



COMMONWEALTH OF KENTUCKY
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20-ORD-007

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In re: WAVE3 News/Louisville Metro Police Department

Summary: Louisville Metro Police Department lawfully withheld a Professional Standards Unit report as "preliminary" under KRS 61.878(1)(i) and (j) where investigative process was closed due to officer's resignation.

Open Records Decision

The question presented in this appeal is whether the Louisville Metro Police Department ("LMPD") violated the Open Records Act ("the Act") in its denial of a request from WAVE3 News ("Appellant") dated September 4, 2019, for a copy of a Professional Standards Unit ("PSU") document titled "Preliminary Summary Findings and Conclusions," dated September 5, 2013, relating to Officer Kenneth Betts. For the reasons that follow, this Office finds no violation of the Act.

LMPD denied Appellant's request on September 20, 2019,¹ stating that the document was "exempt from release pursuant to KRS 61.878(1)(i) and (j) which exempts the release of those that express opinions and are preliminary in nature." LMPD stated that "[k]eeping preliminary documents exempt from disclosure protects the integrity of the investigations by allowing investigators to free [sic] express opinions without fear of retaliation. Further, this investigation

¹ The record on appeal does not reflect the date when LMPD received the request. Under KRS 61.880(1), a public agency must respond to an open records request within three days, excluding weekends and legal holidays.

was 'Closed by Exception' by Chief Conrad meaning the Chief did not incorporate any of these records in making his final decision to close the investigation due to Kenneth Betts' resignation." Appellant initiated this appeal on December 11, 2019.

KRS 61.878(1)(i) and (j), respectively, create exceptions to the Open Records Act in the cases of:

- (i) Preliminary drafts, notes, correspondence with private individuals other than correspondence which is intended to give notice of final action of a public agency; [and]
- (j) Preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended[.]

The nature of the PSU document is such that it would consist of preliminary recommendations made prior to final agency action. Thus, the record was preliminary at the time of its creation.

In *University of Kentucky v. Courier-Journal & Louisville Times Co.*, 830 S.W.2d 373, 378 (Ky. 1992), the Kentucky Supreme Court made clear that "materials that were once preliminary in nature lose their exempt status once they are adopted by the agency as part of its action." In 01-ORD-47, summarizing the manner in which "preliminary" records under KRS 61.878(1)(i) and (j) may retain or lose their exemption after final agency action is taken, this Office stated:

Until final administrative action is taken, or a decision is made to take no action, the requested records are protected by KRS 61.878(1)(i) and (j). If the records are adopted as part of that final action, they will forfeit their preliminary characterization. If not adopted, they will retain their preliminary character.

It is not necessary that the record be explicitly adopted or incorporated by reference, so long as it constitutes a basis for the final agency action. "In our view, the courts purposefully employed the broader concept of 'adoption' rather than 'incorporation,' relative to preliminary investigative reports and records, to

avoid a narrow, legalistic interpretation.” 01-ORD-83 (citing *City of Louisville v. Courier-Journal and Louisville Times Co.*, 637 S.W.2d 658 (Ky. App. 1982)). The Kentucky Court of Appeals reaffirmed this analysis in *University of Kentucky v. Lexington H-L Services, Inc.*, 579 S.W.3d 858 (Ky. App. 2018).

The question is whether PSU’s “Preliminary Summary Findings and Conclusions” document was adopted as the basis of final agency action. In its response to this appeal dated December 18, 2019, LMPD stated that PSU’s role is to conduct administrative investigations of employees “to determine whether a policy violation has occurred. PSU ultimately serves as a fact-finder for the LMPD Chief of Police; the Chief is the final decisionmaker as to whether charge of a policy violation is warranted and discipline appropriate.” There are six potential dispositions of a charge, which LMPD explained as follows:

SUSTAINED: Supported by a preponderance of the evidence; allegation(s) did occur.

NOT SUSTAINED: Insufficient evidence to either prove or disprove the allegation(s).

EXONERATED: Incident occurred, but was lawful and proper.

UNFOUNDED: Allegation(s) is false or not factual.

CLOSED: Withdrawn by complainant or complainant will not cooperate.

CLOSED BY EXCEPTION: Retirement, resignation, or other.

In this case, the final disposition imposed by Chief Conrad was “Closed by Exception” because Officer Betts resigned prior to the completion of the process.

These facts are analogous to those presented in *Palmer v. Driggers*, 60 S.W.3d 592 (Ky. App. 2001), in which a police officer had resigned prior to final disposition of a disciplinary proceeding. The court determined that, in such a case, “the ‘final action’ of the agency was to take ‘no action’ on the complaint.” *Palmer*, at 597 (quoting 00-ORD-107). Therefore, once the officer had resigned, “[t]he subsequent decision of the [agency] to end the hearings against [the officer] constituted its ‘final action.’” *Id.* at 597. Where an internal investigative or disciplinary process is pre-empted by the employee’s resignation, the agency

“is not obligated to [disclose] the underlying investigative records because those records were not adopted as part of its final action,” and thus they “retain their preliminary characterization.” 10-ORD-053; *see also* 12-ORD-055.

Appellant argues that the analysis should be different here because Officer Betts, shortly before his resignation, had purportedly received a notice of intent to terminate based upon the findings of PSU’s investigation. LMPD responds that “[w]hether or not this is accurate is irrelevant” because “[t]he final action ultimately taken by Chief Conrad was to close the investigation with a disposition of ‘Closed by Exception’ due to the subject employee’s resignation,” and that final disposition was not based on the PSU document.

This Office agrees that the existence of a notice of intent to terminate would not alter the nature of the final agency action. LMPD’s applicable Standard Operating Procedure provides as follows:

If the Chief of Police believes that termination/discharge is the correct discipline for a non-probationary member, the Chief’s Office will provide, to the member, *a statement citing the reason(s)* and a pre-termination/discharge opportunity to respond will be scheduled. ... If the member is terminated/discharged, the Chief’s Office will *notify the member, in writing, of the decision* and the effective date of the termination/discharge.²

SOP 2.11.10 (emphasis added). Thus, if an officer is actually terminated, two documents are generated. A *final* “decision” to terminate is only issued after a *preliminary* notice of intent to dismiss and an opportunity to be heard.³ Accordingly, if Officer Betts received such a preliminary notice before choosing to resign, this fact would not alter Chief Conrad’s final disposition of the matter, which was “Closed by Exception” due to the intervening resignation.


² Available at <https://louisville-police.org/DocumentCenter/View/615/Standard-Operating-Procedures-PDF> (last visited Dec. 20, 2019).

³ *See also* KRS 15.520(6)(b) (charge of officer misconduct “shall set out the disciplinary action recommended or imposed”); KRS 15.520(6)(c) (“no public statements shall be made concerning the alleged violation ... until final disposition of the charges”).

This Office therefore finds that the document titled "Preliminary Summary Findings and Conclusions" did not lose its preliminary character under KRS 61.878(1)(i) and (j), because it was not adopted as the basis of the final agency action; *i.e.*, closing the case "by exception" following Officer Betts' resignation. Thus, LMPD did not violate the Act.

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

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