. Clark that JCPS did not have any records responsive to her request. Ex. 3, Email Correspondence.

16. Ms. Clark challenged that long delayed and unbelievable response because it is not credible that the JCPS officials named in the request did not communicate during the transportation crisis. August 9. Ex. 4., Denial of Transportation Request.

17. Ms. Herzog attempted to justify JCPS’ bait-and-switch by misstating Kentucky open records law and incorrectly asserting (without citation or explanation) that Ms. Clark’s request “would not capture things like text messages sent on personal devices, phone calls, or in person conversations, which are generally how much of our staff communicates during real time, urgent situations.” Ex. 4.

18. That is incorrect. By definition, an open records request always includes these records because the Act defines “public record” broadly to include all records used by a public agency “regardless of physical form or characteristic.” KRS 61.870(2). In other words, it is the nature and purpose of a document that controls its status as a public record, not where the record is stored. *Kentucky Open Gov't Coal*, 2023 WL 7095744, *9 (Ky. App. Oct. 27, 2023). That means text messages on public employees’ personal devices related to public business are public records under the Act. *See* KRS 61.870(2).

b. The Alpharoute Request (August 10, 2023)

19. Ms. Clark submitted a second open records request on August 10, 2023, seeking: “email communications between anyone with an ‘@alpharoute’ email address and any member of [JCPS] central office staff up to 8/10/2023.” Ex. 5, Alpharoute ORR. After an exchange of emails with Ms. Herzog to clarify the request, it was modified to include specific JCPS central office staff: Chris Perkins, Katy DeFerrari, Marty Pollio, and Donald Robinson. *Id.* at 2.

20. Ms. Herzog once again responded by claiming that JCPS possessed “voluminous” records responsive to the AlphaRoute request and informed Ms. Clark they would be produced by September 15, 2023. *Id.*

21. On September 28, 2023—thirteen days past JCPS’ self-imposed deadline—JCPS produced some records responsive to Ms. Clark’s request.

22. JCPS, however, withheld an unknown number of records pursuant to the Act’s preliminary records exemption. *See* KRS 61.878(1)(i)-(j).

23. JCPS did not even attempt to meet the requirements necessary to invoke that exemption. An agency denying an open records request carries the burden of proving that the public records sought fit within an exception to the Act. KRS 61.882(3). The agency’s denial must “include a specific exemption authorizing the withholding of the record and a brief explanation of how the exception authorizing the withholding of the record and a brief explanation “must be detailed enough to permit [a] court to assess its claim and the opposing party to challenge it.” *Univ. of Ky. v. Kernel Press, Inc.*, 620 S.W.3d 43, 53 (Ky. 2021) (citing *Ky. New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76, 81 (Ky. 2013)).

24. Here, JCPS simply named the preliminary records exemption and incorrectly asserted it applies, without meaningful explanation. Ex. 5.

25. Preliminary records are recommendations, drafts, notes, and correspondence and memoranda used to create opinions or policy recommendations. KRS 61.878(i)-(j).

26. Preliminary records are protected from production by the Open Records Act—but only temporarily. They lose their protected status “once they are adopted by the agency as part of its action.” *Univ. of Kentucky v. Lexington H-L Servs., Inc.* 579 S.W.3d 858 (Ky. App. 2018); *Univ. of Kentucky v. Courier Journal & Louisville Times Co.*, 830 S.W.2d 373 (Ky. 1992). At that moment, the Act’s exemption no longer applies, and the records are subject to release. *Univ. of Kentucky v. Kernel Press, Inc.*, 620 S.W.3d 43, 61-62 (Ky. 2021).

27. JCPS' response is impossible to understand—let alone challenge. JCPS did not attempt to explain what “policy” was being debated as the transportation crisis unfolded in real time.

28. Its invocation of the preliminary records exemption rests on the improbable claim that JCPS had not yet made any policy decisions related to the transportation crisis by September 28, 2023—over a month after the crisis began.

29. Moreover, JCPS bears the burden of demonstrating, throughout this litigation, that it has properly invoked the preliminary records exception. Thus, it cannot prevail on that exemption claim if the records withheld pertain to “policy” questions that are no longer under debate.

c. The Second Transportation Request (September 25, 2023)

30. JCPS' obstinance responding to the August 10 Transportation Request eventually caused Ms. Clark to try again, this time requesting records that include specific search terms to assist JCPS' “compliance tool.” Ex. 4.

31. On September 25, 2023, Ms. Clark submitted The Second Transportation Request, which sought: “all electronic written communications, including emails, texts, instant message, containing the word ‘bus,’ ‘buses,’ or ‘transportation’ sent by or received by the following people: Marty Pollio, Carolyn Callahan, Marcus Dobbs, Chris Perkins, Katy DeFerrari, Robert Moore.” Ex. 6, The Second Transportation Request.

32. Ms. Herzog acknowledged receipt of the request on September 28, but informed Ms. Clark JCPS needed until November 30th to review records for material exempt from production under the Act. Ex X. (add email 2 and 3).

33. On that day, JCPS produced 433 pages of responsive email records. Many of those emails were generated on August 9 and contained the words “bus” and “transportation.” It is unclear why JCPS did not produce these records in response to the First Transportation Request. JCPS did not offer any explanation for its failure to procure these records or its “compliance tool’s” apparent failure to locate them.

34. JCPS also improperly withheld an unknown number of records ostensibly under the Act’s preliminary records exemption (KRS 61.878(1)(i)-(j)), the Act’s personal privacy exemption (KRS 61.878(1)(a)), and the Family Education Rights & Privacy Act (“FERPA”).

35. JCPS again did not attempt to meet its burden to invoke these exemptions.

36. JCPS did not attempt to explain what policy decision the withheld records were supposedly preliminary to, or when it expected that decision to be finalized.

37. Nor did JCPS explain how communications among its employees related to the transportation crisis qualified as “education records” protected by FERPA, which is defined narrowly to include only “documents with information about [student’s] academic performance, financial aid, or disciplinary matters.” *Kernel Press*, 620 S.W.3d 43 at 56.

38. And JCPS again refused to search for responsive public records stored on the named employees’ personal phones based on the false assumption that they “are not in the possession of the agency.” Ex. 3 at 9.

III. LPM's Attempt to Avoid Litigation

39. After months of JCPS's refusal to provide most of the public records requested by Ms. Clark, LPM made one last attempt to obtain the records without litigation. Ex. 7, LPM Letter.

40. On January 2, 2024, undersigned counsel wrote Ms. Herzog explaining the deficiencies in JCPS' denials and offering one last opportunity to produce these important public records without litigation.

41. That letter explained that JCPS is simply wrong when it asserts that the Open Records Act "does not capture things like text messages on personal devices." *Id.*

42. LPM directed JCPS to the Act's broad definition of public record that includes all documents "prepared, owned, used in the possession of or retained by a public agency." *Id.* (citing KRS 61.870(2)).

43. There can be no doubt that the records requested by Ms. Clark were "prepared", "owned", and "used" by JCPS, and, therefore, are public records under the Act. JCPS' initial denial confirms that the requested records were the primary means used by JCPS to "communicate[] during real time, urgent situations." Ex. 4.

44. It is simply not relevant that these public records are stored on JCPS' employees' personal cell phones. LPM reiterated this fundamental principle of open records law and correctly characterized JCPS' attempt to distinguish public "officials" from "paid employees" as a willful flouting of *Kentucky Open Government Coalition*.

45. The Court of Appeals did not distinguish between government officers and paid employees. Rather, the Court affirmed the Act's broad definition of public record and declared unequivocally "**both the [agency] and its members** have a duty to produce public records within their custody and control." *Id.* at *9 (emphasis added).

46. LPM identified JCPS's failure to attempt to meet the requirements of the preliminary records exemption. JCPS had not identified what policy was being debated as the transportation crisis unfolded in real time and its continued withholding of the records rested on the unlikely premise that JCPS has yet to make any decisions regarding the transportation crisis.

47. LPM also informed JCPS that it cannot withhold its staff's communications related to the transportation crisis under FERPA. Kentucky courts have made clear, FERPA is "not intended as an invisibility cloak that can be used to shield any document that involves or is associated in some way with a student." *Kernel Press*, 620 S.W.3d at 56.

48. The statute protects only students' education records and must be "narrowly construed." FERPA defines education record to mean "records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational agency...." 20 U.S.C. 1232g(b)(1) (emphasis added). Generally, courts have "defined education records as documents with information about academic performance, financial aid, and disciplinary matters." *Kernel Press*, 620 S.W.3d at 56 (collecting cases).

49. FERPA likely has no application to the records requested by Ms. Clark. But even if it did, JCPS would be required to redact the exempted material and release the rest. *Id.*; KRS 61.878(4).

50. JCPS responded on January 5, 2024, by doubling down on its willful refusal to produce public records responsive to Ms. Clark's request. Ex. 8, JCPS Response Letter.

51. Ms. Herzog again willfully mischaracterized the Court of Appeals' *Kentucky Open Government Coalition* holding and asserted public records created and used by JCPS employees on their personal cell phones while responding to the transportation crisis are not public records under the Act. *Id.* at 2.

52. Even more troubling, Ms. Herzog informed Ms. Clark that "[m]any JCPS employees have agency owned cell phones" and JCPS acknowledged that "[t]he messages on those devices would be subject to production. However, there are not any responsive messages on those devices." *Id.*

53. Ms. Herzog's response suggests that JCPS employees may be willfully using their personal phones under the mistaken belief that the public records created there are not subject to production under the Act.

54. Ms. Herzog also attempted far-too-late explanations of its previous inadequate denials. For example, she justified JCPS' non-production of responsive records to the First Transportation Request because Ms. Clark used the phrase "among the following people" as opposed to "sent or received by."

55. JCPS's hyper-technical parsing of the English language to avoid production is not permitted under the Act. *Com. v. Chestnut*, 250 S.W.3d 655 (Ky. 2008) (an open records request "should not require the specificity and cunning of a carefully drawn set of requests, so as to outwit narrowing legalistic interpretations by the government. A citizen should be able to submit a brief and simple request for the government to make full disclosure or openly assert its reasons for non-disclosure.").

56. Ms. Herzog, for the first time, suggested that FERPA, KYFERPA, and the Act's personal privacy exemption were used to redact student and parent names, addresses, email addresses, and cell phone numbers from records produced in response to the Second Transportation Request.

57. LPM, however, has no way of confirming that statement because JCPS has never explained those redactions in a manner that allows LPM to assess and challenge JCPS' claim. *Kernel Press, Inc.*, 620 S.W.3d at 53.

58. Ms. Herzog's too late first attempt to justify JCPS' withholding these public records pursuant to the preliminary records exemption is similarly inadequate. Ms. Herzog suggests that the withheld records are primarily "draft routes" or "draft stops" that were "ultimately changed prior to implementation." JCPS, however, did not request specific route plans, but rather communications among JCPS officials in real time as they were reacting to JCPS' transportation crisis.

COUNT I – Violation of the Open Records Act
(The First Transportation Request)

59. LPM hereby incorporates and restates the allegations set forth in all preceding paragraphs of the Complaint.

60. Under Kentucky Law, LPM is entitled to disclosure of the public records requested in the First Transportation Request.

61. JCPS willfully violated the Open Records Act when it refused to disclose records responsive to LPM's request.

62. Pursuant to KRS 61.882(2), LPM is entitled to seek injunctive and other relief from LPM's actions with respect to its open records request directly from this Court without first seeking relief from the Attorney General under KRS 61.880.

63. Pursuant to KRS 61.882(4), this action should take precedence on this Court's docket over all other causes and should be assigned for a hearing or trial at the earliest practicable date.

64. Pursuant to KRS 61.882(5), LPM is entitled to recover its costs, reasonable attorney's fees from this lawsuit and statutory penalties because JCPS is willfully withholding the requested records in violation of the Open Records Act.

COUNT II – Violation of the Open Records Act
(The AlphaRoute Request)

65. LPM hereby incorporates and restates the allegations set forth in all preceding paragraphs of the Complaint.

66. Under Kentucky Law, LPM is entitled to disclosure of the public records requested in the AlphaRoute Request.

67. JCPS willfully violated the Open Records Act when it refused to disclose records responsive to LPM's request.

68. Pursuant to KRS 61.882(2), LPM is entitled to seek injunctive and other relief from LPM's actions with respect to its open records request directly from this Court without first seeking relief from the Attorney General under KRS 61.880.

69. Pursuant to KRS 61.882(5), LPM is entitled to recover its costs, reasonable attorney's fees from this lawsuit and statutory penalties because JCPS is willfully withholding the requested records in violation of the Open Records Act.

COUNT II – Violation of the Open Records Act
(The Second Transportation Request)

70. LPM hereby incorporates and restates the allegations set forth in all preceding paragraphs of the Complaint.

71. Under Kentucky Law, LPM is entitled to disclosure of the public records requested in the Second Transportation Request.

72. JCPS willfully violated the Open Records Act when it refused to disclose records responsive to LPM's request.

73. Pursuant to KRS 61.882(2), LPM is entitled to seek injunctive and other relief from LPM's actions with respect to its open records request directly from this Court without first seeking relief from the Attorney General under KRS 61.880.

74. Pursuant to KRS 61.882(5), LPM is entitled to recover its costs, reasonable attorney's fees from this lawsuit and statutory penalties because JCPS is willfully withholding the requested records in violation of the Open Records Act.

WHEREFORE, LPM respectfully requests the following relief:

1. An expedited briefing schedule and hearing on this matter at the earliest practicable date;
2. An injunction ordering JCPS to immediately disclose the requested records;
3. An award to LPM of its costs and attorney's fees in connection with this matter pursuant to KRS 61.882(5).
4. All other relief to which LPM may be entitled.

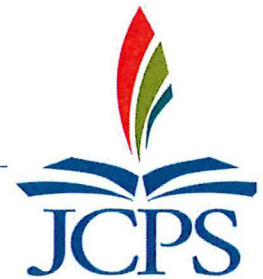
Respectfully submitted,

/s/ Michael P. Abate

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Counsel for LPM

Exhibit 1



January 5, 2024

VIA EMAIL

Michael Abate
Kaplan Johnson Abate & Bird LLP
710 West Main Street, 4th Floor
Louisville, KY 40202
mabate@kaplanjohnsonlaw.com

Mr. Abate,

We are in receipt of your letter on behalf of Jess Clark related to a variety of Ms. Clark's recent requests under the Open Records Act. You assert that the Jefferson County Public Schools (JCPS) or Jefferson County Board of Education (JCBE) have willfully and intentionally violated the Kentucky Open Records Act. We categorically deny that characterization, but will provide you with more context and information to help you advise your client.

As an initial matter, you repeatedly reference responses from our office as "well beyond the Act's five-day deadline." The Kentucky Open Record Act requires response "within five (5) days, excepting Saturdays, Sundays, and legal holidays, after the receipt of any such request..." KRS 61.880. This means that for a request received on Thursday, August 10, day 1 would be Friday, August 11, the first day **after** receipt. August 12 and August 13 would not be counted, as they are weekends. Monday, August 14 would be day 2, and day 3 would be Tuesday, August 15. Wednesday, August 16 would be day 4, and the last day for a response, day 5, would be Tuesday, August 17. If you follow the proper counting method, accounting for the fact that JCPS's posted business hours are Monday through Friday from 7:30 a.m. to 4:30 p.m., you will find that the responses you initially counted as 7 or 8 days, were, in fact, 5 business days after receipt.

Additionally, as you are likely aware, Ms. Clark is a sophisticated requester under the Open Records Act. She has filed over 135 requests with JCPS alone. It is not our practice, nor would it be wise, for our agency to attempt to divine what any requester, but especially such a sophisticated requester, "really meant." Instead, as required under the Act, JCPS fulfills requests based on the plain language of the request.

Responses to your concerns are listed below, separated by individual request.

I. August 10, 2023 request for "all communications and correspondence regarding student transportation on 8/9/23 received or sent"

As noted above, when a request is made for records "regarding" a topic, that is the search term utilized. Ms. Clark did not ask for records regarding "buses" or "alphanumeric" or any other related term. She specifically chose the phrase "student transportation." We searched for those records, and made clear in our response that our search had been conducted using that term. We also provided ample opportunity for Ms. Clark to clarify or amend her request, as is demonstrated by her subsequent communication clarifying and changing her request.

On August 17, 2023, Ms. Clark clarified her request to be for “all correspondence on 8/9/23 pertaining to the transportation issue that occurred on 8/9/23, among the following people...” Again, we utilize the plain language of the request to frame our search for responsive records and our efforts to categorize records as responsive or unresponsive. Our computer-aided searches often generate “false hits” or records that may contain the subject phrases but not be “among” the listed individuals. As noted in our response to Ms. Clark, these records contained exempt and non-exempt information, which had to be segregated pursuant to the Act. The records responsive to this request were produced, with the noted exceptions.

You take issue with our statement to Ms. Clark that communications on personal devices, phone calls, or in person conversations were not produced. As you note in your footnotes, in person conversations are not public records. They are not records of any kind, and as such, cannot be produced.

A request for phone calls suffers from a similar deficiency. Call logs have no record of the content of the call itself, and thus no way to determine if any particular call related to a specific issue. There was also no request for call logs, but rather for phone calls themselves. There is no recording of calls on JCPS phone lines, so there is, again, no record to be produced. You mentioned the possibility of minutes or notes related to phone calls. We do not possess any minutes or notes of phone calls related to transportation issues among the listed staff on August 9 or August 10, 2023.

Finally, you assert that text messages on personal devices are records subject to disclosure under the Open Records Act, and that JCPS has withheld a significant number of those records. As a preliminary matter, please note that as has been communicated to Ms. Clark, our agency is not in possession of any text messages from personal devices responsive to this request. The agency does not possess or utilize the private devices of its employees. Therefore, no such records could be produced by JCPS.

You state that these hypothetical personal messages are used or prepared by the agency. That is simply not the case. There is a difference between an agency and its employees. This is not, as you state, merely a semantic debate. The agency consists of the Board of Education. Our employees acting in their capacity as our employees are agents of the Board. Many JCPS employees have agency owned cell phones. The messages on those devices would be subject to production. However, there are not any responsive messages on those devices. However, our employees are still able to act in a private capacity as well. Ms. Clark has specified that she is requesting messages from the personal devices of our employees, however, we are unable to provide those records as JCBE as an agency does not own, possess, use, or create those records.

You state that the recent opinion in *Kentucky Open Government Coalition, Inc. v. Kentucky Department of Fish and Wildlife Resources Commission*, 2022-CA-0170 requires the production of messages on personal devices. This fails to see the clear distinction drawn by the Court of Appeals. In that case, the Court was dealing with members of the Department for Fish and Wildlife Resources Commission, who are appointed officials subject to the Open Records Act in their own right. Their analog in JCPS would be the seven elected members of the Board of Education, not individual JCPS employees.

The Kentucky Court of Appeals rightly distinguished Fish and Wildlife Resources Commission members from employees¹ prior to finding that the commission members themselves qualify as public agencies. *Id.* The Superintendent of Jefferson County Public Schools and various other JCPS staff are not elected or appointed officials. They are only public employees, and as such, their communications on their personal devices are not within the possession, control, use, or maintenance of their employer.

¹ “The Commission members are not paid employees and are required to take the constitutional oath of office.” *Id.*

II. September 25, 2023 request for “all electronic written communications, including emails, texts, instant messages, containing the word “bus,” “buses” or “transportation” sent by or received by the following people on 8/9/23 and 8/10/23”

Ms. Clark never inquired about the difference in results, but if she had asked, we would have explained the difference was due to the wording in her request, chiefly the phrase “among the following people” as opposed to “sent by or received by.” As discussed above, we provide the records requested by the plain language of the request.

You additionally claim that records were improperly withheld due to the Family Educational Rights & Privacy Act (“FERPA”), the Kentucky Family Education Rights & Privacy Act (“KFERPA”), KRS 61.878(1)(k), or KRS 61.878(1)(a). As was noted in our response on November 20, 2023, discrete information protected by these two sections was redacted from the files provided. No records were withheld in their entirety on this basis. As noted, the information redacted pursuant to these sections consists of student identifying information such as student and parent names as well as personal information such as home addresses, personal email address, and personal cell phone numbers. The bulk of the communications remain in the records that were produced. Contrary to your assertion, after weighing public and private interests, the minimum amount of identifying personal information necessary to protect student and individual privacy interest was redacted while leaving in the content of the communications themselves, which is the chief item of public interest.

Some materials were withheld as preliminary drafts, opinions, and recommendations, as allowed by KRS 61.878(1)(i) and (j). These consist largely of preliminary drafts of communications, the final drafts of which were produced. For example, comments on or edits to a draft statement from the Superintendent or a draft response to a media inquiry. The final statement or official response to a media inquiry would have been included in the responsive records.

Other records withheld as preliminary include suggestions or inquiries as to whether a particular course of action may be taken (i.e: “can we...” or “should we...”) where that course of action was ultimately not adopted by the agency. As these recommendations were not adopted by the agency, they continue to remain preliminary. As the Attorney General’s Office has noted, “KRS 61.878(1)(i) and (j) are intended to protect the integrity of the agency’s decision-making process by encouraging the free exchange of opinions and ideas, and to promote informed and frank discussions of matters of concern to the agency.” 00-ORD-139 citing e.g., 94-ORD-118 and 93-ORD-125. Public records that are preliminary in nature, such as these recommendations or opinions “forfeit their exempt status only after they are adopted by the agency as part of its final action.” 00-ORD-139 citing *City of Louisville v. Courier-Journal and Louisville Time, Ky. App., 637 S.W.2d 2d 658 (1982)*; *Kentucky State Board of Medical Licensure v. Courier-Journal and Louisville Times Co., Ky. App., 663 S.W.2d 953 (1983)*; *University of Kentucky v. Courier-Journal and Louisville Times Co., Ky., 830 S.W.2d 373 (1992)*.

In summary, all responsive final records were provided to Ms. Clark, and information exempt pursuant to KRS 61.878(1)(a) or KRS 61.878(1)(k), FERPA, and KFERPA, was simply redacted from the records that were produced.

III. August 10, 2023 request related to AlphaRoute

Records responsive to this request were produced, and Ms. Clark was provided with descriptions of the information withheld or redacted, as well as the reasoning. As was previously stated to Ms. Clark, the full search generated fewer than 85 messages. Over half of those messages were either not responsive to her request at all or duplicates of existing records. The messages withheld as preliminary represent a very small number of messages and are in fact preliminary drafts, opinions and recommendations.

Preliminary records withheld from this request largely include preliminary drafts, as in draft routes or draft stops, which were ultimately changed prior to implementation. These potential routing scenarios are preliminary until such time as they are adopted. None of the draft routing scenarios or recommendations were adopted and implemented, and as such, they retain their classification as preliminary records.

Notwithstanding Ms. Clark's frustration with the lack of records generated by these particular requests, JCPS has fully complied with its obligations under the Open Records Act and produced all non-exempt responsive records.

Sincerely,



Amanda Herzog
Assistant General Counsel

Cc: Kevin C. Brown, General Counsel

Exhibit 2



Jess Clark <jclark@lpm.org>

Records request

19 messages

Jess Clark <jclark@lpm.org>

Thu, Aug 10, 2023 at 9:31 AM

To: Open Records <open.records@jefferson.kyschools.us>

Please provide all communication and correspondence regarding student transportation on 8/9/23 received or sent from the following:

Marty Pollio
Chris Perkins
Donald Robinson
Carolyn Callahan
Katy Deferrari

Open Records <open.records@jefferson.kyschools.us>

Thu, Aug 17, 2023 at 10:31 AM

To: Jess Clark <jclark@lpm.org>

Cc: "Callahan, Carolyn F" <carolyn.callahan@jefferson.kyschools.us>

Ms. Clark,

The only message containing the phrase "student transportation" is attached.

**Amanda Herzog**

Assistant General Counsel

Contracts, Insurance & Data Sharing

Jefferson County Public Schools


3332 Newburg Rd. Louisville, KY 40218

Phone: (502)-485-3584 | Fax: (502) 313-2706

From: Jess Clark <jclark@lpm.org>**Sent:** Thursday, August 10, 2023 9:31 AM**To:** Open Records <open.records@jefferson.kyschools.us>**Subject:** Records request

CAUTION: This email originated from outside of JCPS. Do not click links or open attachments unless you recognize the sender and know the content is safe.

[Quoted text hidden]

 **24-0174 Clark.pdf**
413K

Jess Clark <jclark@lpm.org>
To: Open Records <open.records@jefferson.kyschools.us>
Cc: "Callahan, Carolyn F" <carolyn.callahan@jefferson.kyschools.us>

Mon, Aug 21, 2023 at 4:44 PM

Hi Ms. Herzog,

I wasn't necessarily asking for emails with that phrase, but on the topic. Is there a better way you'd like me to phrase this? I know if in the past you all have provided correspondence related to specific incidents. That's what I'm looking for here: all correspondence on 8/9/23 pertaining to the transportation issues that occurred on 8/9/23, among the following people:

- Marty Pollio
- Chris Perkins
- Donald Robinson
- Carolyn Callahan
- Katy Deferrari

Thank you

[Quoted text hidden]

Open Records <open.records@jefferson.kyschools.us>
To: Jess Clark <jclark@lpm.org>
Cc: "Callahan, Carolyn F" <carolyn.callahan@jefferson.kyschools.us>

Tue, Aug 29, 2023 at 1:34 PM

Ms. Clark,

The records you requested are voluminous. They contain a mixture of exempt and non-exempt information which must be reviewed and redacted in accordance with state and federal law. Additionally, a computer aided search is likely to have pulled some non-responsive messages as well, which must be manually reviewed for responsiveness. This will require additional processing time.

These records will be available to you no later than September 22, 2023.

[Quoted text hidden]

Jess Clark <jclark@lpm.org>
To: Open Records <open.records@jefferson.kyschools.us>
Cc: "Callahan, Carolyn F" <carolyn.callahan@jefferson.kyschools.us>

Tue, Aug 29, 2023 at 5:40 PM

Ok, thank you very much.

[Quoted text hidden]

Jess Clark <jclark@lpm.org>
To: Open Records <open.records@jefferson.kyschools.us>
Cc: "Callahan, Carolyn F" <carolyn.callahan@jefferson.kyschools.us>

Thu, Sep 7, 2023 at 12:38 PM

Hi Ms Herzog,

9C78261B-5900-407C-B86E-1CF3F234848F : 000024 of 000077

Can you add Marcus Dobbs to the list of people whose communications are to be searched in regards to the transportation issues on 8/9? Or would you like me to file a separate request?

[Quoted text hidden]

Open Records <open.records@jefferson.kyschools.us>
To: Jess Clark <jclark@lpm.org>
Cc: "Callahan, Carolyn F" <carolyn.callahan@jefferson.kyschools.us>

Thu, Sep 7, 2023 at 1:04 PM

This is the same as the other email search. We pulled the messages when the request was originally filed in order to determine how many results there are and set the appropriate extension timeframe. We would need a new request for Mr. Dobbs's messages.

[Quoted text hidden]

Jess Clark <jclark@lpm.org>
To: Open Records <open.records@jefferson.kyschools.us>
Cc: "Callahan, Carolyn F" <carolyn.callahan@jefferson.kyschools.us>

Thu, Sep 7, 2023 at 1:05 PM

Got it. I'll file that shortly. Thank you.

[Quoted text hidden]

6 attachments



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image002.png
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Exhibit 3



Jess Clark <jclark@lpm.org>

records dispute

24 messages

Jess Clark <jclark@lpm.org>

Mon, Oct 9, 2023 at 10:40 AM

To: Open Records <open.records@jefferson.kyschools.us>, "Callahan, Carolyn F."

<carolyn.callahan@jefferson.kyschools.us>, "Hebert, Mark R." <mark.hebert@jefferson.kyschools.us>

Cc: "Brown, Kevin C." <kevin.brown@jefferson.kyschools.us>, Rebecca Feldhaus Adams <bec@wfpl.org>, John Boyle <jboyle@louisvillepublicmedia.org>

Ms. Herzog, Carolyn and Mark,

I'm writing in response to several issues in which JCPS is illegally withholding records. We have come to this conclusion after conversations with our attorney Jon Fleischaker.

First, in regards to the response to my request dated Aug. 10, 2023, and revised Aug. 21 for all electronic communication records sent or received by certain top JCPS officials regarding the unfolding transportation crisis:

In the response I received on Sept. 22, 2023, Ms. Herzog told me there were no records responsive to my request. When I contested, based on the knowledge that officials must have communicated electronically, whether by email, text, or instant message, Ms. Herzog wrote that my request "would not capture things like text messages sent on personal devices, phone calls, or in person conversations, which are generally how much of our staff communicates during real time, urgent situations."

It is our opinion and that of our attorney that open records law does not exempt communications between public employees conducting the public's business because they are transmitted on a personal device.

These text messages or direct messages, while they may have been sent on personal devices, were sent discussing a matter of great public importance, and were sent by public officials doing the public's work.

JCPS must provide these records immediately. It has been nearly two months since my initial request.

Second, in regards to my request on Aug. 10, 2023 and revised on Aug. 21 for "all email communications between anyone with an @alpharoute.com email address" and top JCPS officials:

I did not receive a timely response as defined under state law. The initial request was denied on Aug. 17, seven days after I submitted it. When I revised the request, I was promised the records on Sept. 15. They were not sent to me until Sept. 28, and only after I followed up.

Most importantly, these records are incomplete. All communications provided in the response by JCPS occurred after February 2023. However, AlphaRoute has been working with JCPS top staff since at least 2021.

In filling the request, Ms. Herzog wrote that "Pursuant to KRS § 61.878(1)(i) and (j), both 'preliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action to a public agency' and 'preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended' are exempted from public inspection. Documents consisting of preliminary opinions and recommendations have been withheld."

It appears that years of correspondence is being illegally withheld under this overbroad interpretation of the exemption. Each email found to or from an @alpharoute.com address must be given over, or denied *with particularity*, with the specific reason cited for each email JCPS believes is exempt.

Furthermore, JCPS should be careful they are not exempting emails from AlphaRoute on the basis that they are with “private individuals.” AlphaRoute is a corporation doing public business with JCPS, and is therefore not covered under this particular exemption.

JCPS should also be careful not to apply the preliminary recommendations and memoranda exemption to emails to or from AlphaRoute when the emails do not truly contain preliminary opinions and recommendations. Emails between JCPS and AlphaRoute are the public’s business and the public deserves to know the facts of how AlphaRoute and JCPS staff crafted and implemented the transportation plan.

Third, I am still awaiting a response for materials used to calculate the average amount of instructional time lost to bus delays, as presented by Marty Pollio on Sept 26.

On Sept. 18 I requested “any and all records kept by JCPS tracking instructional time lost to transportation delays for the 2023-2024 school year, up to the current date (Sept. 18),” after confirming with JCPS Superintendent Marty Pollio at a press conference that the district was tracking the time.

On Sept. 25 I received a response saying that there were no records responsive to my request:

“Schools are manually tracking bus arrival times on paper, which can then be cross referenced with student records to compute the instructional minutes lost for any given student as schools meet with parents and implement any IEPs,” the records custodian wrote. “The records themselves do not track instructional time lost, and do require staff expertise to cross reference bell times and individual student schedules to compute and determine any instructional minutes lost. For this reason, we do not have any existing records responsive to your request.”

Later that day (Sept. 25) I requested to inspect records for two specific schools in person: Waggener and Newburg. These were provided to me about a week later.

The very next evening (Sept. 26), JCPS Superintendent Marty Pollio gave a presentation to the board which included the average instructional time lost — the very information I had requested on Sept. 18 and was told on Sept. 25 the district did not have.

When I emailed the district that evening to ask for an explanation, district spokesperson Carolyn Callahan told me “we manually collected information from schools and put together the estimated averages from that information. We did not have that complete until Sept. 26.”

I followed up the next day and asked for all records collected and documents created, including spreadsheets, in calculating the average instructional time lost. I was told on Oct. 2 there might not be a spreadsheet by Mark Hebert on the phone. Mark told me it was calculated by a “group” who got together, reviewed paper copies and made an estimate. He offered me the original school-based documents, but said it would take at least three months to fill the request.

There are more than 150 schools, about 600 routes, and 67,000 students who use transportation, with dozens of buses late each day. It seems unlikely to me that a group made this calculation all in a collective hive mind without having a central document or spreadsheet to calculate the average instructional time lost.

I reiterated my request for those centralized materials on Oct 4. I still have not heard back.

JCPS must provide these materials immediately, as it has been more than a week since my request for the centralized materials, and three weeks since I made my initial request.

The public deserves to understand precisely how this calculation was derived, as it is a matter of great public importance.

Thank you for your attention to these issues. Please provide a written response within three business days.

Sincerely,

Open Records <open.records@jefferson.kyschools.us>

Mon, Oct 9, 2023 at 11:58 AM

To: Jess Clark <jclark@lpm.org>, "Callahan, Carolyn F" <carolyn.callahan@jefferson.kyschools.us>, "Hebert, Mark R" <mark.hebert@jefferson.kyschools.us>

Cc: "Brown, Kevin C" <kevin.brown@jefferson.kyschools.us>, Rebecca Feldhaus Adams <bec@wfpl.org>, John Boyle <jboyle@louisvillepublicmedia.org>

Ms. Clark,

We understand your frustration but disagree with your legal assertions.

First, you claim that text messages on personal devices are public records and should be turned over. To be clear, our initial response posits that there may be text messages on personal devices, however, as we are not in possession of our employees personal devices, we are not able to verify that and have not withheld those records. We simply do not maintain or possess them.

The Attorney General in 21-ORD-127 affirmed prior holdings that “[c]ell phone communications, including calls or text messages, made using a private cell phone that is paid for with private funds, are not prepared by or in the possession of a public agency.” citing 15-ORD-226 In short, communications on privately owned devices are not public records within the meaning of the Open Records Act and are not in the possession of the agency.

Simply put, the established law in Kentucky is clear that personal devices paid for with personal funds are not subject to the Kentucky Open Records Act.

Second, you indicate that you believe a substantial number of communications with Alpha Route have been withheld from the records you were provided. That is not the case. The preliminary drafts and correspondence withheld were communications between JCPS staff and the vendor of draft documents or work product. For example, draft charts that Alpha Route employees themselves state are “not complete” or emails of various potential routes or stops scenarios that were ultimately not implemented. These are draft materials that were never finalized. As a vendor, these preliminary communications are the same as any preliminary suggestions or drafts that are created and shared by employees internally. They are not subject to release until finalized. Any finalized records were provided to you.

It is important to note that the search for any and all records between the 4 employees you named for “alpharoute.com” only generated 83 search results, many of which were nonresponsive as they contained the phrase “alpharoute.com” but were not actually communications with someone at an “@alpharoute.com” email address.

Finally, you indicate that you have requested an intermediate calculation sheet multiple times. Your initial request was for the documents that serve as the basis of the calculations of instructional time lost. Those documents are paper forms that were collected from every school and manually tabulated by central office staff. In a call with Mark Hebert regarding the volume of those records and the time it would take to redact them, you told Mr. Hebert to "hold on those for now" as you wanted to request an intermediate calculation sheet you believe should exist. Your first request for that was on October 4, 2023, which was only 3 business days ago. We are working to determine if such an intermediate sheet exists and to respond to that request, but the 5 business days after receipt allocated by the Kentucky Open Records Act has not yet run. We anticipate having a more thorough answer to you on that request by the close of business Wednesday, October 11, which is 5 business days after receipt of that request.



Amanda Herzog

Assistant General Counsel

Contracts, Insurance & Data Sharing

Jefferson County Public Schools

3332 Newburg Rd. Louisville, KY 40218

Phone: (502)-485-3584 | Fax: (502) 313-2706

From: Jess Clark <jclark@lpm.org>
Sent: Monday, October 9, 2023 10:40 AM
To: Open Records <open.records@jefferson.kyschools.us>; Callahan, Carolyn F <carolyn.callahan@jefferson.kyschools.us>; Hebert, Mark R <mark.hebert@jefferson.kyschools.us>
Cc: Brown, Kevin C <kevin.brown@jefferson.kyschools.us>; Rebecca Feldhaus Adams <bec@wfpl.org>; John Boyle <jboyle@louisvillepublicmedia.org>
Subject: records dispute

CAUTION: This email originated from outside of JCPS. Do not click links or open attachments unless you recognize the sender and know the content is safe.

[Quoted text hidden]

Jess Clark <jclark@lpm.org>

Mon, Oct 9, 2023 at 12:11 PM

To: Open Records <open.records@jefferson.kyschools.us>

Cc: "Callahan, Carolyn F" <carolyn.callahan@jefferson.kyschools.us>, "Hebert, Mark R"

<mark.hebert@jefferson.kyschools.us>, "Brown, Kevin C" <kevin.brown@jefferson.kyschools.us>, Rebecca Feldhaus Adams <bec@wfpl.org>, John Boyle <jboyle@louisvillepublicmedia.org>

Thank you for your response. I will forward this to our attorneys.

In the meantime, I would like to correct your timeline for my request of the centralized records. You stated I first requested those on Oct 4. My first request for those was on Sept 27 at 10:53 AM.

Today is the ninth business day since I requested those centralized materials. Please provide them as soon as possible.

Thank you,

[Quoted text hidden]



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Open Records <open.records@jefferson.kyschools.us>

Mon, Oct 9, 2023 at 12:19 PM

To: Jess Clark <jclark@lpm.org>

Cc: "Callahan, Carolyn F" <carolyn.callahan@jefferson.kyschools.us>, "Hebert, Mark R" <mark.hebert@jefferson.kyschools.us>, "Brown, Kevin C" <kevin.brown@jefferson.kyschools.us>, Rebecca Feldhaus Adams <bec@wfpl.org>, John Boyle <jboyle@louisvillepublicmedia.org>

Your request on September 27 was for the materials collected. That is the item Mark Hebert discussed with you. We have the thousands of pages of materials collected from schools that constitute the authoritative source record for the data that was presented and the calculations that were done. Those paper records contain a significant amount of student information, which must be redacted. When you spoke to Mark, you stated that you wanted to hold on that request due to the volume and the time needed to redact such a significant amount of material and that you would follow up with a request for any sort of intermediary calculations, which indicates that you, at least at that time, had not understood your initial request to be for intermediary calculations or notes written as employees manually tabulated data from the paper records.

Are you saying you do want us to continue processing that request for the thousands of pages of paper from individual schools?



Amanda Herzog

Assistant General Counsel

Contracts, Insurance & Data Sharing

Jefferson County Public Schools

3332 Newburg Rd. Louisville, KY 40218

Phone: (502)-485-3584 | Fax: (502) 313-2706

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From: Jess Clark <jclark@lpm.org>
Sent: Monday, October 9, 2023 12:12 PM
To: Open Records <open.records@jefferson.kyschools.us>
Cc: Callahan, Carolyn F <carolyn.callahan@jefferson.kyschools.us>; Hebert, Mark R <mark.hebert@jefferson.kyschools.us>; Brown, Kevin C <kevin.brown@jefferson.kyschools.us>; Rebecca Feldhaus Adams <bec@wfpl.org>; John Boyle <jboyle@louisvillepublicmedia.org>
Subject: Re: records dispute

CAUTION: This email originated from outside of JCPS. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Thank you for your response. I will forward this to our attorneys.

In the meantime, I would like to correct your timeline for my request of the centralized records. You stated I first requested those on Oct 4. My first request for those was on Sept 27 at 10:53 AM.

Today is the ninth business day since I requested those centralized materials. Please provide them as soon as possible.

Thank you,

On Mon, Oct 9, 2023 at 11:58AM Open Records <open.records@jefferson.kyschools.us> wrote:

Ms. Clark,

We understand your frustration but disagree with your legal assertions.

First, you claim that text messages on personal devices are public records and should be turned over. To be clear, our initial response posits that there may be text messages on personal devices, however, as we are not in possession of our employees personal devices, we are not able to verify that and have not withheld those records. We simply do not maintain or possess them.

The Attorney General in 21-ORD-127 affirmed prior holdings that “[c]ell phone communications, including calls or text messages, made using a private cell phone that is paid for with private funds, are not prepared by or in the possession of a public agency.” citing 15-ORD-226 In short, communications on privately owned devices are not public records within the meaning of the Open Records Act and are not in the possession of the agency.

9C78261B-5900-407C-B86E-1CF3F234848F : 000032 of 000077

Simply put, the established law in Kentucky is clear that personal devices paid for with personal funds are not subject to the Kentucky Open Records Act.

Second, you indicate that you believe a substantial number of communications with Alpha Route have been withheld from the records you were provided. That is not the case. The preliminary drafts and correspondence withheld were communications between JCPS staff and the vendor of draft documents or work product. For example, draft charts that Alpha Route employees themselves state are “not complete” or emails of various potential routes or stops scenarios that were ultimately not implemented. These are draft materials that were never finalized. As a vendor, these preliminary communications are the same as any preliminary suggestions or drafts that are created and shared by employees internally. They are not subject to release until finalized. Any finalized records were provided to you.

It is important to note that the search for any and all records between the 4 employees you named for “[alpharoute.com](#)” only generated 83 search results, many of which were nonresponsive as they contained the phrase “[alpharoute.com](#)” but were not actually communications with someone at an “[@alpharoute.com](#)” email address.

Finally, you indicate that you have requested an intermediate calculation sheet multiple times. Your initial request was for the documents that serve as the basis of the calculations of instructional time lost. Those documents are paper forms that were collected from every school and manually tabulated by central office staff. In a call with Mark Hebert regarding the volume of those records and the time it would take to redact them, you told Mr. Hebert to “hold on those for now” as you wanted to request an intermediate calculation sheet you believe should exist. Your first request for that was on October 4, 2023, which was only 3 business days ago. We are working to determine if such an intermediate sheet exists and to respond to that request, but the 5 business days after receipt allocated by the Kentucky Open Records Act has not yet run. We anticipate having a more thorough answer to you on that request by the close of business Wednesday, October 11, which is 5 business days after receipt of that request.

Amanda Herzog

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[Quoted text hidden]

Jess Clark <jclark@lpm.org>

Mon, Oct 9, 2023 at 12:34 PM

To: Open Records <open.records@jefferson.kyschools.us>

Cc: "Callahan, Carolyn F" <carolyn.callahan@jefferson.kyschools.us>, "Hebert, Mark R"

<mark.hebert@jefferson.kyschools.us>, "Brown, Kevin C" <kevin.brown@jefferson.kyschools.us>, Rebecca Feldhaus Adams <bec@wfpl.org>, John Boyle <jboyle@louisvillepublicmedia.org>

Ms Herzog,

On Sept. 27 I said by email "Per open records law, can you please provide the materials collected, spreadsheets and other materials created in estimating the averages." That is clearly broad language that is meant to include intermediary documents that allowed Pollio to give the public an estimate, along with the materials collected from the schools.

Mark called me on the following Monday to tell me that the school-based materials would take 3 months to get back to me. Which is why I said to hold it, and go ahead with getting me the intermediary documents, which were also a part of that Sept 27 request. During the call he seemed not sure those documents existed. But I pushed back because that seems impossible and asked him to please move forward with finding them and getting them to me.

I followed up by email once he confirmed their actual existence on Oct 4. But just because staff took a week to find out if what I was asking for existed doesn't change the date I asked for it. It has been nine days.

I do not wish to request the school-based documents yet because I do not wish to saddle the department with the workload if my questions can be answered by the intermediary document. Please continue to hold off on processing the

school-based documents. I look forward to seeing the intermediary documents by EOB Wednesday.

Thank you,

[Quoted text hidden]

2 attachments



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Jess Clark <jclark@lpm.org>

Thu, Nov 9, 2023 at 5:19 PM

To: Open Records <open.records@jefferson.kyschools.us>

Cc: "Callahan, Carolyn F" <carolyn.callahan@jefferson.kyschools.us>, "Hebert, Mark R"

<mark.hebert@jefferson.kyschools.us>, "Brown, Kevin C" <kevin.brown@jefferson.kyschools.us>, Rebecca Feldhaus Adams <bec@wfpl.org>, John Boyle <jboyle@louisvillepublicmedia.org>

Hello,

In light of the [recent Kentucky Supreme Court ruling](#), I am re-submitting my original request for for all electronic communication records sent or received by the following top JCPS officials regarding the unfolding transportation crisis on August 9, 2023. I have revised this request to include fewer employees to expedite the turnaround time.

Marty Pollio
Chris Perkins
Marcus Dobbs

By electronic communication I mean communications that include, but are not limited to email, SMS, texts, i-messages and any other electronic messages, sent on personal or work devices. As you have already provided what you say exists of email communications, please provide all other forms of electronic communication on this topic.

Because JCPS wrongfully withheld these communications, originally requested on Aug 10, (and Sept 7 for Dobbs) I respectfully ask that you expedite this request.

Please let me know when this will be available.

Sincerely,

[Quoted text hidden]

Open Records <open.records@jefferson.kyschools.us>

Fri, Nov 17, 2023 at 2:03 PM

To: Jess Clark <jclark@lpm.org>

Cc: "Callahan, Carolyn F." <carolyn.callahan@jefferson.kyschools.us>, "Hebert, Mark R."

<mark.hebert@jefferson.kyschools.us>, "Brown, Kevin C." <kevin.brown@jefferson.kyschools.us>, Rebecca Feldhaus Adams

<bec@wfpl.org>, John Boyle <jboyle@louisvillepublicmedia.org>

Ms. Clark,

We are in receipt of your request for electronic communication records sent or received by Marty Pollio, Chris Perkins, and Marcus Dobbs. As you noted that you have received the email communications, to the extent they exist, responsive to your request. Additionally, as previously communicated to you on November 28, we are still processing and working to produce all emails to or from those individuals on August 9 or August 10, 2023 containing the word “bus,” “buses,” or “transportation.” As was previously stated, these records will be available to you no later than November 30, 2023.

Given that all responsive email records have either already been produced or are in the process of production pursuant to a separate request, this response is limited to SMS, texts, i-messages or other electronic communications.

We do not possess any additional records responsive to your request, other than what was previously produced or is being processed to provide to you no later than November 30, 2023. The individuals you listed do not utilize a JCPS cell phone, and as such, any text messages, SMS, or i-messages are not maintained or possessed by our agency.

We understand that you have interpreted the recent Kentucky Court of Appeals ruling in *Kentucky Open Government Coalition, Inc. v. Kentucky Department of Fish and Wildlife Resources Commission*, 2022-CA-0170, to alter the existing law regarding the production of text messages. However, that case specifically applies to government officers. The Court specifically distinguished the case of paid employees, who are not covered by the definition of a “public agency” in KRS 61.870(1).

The individuals you have listed are not “state or local government officers.” They are not politically appointed or elected, and they do not take an oath of office. They are simply paid employees of a government agency. As such, the ruling in 2022-CA-0170 is not applicable to this request. Instead, the governing precedent is the decision issued by the Kentucky Attorney General in 15-ORD-226 which held that “Cell phone communications, such as calls and text messages, on the private cell phones of its employees are not within the possession of [the agency].” As the personal cell phones of employees are not within the possession of JCPS, we are unable to search or produce any records that were exclusively created and maintained on those devices, such as text messages.



Amanda Herzog

Assistant General Counsel

Contracts, Insurance & Data Sharing

Jefferson County Public Schools

3332 Newburg Rd. Louisville, KY 40218

Phone: (502)-485-3584 | Fax: (502) 313-2706

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Exhibit 4



Jess Clark <jclark@lpm.org>

Records request

Herzog, Amanda M <amanda.herzog@jefferson.kyschools.us>

Mon, Sep 25, 2023 at 2:27 PM

To: Jess Clark <jclark@lpm.org>

Cc: "Callahan, Carolyn F" <carolyn.callahan@jefferson.kyschools.us>, "Hebert, Mark R" <mark.hebert@jefferson.kyschools.us>, John Boyle <jboyle@louisvillepublicmedia.org>, Rebecca Feldhaus Adams <bec@wfpl.org>

The Microsoft Compliance tool searches our Microsoft suite of products. I don't have the technical background to provide a more complete answer than that. However, it would not capture things like text messages sent on personal devices, phone calls, or in person conversations, which are generally how much of our staff communicates during real time, urgent situations.

As previously discussed, with a computer aided search, we also utilize keywords to narrow results in order to make results available in a faster timetable. In this case, the keywords utilized were "transportation" or "bus" If you have additional keywords you would like us to use, we are happy to re-run the search, but again things like messages on personal devices, phone calls, or in person conversations will not be reflected. We do not have a written record of phone call topic or of in person conversations, and employee personal devices are outside the possession of the agency.

[Quoted text hidden]

[Quoted text hidden]

[Quoted text hidden]

[Quoted text hidden]

[Quoted text hidden]

[Quoted text hidden]

[Quoted text hidden]

Amanda Herzog

Assistant General Counsel

Contracts, Insurance & Data Sharing

Jefferson County Public Schools

[3332 Newburg Rd. Louisville, KY 40218](#)

Phone: (502)-485-3584 | Fax: (502) 313-2706

From: Open Records

Sent: Tuesday, August 29, 2023 1:34 PM

To: Jess Clark <jclark@lpm.org>

Cc: Callahan, Carolyn F <carolyn.callahan@jefferson.kyschools.us>

Subject: RE: Records request

9C78261B-5900-407C-B86E-1CF3F234848F : 000037 of 000077

Ms. Clark,

The records you requested are voluminous. They contain a mixture of exempt and non-exempt information which must be reviewed and redacted in accordance with state and federal law. Additionally, a computer aided search is likely to have pulled some non-responsive messages as well, which must be manually reviewed for responsiveness. This will require additional processing time.

These records will be available to you no later than September 22, 2023.

Amanda Herzog

Assistant General Counsel

Contracts, Insurance & Data Sharing

Jefferson County Public Schools

3332 Newburg Rd. Louisville, KY 40218

Phone: (502)-485-3584 | Fax: (502) 313-2706

From: Jess Clark <jclark@lpm.org>
Sent: Monday, August 21, 2023 4:45 PM
To: Open Records <open.records@jefferson.kyschools.us>
Cc: Callahan, Carolyn F <carolyn.callahan@jefferson.kyschools.us>
Subject: Re: Records request

CAUTION: This email originated from outside of JCPS. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Hi Ms. Herzog,

I wasn't necessarily asking for emails with that phrase, but on the topic. Is there a better way you'd like me to phrase this? I know if in the past you all have provided correspondence related to specific incidents. That's what I'm looking for here: all correspondence on 8/9/23 pertaining to the transportation issues that occurred on 8/9/23, among the following people:

Marty Pollio

Chris Perkins
Donald Robinson
Carolyn Callahan
Katy Deferrari

Thank you

On Thu, Aug 17, 2023 at 10:31 AM Open Records <open.records@jefferson.kyschools.us> wrote:

Ms. Clark,

The only message containing the phrase “student transportation” is attached.

Amanda Herzog

Assistant General Counsel

Contracts, Insurance & Data Sharing

Jefferson County Public Schools

[3332 Newburg Rd. Louisville, KY 40218](https://www.jefferson.kyschools.us)

Phone: (502)-485-3584 | Fax: (502) 313-2706

[Quoted text hidden]

9C78261B-5900-407C-B86E-1CF3F234848F : 000039 of 000077

Exhibit 5



Jess Clark <jclark@lpm.org>

ORR: alpharoute

15 messages

Jess Clark <jclark@lpm.org>
To: Open Records <open.records@jefferson.kyschools.us>

Thu, Aug 10, 2023 at 10:35 AM

Hello,

Please provide all email communications between anyone with an @alpharoute.com email address and any member of central office staff up to 8/10/23.

Thank you,

Open Records <open.records@jefferson.kyschools.us>
To: Jess Clark <jclark@lpm.org>
Cc: "Callahan, Carolyn F" <carolyn.callahan@jefferson.kyschools.us>

Thu, Aug 17, 2023 at 10:32 AM

Ms. Clark,

We are not able to perform the email search you requested. We do not have a list or definition of "central office staff."



Amanda Herzog

Assistant General Counsel

Contracts, Insurance & Data Sharing

Jefferson County Public Schools

3332 Newburg Rd. Louisville, KY 40218

Phone: (502)-485-3584 | Fax: (502) 313-2706

From: Jess Clark <jclark@lpm.org>
Sent: Thursday, August 10, 2023 10:35 AM
To: Open Records <open.records@jefferson.kyschools.us>
Subject: ORR: alpharoute

9C78261B-5900-407C-B86E-1CF3F234848F : 000041 of 000077

CAUTION: This email originated from outside of JCPS. Do not click links or open attachments unless you recognize the sender and know the content is safe.

[Quoted text hidden]

Jess Clark <jclark@lpm.org>
To: Open Records <open.records@jefferson.kyschools.us>
Cc: "Callahan, Carolyn F" <carolyn.callahan@jefferson.kyschools.us>

Mon, Aug 21, 2023 at 4:47 PM

Please consider this a revised request:

Please provide all electronic communications between anyone with an @alpharoute.com and the following employees up to 8/18/23.

Chris Perkins
Katy DeFerrari
Marty Pollio
Donald Robinson

[Quoted text hidden]

Open Records <open.records@jefferson.kyschools.us>
To: Jess Clark <jclark@lpm.org>
Cc: "Callahan, Carolyn F" <carolyn.callahan@jefferson.kyschools.us>

Tue, Aug 29, 2023 at 1:34 PM

Ms. Clark,

The records you requested are voluminous. They contain a mixture of exempt and non-exempt information which must be reviewed and redacted in accordance with state and federal law. Additionally, a computer aided search is likely to have pulled some non-responsive messages as well, which must be manually reviewed for responsiveness. This will require additional processing time.

These records will be available to you no later than September 15, 2023.

[Quoted text hidden]

Jess Clark <jclark@lpm.org>
To: Open Records <open.records@jefferson.kyschools.us>
Cc: "Callahan, Carolyn F" <carolyn.callahan@jefferson.kyschools.us>

Tue, Aug 29, 2023 at 5:40 PM

Ok, thank you.

[Quoted text hidden]

Jess Clark <jclark@lpm.org>
To: Open Records <open.records@jefferson.kyschools.us>

Thu, Sep 7, 2023 at 12:36 PM

Hi Ms. Herzog,

Have you already started on this request? Can I add Marcus Dobbs to this list? Or would you prefer I file a separate request?

Thank you,

[Quoted text hidden]

Open Records <open.records@jefferson.kyschools.us>
To: Jess Clark <jclark@lpm.org>

Thu, Sep 7, 2023 at 1:04 PM

Cc: "Callahan, Carolyn F" <carolyn.callahan@jefferson.kyschools.us>

We pulled the messages when the request was originally filed in order to determine how many results there are and set the appropriate extension timeframe. We would need a new request for Mr. Dobbs's messages.

[Quoted text hidden]

Jess Clark <jclark@lpm.org>
To: Open Records <open.records@jefferson.kyschools.us>
Cc: "Callahan, Carolyn F" <carolyn.callahan@jefferson.kyschools.us>

Mon, Sep 18, 2023 at 9:54 AM

Hi all,

Checking in on this records request, which was scheduled to come in Friday. Can you give me a status update?

Thanks!

[Quoted text hidden]

4 attachments



image002.png
12K



image003.png
12K



image002.png
12K



image003.png
12K

Open Records <open.records@jefferson.kyschools.us>
To: Jess Clark <jclark@lpm.org>
Cc: "Callahan, Carolyn F" <carolyn.callahan@jefferson.kyschools.us>

Mon, Sep 18, 2023 at 11:51 AM

I apologize. I missed it. I will have it to you in the next couple days.

[Quoted text hidden]

9C78261B-5900-407C-B86E-1CF3F234848F : 000043 of 000077

Jess Clark <jclark@lpm.org>
To: Open Records <open.records@jefferson.kyschools.us>
Cc: "Callahan, Carolyn F" <carolyn.callahan@jefferson.kyschools.us>

Mon, Sep 18, 2023 at 12:57 PM

No problem, thank you for the update.

[Quoted text hidden]

2 attachments



image002.png
12K



image002.png
12K

Open Records <open.records@jefferson.kyschools.us>
To: Jess Clark <jclark@lpm.org>
Cc: "Callahan, Carolyn F" <carolyn.callahan@jefferson.kyschools.us>


Thu, Sep 28, 2023 at 12:06 PM

Ms. Clark,

The records you requested are attached.

Pursuant to KRS § 61.878(1)(i) and (j), both “preliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action to a public agency” and “preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended” are exempted from public inspection. Documents consisting of preliminary opinions and recommendations have been withheld.

[Quoted text hidden]

 **24-0242 Clark.pdf**
2923K

Jess Clark <jclark@lpm.org>
To: Open Records <open.records@jefferson.kyschools.us>

Thu, Sep 28, 2023 at 12:07 PM

Thanks very much,

[Quoted text hidden]

4 attachments

Exhibit 6



Jess Clark <jclark@lpm.org>

records request

Jess Clark <jclark@lpm.org>

Mon, Sep 25, 2023 at 1:47 PM

To: Open Records <open.records@jefferson.kyschools.us>

Cc: "Callahan, Carolyn F." <carolyn.callahan@jefferson.kyschools.us>, "Hebert, Mark R."

<mark.hebert@jefferson.kyschools.us>, John Boyle <jboyle@louisvillepublicmedia.org>, Rebecca Feldhaus Adams

<bec@wfpl.org>

Per open records laws, please provide all electronic written communications, including emails, texts, instant messages, containing the word "bus," "buses" or "transportation" sent by or received by the following people on 8/9/23 and 8/10/23

Marty Pollio
Carolyn Callahan
Marcus Dobbs
Chris Perkins
Katy DeFerrari
Robert Moore

As this request is a revised version of a previous request that yielded no results, and as I am a journalist conducting my work in the public interest, I respectfully request you to expedite this search.

Thank you very much,

9C78261B-5900-407C-B86E-1CF3F234848F : 000046 of 000077

Exhibit 7



Michael P. Abate
(502) 416-1630
mabate@kaplanjohnsonlaw.com

2 January 2024

Amanda Herzog
JCPS Assistant General Counsel
Vanhoose Education Center
3332 Newburg Road
Louisville, KY 40218
Via email:
open.records@jefferson.kyschools.us

**Re: Open Records
Requests**

Dear Ms. Herzog:

This firm and the undersigned represent Louisville Public Media and its reporter, Jess Clark. As you know, Ms. Clark recently submitted several open records requests to Jefferson County Public Schools (“JCPS”) related to the transportation crisis that began at the beginning of this school year. JCPS has produced some records in response to those requests, however, its responses indicate that it is refusing to produce public records that must be released under Kentucky’s Open Records Act (the “Act”). I am writing in the hope that we may resolve these outstanding issues efficiently and without litigation.

Ms. Clark submitted two open records requests on August 10. The first request seeks: “all communication and correspondence regarding student transportation on 8/9/23 received or sent” by certain JCPS officials. Ex. 1, 8/10/2023 ORR and Email Thread. JCPS responded on August 17 (well beyond the Act’s five-day deadline) by producing one document that contained the phrase “student transportation.” *Id.* Ms. Clark then followed-up to note that JCPS misread her request; Ms. Clark did not seek records containing that specific phrase, rather she sought all communications between the named JCPS officials regarding the topic of student transportation. *Id.* at 3. Eight days later—again, beyond the Act’s five-day deadline—JCPS informed Ms. Clark it would produce responsive public records “no later than September 22, 2023. *Id.*

JCPS’s response on the 22nd denied possession of any public records responsive to Ms. Clark’s request. The same day, Ms. Clark followed up seeking to clarify her request because it is not believable that the named JCPS officials did not communicate during the transportation crisis on August 9. Ex. 2, Denial and Email Thread. JCPS responded by incorrectly asserting that her request did “not capture things like text messages sent on personal devices, phone calls, or in person conversations, which are generally how much of our staff communicates during real time, urgent situations.” *Id.* On the contrary, by definition, an open records request always includes these records.¹ That is because the Open Records Act defines “public record” broadly to include all records used by a public agency “regardless of physical form or characteristic.” KRS 61.870(2). In other words, it is the nature and purpose of a document that determines its status as a public record, not where the record is stored. *Kentucky Open Gov’t Coal., Inc. v. Kentucky Dep’t of Fish & Wildlife Res. Comm’n*, No. 2022-CA-0170-MR, 2023 WL 7095744, *9 (Ky. App. Oct. 27,

¹ Of course, in-person conversations are not public records that can be produced under the Act. However, any minutes or notes memorializing those conversations are.

2023). That means text messages on public employees' personal devices related to public business are public records under the Act. See KRS 61.870(2).

JCPS' refusal to produce the requested public records caused Ms. Clark to submit another request on September 25th. Ms. Clark specifically requested:

"Per open records law, please provide all electronic written communications, including emails, texts, instant messages, containing the word "bus," buses" or "transportation" send by or received by the following people on 8/9/23 and 8/10/23:

Marty Pollio

Carolyn Callahan

Marcus Dobbs

Chris Perkins

Katy DeFerrari

Robert Moore

Ex. 3, 9/25/2023 ORR. This request was necessary because JCPS continued to refuse to provide responsive public records responsive to Ms. Clark's first request. Specifically, JCPS represented to Ms. Clark that it used a "compliance tool" that searched for emails with the words "bus" and "transportation" and that tool produced no responsive records. Ex. 2, p. 1. JCPS acknowledged receipt of the request on September 28, but informed Ms. Clark it needed until November 30th to review the records for material exempt from production under the Act. On that day, JCPS produced 433 pages of responsive email records. Many of those emails were generated on August 9 and contained the words "bus" and "transportation." It is unclear why JCPS did not produce these in response to Ms. Clark's first request. To date, JCPS has not offered any explanation for its failure to produce these records or its "compliance tool's" apparent failure to locate them. JCPS compounded its error by refusing to produce other records pursuant to the Act's preliminary records exemption (KRS 61.878(1)(i)-(j)), the Family Educational Rights & Privacy Act ("FERPA"), and the Act's personal privacy exemption. KRS 61.878(1)(a). JCPS' denial, however, did not even attempt to make the showings required to properly invoke those exemptions. Ex. 4, p. 4.

Ms. Clark submitted a second open records request on August 10, 2023 seeking: "email communications between anyone with an '@alpharoute' email address and any member of central office staff up to 8/10/2023. Ex. 5, Alpharoute ORR and Email Thread. After several weeks of follow-up emails clarifying the request, Ms. Clark's request was revised to include certain named JCPS officials' correspondence with individuals with an '@alpharoute' email address. *Id.* Eventually, JCPS produced some records responsive to Ms. Clark's request but withhold an unknown number of records purportedly pursuant to the Act's preliminary records exemptions (KRS 61.878(1)(i)-(j)), but JCPS has not come close to meeting the requirements necessary to invoke those exemptions. *Id.* at 4.

JCPS' responses to Ms. Clark's requests are clearly inadequate. For the reasons explained herein, JCPS has willfully violated the Act. It should produce the requested public records now to avoid costly and time-consuming litigation that will only serve to further deepen the public's concern over JCPS' handling of the ongoing transportation crisis.

1. August 10, 2023 Request (Student Transportation)

JCPS officials' electronic communications regarding the transportation crisis are undoubtedly public records that must be produced under the Act. JCPS is simply wrong when it asserts that the Open Records Act does "not capture things like text messages sent on personal devices." Ex. 2, p. 1. The plain terms of the Act make clear that the definition of "public record" turns on the record's content, not its location. The Act broadly defines "public record" to mean:

"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 Kentucky Court of Appeals recently reaffirmed this means "a public record may be **prepared by or used by** a public agency but not necessarily in the possession of a public agency." *Kentucky Open Gov't Coal*, 2023 WL 7095744 at *9 (emphasis added). Accordingly, a text message stored on a personal cell phone is considered a public record if it is used by the public agency in any capacity. *Id.* Indeed, that opinion only continued a long line of cases that rejected agencies' attempts to avoid disclosing public records by storing them off public property. Since the inception of the Act, courts have understood that "in the end it is the nature and the purpose of the document, not the place where it is kept, that determines its status as a public record." *City of Louisville v. Brian Cullinan*, No. 1998-CA001237-MR, 1998-CA001305-MR (Ky. App. 1999). This fundamental principle of open records law remains constant whether the requested public records are physically stored on private property or digitally stored on public employees' personal cell phones. *Kentucky Open Gov't Coal*, 2023 WL 7095744 at *9.

Here, there is no doubt the requested records were "prepared", "owned", and "used" by JCPS, and therefore are public records under the Act. Indeed, JCPS' response confirms that the requested communications were the primary means that JCPS' "staff communicates during real time, urgent situations." *Id.* It is simply not relevant that these important public records are stored on JCPS' employees' personal cell phones.

Notably, Ms. Clark informed JCPS of the Court of Appeals' affirmation of these principles on November 9th. Ex. 4, Email Thread, p. 8. JCPS responded by doubling down on its initial denial and misreading *Kentucky Open Government Coalition's* holding. The Court of Appeals did not "distinguish" between "government officers" and "paid employees" as you claim. *Id.* The Court affirmed the Act's broad definition of public record and declared unequivocally "**both** the Commission and its members have a duty to produce public records within their custody and control" and "it is beyond cavil that the Commission members have custody or control over text messages stored on their personal cell phones." *Kentucky Open Gov't Coal*, 2023 WL 7095744 at *9 (emphasis added). The Court made clear that regardless of whether the targets of the requests were "agents of the Commission" or considered "officials thereof" public records stored on their personal devices must be produced under the Act. *Id.*

Similarly here, whether the officials named in Ms. Clark's request are "officials" or "paid employees" (and therefore, agents) of JCPS is a semantic debate. Any record "prepared", "owned", or "used" by JCPS and its employees that is responsive to Ms. Clark's request is a public record that must be produced under the Act.

The context here is crucial, too. It strains credulity to assert that text messages among senior JCPS officials about an unfolding crisis are not the public's records. That argument has virtually no chance of prevailing in a court of law—and will be rightly pilloried in the court of public opinion.

2. August 10, 2023 Request (Alpharoute)

JCPS's denial of the Alpharoute request is similarly deficient. Ms. Clark requested communications between certain JCPS officials and individuals with an "@alpharoute" email domain. JCPS produced some records, but did not produce an unknown number of public records citing the Act's preliminary records exemption.

As an initial matter, the agency denying an open records request carries the burden of proving that the public records sought fit within an exception to the Act. KRS 61.882(3). The agency's denial must "include a statement of the specific exemption authorizing the withholding of the record and a brief explanation of how the exception authorizing the withholding of the record and a brief explanation of how the exception applies to the record withheld." KRS 61.880. That explanation "must be detailed enough to permit the court to assess its claim and the opposing party to challenge it." *Univ. of Ky. v. Kernel Press, Inc.*, 620 S.W.3d 43, 53 (Ky. 2021) (citing *Ky. New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76, 81 (Ky. 2013)). Here, JCPS has simply named the exemption it attempted to invoke and concluded it applied. Ex. 5, p. 4. Much more is required.

Preliminary records are recommendations, drafts, notes, correspondence and memoranda used to create opinions or policy recommendations. KRS 61.878(1)(j). Preliminary records are protected from production by the Open Records Act—but only temporarily. They lose their protected status "once they are adopted by the agency as part of its action." *Univ. of Kentucky v. Lexington H-L Servs., Inc.* 579 S.W.3d 858 (Ky. App. 2018); *Univ. of Kentucky v. Courier Journal & Louisville Times Co.*, 830 S.W.2d 373 (Ky. 1992). At that moment, the Act's exemption no longer applies, and the records are subject to release. *Univ. of Kentucky v. Kernel Press, Inc.*, 620 S.W.3d 43, 61-62 (Ky. 2021). JCPS' sparse response makes it impossible for Ms. Clark to understand—let alone challenge—JCPS' assertion that the records are preliminary. JCPS has not even attempted to explain what "policy" was being debated as the situation unfolded in real time. Moreover, JCPS' assertion rests on the improbable claim that JCPS has not yet made any policy decisions related to the transportation crisis. Simply put, this appears to be a willfully improper invocation of the exception made to hide communications JCPS doesn't think should see the light of day.

3. September 25, 2023 Request

JCPS' denial of Ms. Clark's second request is also inadequate. Ms. Clark requested communications between certain JCPS officials on August 9, 2023 and August 10, 2023 that mention the words "bus", "buses", or "transportation." Ex. 3. JCPS denied the request by invoking the Act's preliminary records exemption, FERPA, and the Act's personal privacy exemption, but did not even attempt to make the showings required to invoke those exemptions under the Act. For example, JCPS repeated its erroneous denial invoking the preliminary records exemption without attempting to explain what policy decision the public records are preliminary to or when JCPS expects a decision to be made.

Similarly, FERPA does not permit JCPS to withhold communications between its employees about transportation issues. Kentucky's Supreme Court has made clear FERPA is "not intended as an invisibility cloak that can be used to shield any document that involves or is associated in some way with a student." *Id.* The statute protects only students' education records and must be "narrowly construed." *Id.* FERPA defines education record to mean "records, files, documents, and other materials which (i) contain information **directly related** to a student; and (ii) are maintained by an educational agency...." 20 U.S.C. 1232g(b)(1) (emphasis added). Generally, courts have "defined education records as documents with information about academic performance, financial aid, and disciplinary matters." *Kernel Press*, 620 S.W.3d at 56 (collecting cases). It is highly unlikely that communications between JCPS' employees concerning the transportation crisis contain any education records protected by FERPA. If they do, both FERPA and

the Open Records Act require JCPS to separate exempted material from non-exempted material and produce the non-exempted material with appropriate redactions. *Id.*; KRS 61.878(4).

Finally, JCPS improperly invoked the Act's personal privacy exemption (KRS 61.878(1)(a)) to withhold these communications. To invoke that exemption, JCPS is required to analyze the open records request in context and strike an appropriate balance between the public and private interests at play. *Kentucky Bd. of Examiners of Psychologists v. Courier-Journal & Louisville Times Co.*, 826 S.W.2d 324, 327 (Ky. 1992). That requires a "comparative weighing" of interests on a "case-specific approach"; "the question of whether an invasion of privacy is 'clearly unwarranted' is intrinsically situational and can only be determined within a specific context." 826 S.W.2d 324, 327 (Ky. 1992). When weighing the public interest, the "primary concern is the nature of the information which is the subject of the requested disclosure" and whether the public has a legitimate interest in the disclosure. *Lexington-Fayette Urban Cty. Gov't v. Lexington Herald-Leader Co.*, 941 S.W.2d 469, 472 (Ky. 1997).

JCPS has not even attempted to conduct this balancing test. It simply quotes the exemption and asserts it applies to some of the requested records. It is apparent, however, that the public's interest in knowing how JCPS responded to a transportation crisis that left hundreds of kids stranded on school buses or without rides to and from school outweighs whatever minimal privacy interest JCPS' employees have in those communications. If some of the records contain some purely personal information like employee addresses or cell phone numbers, as JCPS claims, it may redact that information, but it must release the rest. *See* KRS 61.878(4).

For the reasons stated herein, JCPS has repeatedly violated the Open Records Act. We request that you acknowledge receipt of this letter and produce the public records responsive to Ms. Clark's open records request within five business days. If JCPS elects not to comply with its transparency obligations under the Open Records Act, please preserve all documents and public records that may be relevant in future legal proceedings.

Regards,

/s/ Michael P. Abate

Jon. L. Fleischaker
Michael P. Abate
William R. Adams
Kaplan Johnson Abate & Bird LLP
710 West Main Street, Fourth Floor
Louisville, KY 40202

Exhibit 1



Jess Clark <jclark@lpm.org>

Records request

19 messages

Jess Clark <jclark@lpm.org>

Thu, Aug 10, 2023 at 9:31 AM

To: Open Records <open.records@jefferson.kyschools.us>

Please provide all communication and correspondence regarding student transportation on 8/9/23 received or sent from the following:

Marty Pollio
Chris Perkins
Donald Robinson
Carolyn Callahan
Katy Deferrari

Open Records <open.records@jefferson.kyschools.us>

Thu, Aug 17, 2023 at 10:31 AM

To: Jess Clark <jclark@lpm.org>

Cc: "Callahan, Carolyn F" <carolyn.callahan@jefferson.kyschools.us>

Ms. Clark,

The only message containing the phrase "student transportation" is attached.

**Amanda Herzog**

Assistant General Counsel

Contracts, Insurance & Data Sharing

Jefferson County Public Schools


3332 Newburg Rd. Louisville, KY 40218

Phone: (502)-485-3584 | Fax: (502) 313-2706

From: Jess Clark <jclark@lpm.org>**Sent:** Thursday, August 10, 2023 9:31 AM**To:** Open Records <open.records@jefferson.kyschools.us>**Subject:** Records request

CAUTION: This email originated from outside of JCPS. Do not click links or open attachments unless you recognize the sender and know the content is safe.

[Quoted text hidden]

 **24-0174 Clark.pdf**
413K

Jess Clark <jclark@lpm.org>
To: Open Records <open.records@jefferson.kyschools.us>
Cc: "Callahan, Carolyn F" <carolyn.callahan@jefferson.kyschools.us>

Mon, Aug 21, 2023 at 4:44 PM

Hi Ms. Herzog,

I wasn't necessarily asking for emails with that phrase, but on the topic. Is there a better way you'd like me to phrase this? I know if in the past you all have provided correspondence related to specific incidents. That's what I'm looking for here: all correspondence on 8/9/23 pertaining to the transportation issues that occurred on 8/9/23, among the following people:

Marty Pollio
Chris Perkins
Donald Robinson
Carolyn Callahan
Katy Deferrari

Thank you

[Quoted text hidden]

Open Records <open.records@jefferson.kyschools.us>
To: Jess Clark <jclark@lpm.org>
Cc: "Callahan, Carolyn F" <carolyn.callahan@jefferson.kyschools.us>

Tue, Aug 29, 2023 at 1:34 PM

Ms. Clark,

The records you requested are voluminous. They contain a mixture of exempt and non-exempt information which must be reviewed and redacted in accordance with state and federal law. Additionally, a computer aided search is likely to have pulled some non-responsive messages as well, which must be manually reviewed for responsiveness. This will require additional processing time.

These records will be available to you no later than September 22, 2023.

[Quoted text hidden]

Jess Clark <jclark@lpm.org>
To: Open Records <open.records@jefferson.kyschools.us>
Cc: "Callahan, Carolyn F" <carolyn.callahan@jefferson.kyschools.us>

Tue, Aug 29, 2023 at 5:40 PM

Ok, thank you very much.

[Quoted text hidden]

Jess Clark <jclark@lpm.org>
To: Open Records <open.records@jefferson.kyschools.us>
Cc: "Callahan, Carolyn F" <carolyn.callahan@jefferson.kyschools.us>

Thu, Sep 7, 2023 at 12:38 PM

Hi Ms Herzog,

Can you add Marcus Dobbs to the list of people whose communications are to be searched in regards to the transportation issues on 8/9? Or would you like me to file a separate request?

[Quoted text hidden]

Open Records <open.records@jefferson.kyschools.us>
To: Jess Clark <jclark@lpm.org>
Cc: "Callahan, Carolyn F" <carolyn.callahan@jefferson.kyschools.us>

Thu, Sep 7, 2023 at 1:04 PM

This is the same as the other email search. We pulled the messages when the request was originally filed in order to determine how many results there are and set the appropriate extension timeframe. We would need a new request for Mr. Dobbs's messages.

[Quoted text hidden]

Jess Clark <jclark@lpm.org>
To: Open Records <open.records@jefferson.kyschools.us>
Cc: "Callahan, Carolyn F" <carolyn.callahan@jefferson.kyschools.us>

Thu, Sep 7, 2023 at 1:05 PM

Got it. I'll file that shortly. Thank you.

[Quoted text hidden]

6 attachments



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Exhibit 2



Jess Clark <jclark@lpm.org>

Records request

Herzog, Amanda M <amanda.herzog@jefferson.kyschools.us>

Mon, Sep 25, 2023 at 2:27 PM

To: Jess Clark <jclark@lpm.org>

Cc: "Callahan, Carolyn F" <carolyn.callahan@jefferson.kyschools.us>, "Hebert, Mark R" <mark.hebert@jefferson.kyschools.us>, John Boyle <jboyle@louisvillepublicmedia.org>, Rebecca Feldhaus Adams <bec@wfpl.org>

The Microsoft Compliance tool searches our Microsoft suite of products. I don't have the technical background to provide a more complete answer than that. However, it would not capture things like text messages sent on personal devices, phone calls, or in person conversations, which are generally how much of our staff communicates during real time, urgent situations.

As previously discussed, with a computer aided search, we also utilize keywords to narrow results in order to make results available in a faster timetable. In this case, the keywords utilized were "transportation" or "bus" If you have additional keywords you would like us to use, we are happy to re-run the search, but again things like messages on personal devices, phone calls, or in person conversations will not be reflected. We do not have a written record of phone call topic or of in person conversations, and employee personal devices are outside the possession of the agency.

[Quoted text hidden]

[Quoted text hidden]

[Quoted text hidden]

[Quoted text hidden]

[Quoted text hidden]

[Quoted text hidden]

[Quoted text hidden]

Amanda Herzog

Assistant General Counsel

Contracts, Insurance & Data Sharing

Jefferson County Public Schools

3332 Newburg Rd. Louisville, KY 40218

Phone: (502)-485-3584 | Fax: (502) 313-2706

From: Open Records

Sent: Tuesday, August 29, 2023 1:34 PM

To: Jess Clark <jclark@lpm.org>

Cc: Callahan, Carolyn F <carolyn.callahan@jefferson.kyschools.us>

Subject: RE: Records request

9C78261B-5900-407C-B86E-1CF3F234848F : 000058 of 000077

Ms. Clark,

The records you requested are voluminous. They contain a mixture of exempt and non-exempt information which must be reviewed and redacted in accordance with state and federal law. Additionally, a computer aided search is likely to have pulled some non-responsive messages as well, which must be manually reviewed for responsiveness. This will require additional processing time.

These records will be available to you no later than September 22, 2023.

Amanda Herzog

Assistant General Counsel

Contracts, Insurance & Data Sharing

Jefferson County Public Schools

3332 Newburg Rd. Louisville, KY 40218

Phone: (502)-485-3584 | Fax: (502) 313-2706

From: Jess Clark <jclark@lpm.org>
Sent: Monday, August 21, 2023 4:45 PM
To: Open Records <open.records@jefferson.kyschools.us>
Cc: Callahan, Carolyn F <carolyn.callahan@jefferson.kyschools.us>
Subject: Re: Records request

CAUTION: This email originated from outside of JCPS. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Hi Ms. Herzog,

I wasn't necessarily asking for emails with that phrase, but on the topic. Is there a better way you'd like me to phrase this? I know if in the past you all have provided correspondence related to specific incidents. That's what I'm looking for here: all correspondence on 8/9/23 pertaining to the transportation issues that occurred on 8/9/23, among the following people:

Marty Pollio

Chris Perkins
Donald Robinson
Carolyn Callahan
Katy Deferrari

Thank you

On Thu, Aug 17, 2023 at 10:31 AM Open Records <open.records@jefferson.kyschools.us> wrote:

Ms. Clark,

The only message containing the phrase “student transportation” is attached.

Amanda Herzog

Assistant General Counsel

Contracts, Insurance & Data Sharing

Jefferson County Public Schools

[3332 Newburg Rd. Louisville, KY 40218](https://www.jefferson.kyschools.us)

Phone: (502)-485-3584 | Fax: (502) 313-2706

[Quoted text hidden]

9C78261B-5900-407C-B86E-1CF3F234848F : 000060 of 000077

Exhibit 3



Jess Clark <jclark@lpm.org>

records request

Jess Clark <jclark@lpm.org>

Mon, Sep 25, 2023 at 1:47 PM

To: Open Records <open.records@jefferson.kyschools.us>

Cc: "Callahan, Carolyn F." <carolyn.callahan@jefferson.kyschools.us>, "Hebert, Mark R."

<mark.hebert@jefferson.kyschools.us>, John Boyle <jboyle@louisvillepublicmedia.org>, Rebecca Feldhaus Adams

<bec@wfpl.org>

Per open records laws, please provide all electronic written communications, including emails, texts, instant messages, containing the word "bus," "buses" or "transportation" sent by or received by the following people on 8/9/23 and 8/10/23

Marty Pollio
Carolyn Callahan
Marcus Dobbs
Chris Perkins
Katy DeFerrari
Robert Moore

As this request is a revised version of a previous request that yielded no results, and as I am a journalist conducting my work in the public interest, I respectfully request you to expedite this search.

Thank you very much,

9C78261B-5900-407C-B86E-1CF3F234848F : 000062 of 000077

Exhibit 4



Jess Clark <jclark@lpm.org>

records dispute

24 messages

Jess Clark <jclark@lpm.org>

Mon, Oct 9, 2023 at 10:40 AM

To: Open Records <open.records@jefferson.kyschools.us>, "Callahan, Carolyn F."

<carolyn.callahan@jefferson.kyschools.us>, "Hebert, Mark R." <mark.hebert@jefferson.kyschools.us>

Cc: "Brown, Kevin C." <kevin.brown@jefferson.kyschools.us>, Rebecca Feldhaus Adams <bec@wfpl.org>, John Boyle <jboyle@louisvillepublicmedia.org>

Ms. Herzog, Carolyn and Mark,

I'm writing in response to several issues in which JCPS is illegally withholding records. We have come to this conclusion after conversations with our attorney Jon Fleischaker.

First, in regards to the response to my request dated Aug. 10, 2023, and revised Aug. 21 for all electronic communication records sent or received by certain top JCPS officials regarding the unfolding transportation crisis:

In the response I received on Sept. 22, 2023, Ms. Herzog told me there were no records responsive to my request. When I contested, based on the knowledge that officials must have communicated electronically, whether by email, text, or instant message, Ms. Herzog wrote that my request "would not capture things like text messages sent on personal devices, phone calls, or in person conversations, which are generally how much of our staff communicates during real time, urgent situations."

It is our opinion and that of our attorney that open records law does not exempt communications between public employees conducting the public's business because they are transmitted on a personal device.

These text messages or direct messages, while they may have been sent on personal devices, were sent discussing a matter of great public importance, and were sent by public officials doing the public's work.

JCPS must provide these records immediately. It has been nearly two months since my initial request.

Second, in regards to my request on Aug. 10, 2023 and revised on Aug. 21 for "all email communications between anyone with an @alpharoute.com email address" and top JCPS officials:

I did not receive a timely response as defined under state law. The initial request was denied on Aug. 17, seven days after I submitted it. When I revised the request, I was promised the records on Sept. 15. They were not sent to me until Sept. 28, and only after I followed up.

Most importantly, these records are incomplete. All communications provided in the response by JCPS occurred after February 2023. However, AlphaRoute has been working with JCPS top staff since at least 2021.

In filling the request, Ms. Herzog wrote that "Pursuant to KRS § 61.878(1)(i) and (j), both 'preliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action to a public agency' and 'preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended' are exempted from public inspection. Documents consisting of preliminary opinions and recommendations have been withheld."

It appears that years of correspondence is being illegally withheld under this overbroad interpretation of the exemption. Each email found to or from an @alpharoute.com address must be given over, or denied *with particularity*, with the specific reason cited for each email JCPS believes is exempt.

Furthermore, JCPS should be careful they are not exempting emails from AlphaRoute on the basis that they are with “private individuals.” AlphaRoute is a corporation doing public business with JCPS, and is therefore not covered under this particular exemption.

JCPS should also be careful not to apply the preliminary recommendations and memoranda exemption to emails to or from AlphaRoute when the emails do not truly contain preliminary opinions and recommendations. Emails between JCPS and AlphaRoute are the public’s business and the public deserves to know the facts of how AlphaRoute and JCPS staff crafted and implemented the transportation plan.

Third, I am still awaiting a response for materials used to calculate the average amount of instructional time lost to bus delays, as presented by Marty Pollio on Sept 26.

On Sept. 18 I requested “any and all records kept by JCPS tracking instructional time lost to transportation delays for the 2023-2024 school year, up to the current date (Sept. 18),” after confirming with JCPS Superintendent Marty Pollio at a press conference that the district was tracking the time.

On Sept. 25 I received a response saying that there were no records responsive to my request:

“Schools are manually tracking bus arrival times on paper, which can then be cross referenced with student records to compute the instructional minutes lost for any given student as schools meet with parents and implement any IEPs,” the records custodian wrote. “The records themselves do not track instructional time lost, and do require staff expertise to cross reference bell times and individual student schedules to compute and determine any instructional minutes lost. For this reason, we do not have any existing records responsive to your request.”

Later that day (Sept. 25) I requested to inspect records for two specific schools in person: Waggener and Newburg. These were provided to me about a week later.

The very next evening (Sept. 26), JCPS Superintendent Marty Pollio gave a presentation to the board which included the average instructional time lost — the very information I had requested on Sept. 18 and was told on Sept. 25 the district did not have.

When I emailed the district that evening to ask for an explanation, district spokesperson Carolyn Callahan told me “we manually collected information from schools and put together the estimated averages from that information. We did not have that complete until Sept. 26.”

I followed up the next day and asked for all records collected and documents created, including spreadsheets, in calculating the average instructional time lost. I was told on Oct. 2 there might not be a spreadsheet by Mark Hebert on the phone. Mark told me it was calculated by a “group” who got together, reviewed paper copies and made an estimate. He offered me the original school-based documents, but said it would take at least three months to fill the request.

There are more than 150 schools, about 600 routes, and 67,000 students who use transportation, with dozens of buses late each day. It seems unlikely to me that a group made this calculation all in a collective hive mind without having a central document or spreadsheet to calculate the average instructional time lost.

I reiterated my request for those centralized materials on Oct 4. I still have not heard back.

JCPS must provide these materials immediately, as it has been more than a week since my request for the centralized materials, and three weeks since I made my initial request.

The public deserves to understand precisely how this calculation was derived, as it is a matter of great public importance.

Thank you for your attention to these issues. Please provide a written response within three business days.

Sincerely,

Open Records <open.records@jefferson.kyschools.us>

Mon, Oct 9, 2023 at 11:58 AM

To: Jess Clark <jclark@lpm.org>, "Callahan, Carolyn F" <carolyn.callahan@jefferson.kyschools.us>, "Hebert, Mark R" <mark.hebert@jefferson.kyschools.us>

Cc: "Brown, Kevin C" <kevin.brown@jefferson.kyschools.us>, Rebecca Feldhaus Adams <bec@wfpl.org>, John Boyle <jboyle@louisvillepublicmedia.org>

Ms. Clark,

We understand your frustration but disagree with your legal assertions.

First, you claim that text messages on personal devices are public records and should be turned over. To be clear, our initial response posits that there may be text messages on personal devices, however, as we are not in possession of our employees personal devices, we are not able to verify that and have not withheld those records. We simply do not maintain or possess them.

The Attorney General in 21-ORD-127 affirmed prior holdings that “[c]ell phone communications, including calls or text messages, made using a private cell phone that is paid for with private funds, are not prepared by or in the possession of a public agency.” citing 15-ORD-226 In short, communications on privately owned devices are not public records within the meaning of the Open Records Act and are not in the possession of the agency.

Simply put, the established law in Kentucky is clear that personal devices paid for with personal funds are not subject to the Kentucky Open Records Act.

Second, you indicate that you believe a substantial number of communications with Alpha Route have been withheld from the records you were provided. That is not the case. The preliminary drafts and correspondence withheld were communications between JCPS staff and the vendor of draft documents or work product. For example, draft charts that Alpha Route employees themselves state are “not complete” or emails of various potential routes or stops scenarios that were ultimately not implemented. These are draft materials that were never finalized. As a vendor, these preliminary communications are the same as any preliminary suggestions or drafts that are created and shared by employees internally. They are not subject to release until finalized. Any finalized records were provided to you.

It is important to note that the search for any and all records between the 4 employees you named for “alpharoute.com” only generated 83 search results, many of which were nonresponsive as they contained the phrase “alpharoute.com” but were not actually communications with someone at an “@alpharoute.com” email address.

Finally, you indicate that you have requested an intermediate calculation sheet multiple times. Your initial request was for the documents that serve as the basis of the calculations of instructional time lost. Those documents are paper forms that were collected from every school and manually tabulated by central office staff. In a call with Mark Hebert regarding the volume of those records and the time it would take to redact them, you told Mr. Hebert to "hold on those for now" as you wanted to request an intermediate calculation sheet you believe should exist. Your first request for that was on October 4, 2023, which was only 3 business days ago. We are working to determine if such an intermediate sheet exists and to respond to that request, but the 5 business days after receipt allocated by the Kentucky Open Records Act has not yet run. We anticipate having a more thorough answer to you on that request by the close of business Wednesday, October 11, which is 5 business days after receipt of that request.



Amanda Herzog

Assistant General Counsel

Contracts, Insurance & Data Sharing

Jefferson County Public Schools

3332 Newburg Rd. Louisville, KY 40218

Phone: (502)-485-3584 | Fax: (502) 313-2706

From: Jess Clark <jclark@lpm.org>
Sent: Monday, October 9, 2023 10:40 AM
To: Open Records <open.records@jefferson.kyschools.us>; Callahan, Carolyn F <carolyn.callahan@jefferson.kyschools.us>; Hebert, Mark R <mark.hebert@jefferson.kyschools.us>
Cc: Brown, Kevin C <kevin.brown@jefferson.kyschools.us>; Rebecca Feldhaus Adams <bec@wfpl.org>; John Boyle <jboyle@louisvillepublicmedia.org>
Subject: records dispute

CAUTION: This email originated from outside of JCPS. Do not click links or open attachments unless you recognize the sender and know the content is safe.

[Quoted text hidden]

Jess Clark <jclark@lpm.org>

Mon, Oct 9, 2023 at 12:11 PM

To: Open Records <open.records@jefferson.kyschools.us>

Cc: "Callahan, Carolyn F" <carolyn.callahan@jefferson.kyschools.us>, "Hebert, Mark R" <mark.hebert@jefferson.kyschools.us>, "Brown, Kevin C" <kevin.brown@jefferson.kyschools.us>, Rebecca Feldhaus Adams <bec@wfpl.org>, John Boyle <jboyle@louisvillepublicmedia.org>

Thank you for your response. I will forward this to our attorneys.

In the meantime, I would like to correct your timeline for my request of the centralized records. You stated I first requested those on Oct 4. My first request for those was on Sept 27 at 10:53 AM.

Today is the ninth business day since I requested those centralized materials. Please provide them as soon as possible.

Thank you,

[Quoted text hidden]



image002.png
12K

Open Records <open.records@jefferson.kyschools.us>

Mon, Oct 9, 2023 at 12:19 PM

To: Jess Clark <jclark@lpm.org>

Cc: "Callahan, Carolyn F" <carolyn.callahan@jefferson.kyschools.us>, "Hebert, Mark R" <mark.hebert@jefferson.kyschools.us>, "Brown, Kevin C" <kevin.brown@jefferson.kyschools.us>, Rebecca Feldhaus Adams <bec@wfpl.org>, John Boyle <jboyle@louisvillepublicmedia.org>

Your request on September 27 was for the materials collected. That is the item Mark Hebert discussed with you. We have the thousands of pages of materials collected from schools that constitute the authoritative source record for the data that was presented and the calculations that were done. Those paper records contain a significant amount of student information, which must be redacted. When you spoke to Mark, you stated that you wanted to hold on that request due to the volume and the time needed to redact such a significant amount of material and that you would follow up with a request for any sort of intermediary calculations, which indicates that you, at least at that time, had not understood your initial request to be for intermediary calculations or notes written as employees manually tabulated data from the paper records.

Are you saying you do want us to continue processing that request for the thousands of pages of paper from individual schools?



Amanda Herzog

Assistant General Counsel

Contracts, Insurance & Data Sharing

Jefferson County Public Schools

3332 Newburg Rd. Louisville, KY 40218

Phone: (502)-485-3584 | Fax: (502) 313-2706

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From: Jess Clark <jclark@lpm.org>
Sent: Monday, October 9, 2023 12:12 PM
To: Open Records <open.records@jefferson.kyschools.us>
Cc: Callahan, Carolyn F <carolyn.callahan@jefferson.kyschools.us>; Hebert, Mark R <mark.hebert@jefferson.kyschools.us>; Brown, Kevin C <kevin.brown@jefferson.kyschools.us>; Rebecca Feldhaus Adams <bec@wfpl.org>; John Boyle <jboyle@louisvillepublicmedia.org>
Subject: Re: records dispute

CAUTION: This email originated from outside of JCPS. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Thank you for your response. I will forward this to our attorneys.

In the meantime, I would like to correct your timeline for my request of the centralized records. You stated I first requested those on Oct 4. My first request for those was on Sept 27 at 10:53 AM.

Today is the ninth business day since I requested those centralized materials. Please provide them as soon as possible.

Thank you,

On Mon, Oct 9, 2023 at 11:58AM Open Records <open.records@jefferson.kyschools.us> wrote:

Ms. Clark,

We understand your frustration but disagree with your legal assertions.

First, you claim that text messages on personal devices are public records and should be turned over. To be clear, our initial response posits that there may be text messages on personal devices, however, as we are not in possession of our employees personal devices, we are not able to verify that and have not withheld those records. We simply do not maintain or possess them.

The Attorney General in 21-ORD-127 affirmed prior holdings that “[c]ell phone communications, including calls or text messages, made using a private cell phone that is paid for with private funds, are not prepared by or in the possession of a public agency.” citing 15-ORD-226 In short, communications on privately owned devices are not public records within the meaning of the Open Records Act and are not in the possession of the agency.

Simply put, the established law in Kentucky is clear that personal devices paid for with personal funds are not subject to the Kentucky Open Records Act.

Second, you indicate that you believe a substantial number of communications with Alpha Route have been withheld from the records you were provided. That is not the case. The preliminary drafts and correspondence withheld were communications between JCPS staff and the vendor of draft documents or work product. For example, draft charts that Alpha Route employees themselves state are “not complete” or emails of various potential routes or stops scenarios that were ultimately not implemented. These are draft materials that were never finalized. As a vendor, these preliminary communications are the same as any preliminary suggestions or drafts that are created and shared by employees internally. They are not subject to release until finalized. Any finalized records were provided to you.

It is important to note that the search for any and all records between the 4 employees you named for “[alpharoute.com](#)” only generated 83 search results, many of which were nonresponsive as they contained the phrase “[alpharoute.com](#)” but were not actually communications with someone at an “[@alpharoute.com](#)” email address.

Finally, you indicate that you have requested an intermediate calculation sheet multiple times. Your initial request was for the documents that serve as the basis of the calculations of instructional time lost. Those documents are paper forms that were collected from every school and manually tabulated by central office staff. In a call with Mark Hebert regarding the volume of those records and the time it would take to redact them, you told Mr. Hebert to “hold on those for now” as you wanted to request an intermediate calculation sheet you believe should exist. Your first request for that was on October 4, 2023, which was only 3 business days ago. We are working to determine if such an intermediate sheet exists and to respond to that request, but the 5 business days after receipt allocated by the Kentucky Open Records Act has not yet run. We anticipate having a more thorough answer to you on that request by the close of business Wednesday, October 11, which is 5 business days after receipt of that request.

Amanda Herzog

[Quoted text hidden]

[Quoted text hidden]

Jess Clark <jclark@lpm.org>

Mon, Oct 9, 2023 at 12:34 PM

To: Open Records <open.records@jefferson.kyschools.us>

Cc: "Callahan, Carolyn F" <carolyn.callahan@jefferson.kyschools.us>, "Hebert, Mark R"

<mark.hebert@jefferson.kyschools.us>, "Brown, Kevin C" <kevin.brown@jefferson.kyschools.us>, Rebecca Feldhaus Adams <bec@wfpl.org>, John Boyle <jboyle@louisvillepublicmedia.org>

Ms Herzog,

On Sept. 27 I said by email "Per open records law, can you please provide the materials collected, spreadsheets and other materials created in estimating the averages." That is clearly broad language that is meant to include intermediary documents that allowed Pollio to give the public an estimate, along with the materials collected from the schools.

Mark called me on the following Monday to tell me that the school-based materials would take 3 months to get back to me. Which is why I said to hold it, and go ahead with getting me the intermediary documents, which were also a part of that Sept 27 request. During the call he seemed not sure those documents existed. But I pushed back because that seems impossible and asked him to please move forward with finding them and getting them to me.

I followed up by email once he confirmed their actual existence on Oct 4. But just because staff took a week to find out if what I was asking for existed doesn't change the date I asked for it. It has been nine days.

I do not wish to request the school-based documents yet because I do not wish to saddle the department with the workload if my questions can be answered by the intermediary document. Please continue to hold off on processing the

school-based documents. I look forward to seeing the intermediary documents by EOB Wednesday.

Thank you,

[Quoted text hidden]

2 attachments



image002.png
12K



image002.png
12K

Jess Clark <jclark@lpm.org>

Thu, Nov 9, 2023 at 5:19 PM

To: Open Records <open.records@jefferson.kyschools.us>

Cc: "Callahan, Carolyn F" <carolyn.callahan@jefferson.kyschools.us>, "Hebert, Mark R"

<mark.hebert@jefferson.kyschools.us>, "Brown, Kevin C" <kevin.brown@jefferson.kyschools.us>, Rebecca Feldhaus Adams <bec@wfpl.org>, John Boyle <jboyle@louisvillepublicmedia.org>

Hello,

In light of the [recent Kentucky Supreme Court ruling](#), I am re-submitting my original request for for all electronic communication records sent or received by the following top JCPS officials regarding the unfolding transportation crisis on August 9, 2023. I have revised this request to include fewer employees to expedite the turnaround time.

Marty Pollio
Chris Perkins
Marcus Dobbs

By electronic communication I mean communications that include, but are not limited to email, SMS, texts, i-messages and any other electronic messages, sent on personal or work devices. As you have already provided what you say exists of email communications, please provide all other forms of electronic communication on this topic.

Because JCPS wrongfully withheld these communications, originally requested on Aug 10, (and Sept 7 for Dobbs) I respectfully ask that you expedite this request.

Please let me know when this will be available.

Sincerely,

[Quoted text hidden]

Open Records <open.records@jefferson.kyschools.us>

Fri, Nov 17, 2023 at 2:03 PM

To: Jess Clark <jclark@lpm.org>

Cc: "Callahan, Carolyn F." <carolyn.callahan@jefferson.kyschools.us>, "Hebert, Mark R."

<mark.hebert@jefferson.kyschools.us>, "Brown, Kevin C." <kevin.brown@jefferson.kyschools.us>, Rebecca Feldhaus Adams

<bec@wfpl.org>, John Boyle <jboyle@louisvillepublicmedia.org>

Ms. Clark,

We are in receipt of your request for electronic communication records sent or received by Marty Pollio, Chris Perkins, and Marcus Dobbs. As you noted that you have received the email communications, to the extent they exist, responsive to your request. Additionally, as previously communicated to you on November 28, we are still processing and working to produce all emails to or from those individuals on August 9 or August 10, 2023 containing the word “bus,” “buses,” or “transportation.” As was previously stated, these records will be available to you no later than November 30, 2023.

Given that all responsive email records have either already been produced or are in the process of production pursuant to a separate request, this response is limited to SMS, texts, i-messages or other electronic communications.

We do not possess any additional records responsive to your request, other than what was previously produced or is being processed to provide to you no later than November 30, 2023. The individuals you listed do not utilize a JCPS cell phone, and as such, any text messages, SMS, or i-messages are not maintained or possessed by our agency.

We understand that you have interpreted the recent Kentucky Court of Appeals ruling in *Kentucky Open Government Coalition, Inc. v. Kentucky Department of Fish and Wildlife Resources Commission*, 2022-CA-0170, to alter the existing law regarding the production of text messages. However, that case specifically applies to government officers. The Court specifically distinguished the case of paid employees, who are not covered by the definition of a “public agency” in KRS 61.870(1).

The individuals you have listed are not “state or local government officers.” They are not politically appointed or elected, and they do not take an oath of office. They are simply paid employees of a government agency. As such, the ruling in 2022-CA-0170 is not applicable to this request. Instead, the governing precedent is the decision issued by the Kentucky Attorney General in 15-ORD-226 which held that “Cell phone communications, such as calls and text messages, on the private cell phones of its employees are not within the possession of [the agency].” As the personal cell phones of employees are not within the possession of JCPS, we are unable to search or produce any records that were exclusively created and maintained on those devices, such as text messages.



Amanda Herzog

Assistant General Counsel

Contracts, Insurance & Data Sharing

Jefferson County Public Schools

[3332 Newburg Rd. Louisville, KY 40218](#)

Phone: (502)-485-3584 | Fax: (502) 313-2706

Exhibit 5



Jess Clark <jclark@lpm.org>

ORR: alpharoute

15 messages

Jess Clark <jclark@lpm.org>
To: Open Records <open.records@jefferson.kyschools.us>

Thu, Aug 10, 2023 at 10:35 AM

Hello,

Please provide all email communications between anyone with an @alpharoute.com email address and any member of central office staff up to 8/10/23.

Thank you,

Open Records <open.records@jefferson.kyschools.us>
To: Jess Clark <jclark@lpm.org>
Cc: "Callahan, Carolyn F" <carolyn.callahan@jefferson.kyschools.us>

Thu, Aug 17, 2023 at 10:32 AM

Ms. Clark,

We are not able to perform the email search you requested. We do not have a list or definition of "central office staff."



Amanda Herzog

Assistant General Counsel
Contracts, Insurance & Data Sharing
Jefferson County Public Schools
3332 Newburg Rd. Louisville, KY 40218
Phone: (502)-485-3584 | Fax: (502) 313-2706

From: Jess Clark <jclark@lpm.org>
Sent: Thursday, August 10, 2023 10:35 AM
To: Open Records <open.records@jefferson.kyschools.us>
Subject: ORR: alpharoute

9C78261B-5900-407C-B86E-1CF3F234848F : 000074 of 000077

CAUTION: This email originated from outside of JCPS. Do not click links or open attachments unless you recognize the sender and know the content is safe.

[Quoted text hidden]

Jess Clark <jclark@lpm.org>
To: Open Records <open.records@jefferson.kyschools.us>
Cc: "Callahan, Carolyn F" <carolyn.callahan@jefferson.kyschools.us>

Mon, Aug 21, 2023 at 4:47 PM

Please consider this a revised request:

Please provide all electronic communications between anyone with an @alpharoute.com and the following employees up to 8/18/23.

Chris Perkins
Katy DeFerrari
Marty Pollio
Donald Robinson

[Quoted text hidden]

Open Records <open.records@jefferson.kyschools.us>
To: Jess Clark <jclark@lpm.org>
Cc: "Callahan, Carolyn F" <carolyn.callahan@jefferson.kyschools.us>

Tue, Aug 29, 2023 at 1:34 PM

Ms. Clark,

The records you requested are voluminous. They contain a mixture of exempt and non-exempt information which must be reviewed and redacted in accordance with state and federal law. Additionally, a computer aided search is likely to have pulled some non-responsive messages as well, which must be manually reviewed for responsiveness. This will require additional processing time.

These records will be available to you no later than September 15, 2023.

[Quoted text hidden]

Jess Clark <jclark@lpm.org>
To: Open Records <open.records@jefferson.kyschools.us>
Cc: "Callahan, Carolyn F" <carolyn.callahan@jefferson.kyschools.us>

Tue, Aug 29, 2023 at 5:40 PM

Ok, thank you.

[Quoted text hidden]

Jess Clark <jclark@lpm.org>
To: Open Records <open.records@jefferson.kyschools.us>

Thu, Sep 7, 2023 at 12:36 PM

Hi Ms. Herzog,

Have you already started on this request? Can I add Marcus Dobbs to this list? Or would you prefer I file a separate request?

Thank you,

[Quoted text hidden]

Open Records <open.records@jefferson.kyschools.us>
To: Jess Clark <jclark@lpm.org>

Thu, Sep 7, 2023 at 1:04 PM

Cc: "Callahan, Carolyn F" <carolyn.callahan@jefferson.kyschools.us>

We pulled the messages when the request was originally filed in order to determine how many results there are and set the appropriate extension timeframe. We would need a new request for Mr. Dobbs's messages.

[Quoted text hidden]

Jess Clark <jclark@lpm.org>
To: Open Records <open.records@jefferson.kyschools.us>
Cc: "Callahan, Carolyn F" <carolyn.callahan@jefferson.kyschools.us>

Mon, Sep 18, 2023 at 9:54 AM

Hi all,

Checking in on this records request, which was scheduled to come in Friday. Can you give me a status update?

Thanks!

[Quoted text hidden]

4 attachments



image002.png
12K



image003.png
12K



image002.png
12K



image003.png
12K

Open Records <open.records@jefferson.kyschools.us>
To: Jess Clark <jclark@lpm.org>
Cc: "Callahan, Carolyn F" <carolyn.callahan@jefferson.kyschools.us>

Mon, Sep 18, 2023 at 11:51 AM

I apologize. I missed it. I will have it to you in the next couple days.

[Quoted text hidden]

Jess Clark <jclark@lpm.org>
To: Open Records <open.records@jefferson.kyschools.us>
Cc: "Callahan, Carolyn F" <carolyn.callahan@jefferson.kyschools.us>

Mon, Sep 18, 2023 at 12:57 PM

No problem, thank you for the update.

[Quoted text hidden]

2 attachments



image002.png
12K



image002.png
12K

Open Records <open.records@jefferson.kyschools.us>
To: Jess Clark <jclark@lpm.org>
Cc: "Callahan, Carolyn F" <carolyn.callahan@jefferson.kyschools.us>

Thu, Sep 28, 2023 at 12:06 PM

Ms. Clark,

The records you requested are attached.

Pursuant to KRS § 61.878(1)(i) and (j), both “preliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action to a public agency” and “preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended” are exempted from public inspection. Documents consisting of preliminary opinions and recommendations have been withheld.

[Quoted text hidden]

24-0242 Clark.pdf
2923K

Jess Clark <jclark@lpm.org>
To: Open Records <open.records@jefferson.kyschools.us>

Thu, Sep 28, 2023 at 12:07 PM

Thanks very much,

[Quoted text hidden]

4 attachments