COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

DANIEL CAMERON
ATTORNEY GENERAL

CAPITOL BUILDING, SUITE 118
700 CAPITAL AVENUE
FRANKFORT, KENTUCKY 40601
(502) 696-5300
FAX: (502) 564-2894

20-ORD-095

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In re: WPSD Local 6 News/Office of Marshall County Judge/Executive

Summary: Office of Marshall County Judge/Executive ("Judge/Executive's Office") did not violate the Open Records Act ("Act") in denying a request for nonexistent records because a public agency cannot provide records it does not possess. The Judge/Executive's Office properly relied on KRS 61.878(1)(i) as the basis for denying access to communications between it and a private individual.

Open Records Decision

On March 27, 2020, WPSD Local 6 News Director Perry Boxx ("Appellant") requested a copy of several categories of records related to an individual named Lance Cary. First, he sought all "email[s] and text messages between Marshall County officials and Lance Cary." Second, Appellant requested all emails sent and received using any Marshall County public email address owned by Mr. Cary. Third, Appellant requested a copy "of any email or other document regarding [county officials'] processing of Open Records requests previously submitted by WPSD or our employees" for the period of January 1, 2019, to the present. Fourth, Appellant requested a copy of expense reports and other financial documentation identifying Mr. Cary as a participant in the expenditure of county funds.

Appellant also requested a copy of records related to other individuals. For the same period, Appellant requested all financial records, including emails, documenting "costs, fees and charges or other financial transactions between

Marshall County and Kent Masterson Brown and/or any entity with which he is associated." Finally, Appellant requested a copy of each "expense report submitted by a County elected official wherein the name of Val Finnell, Guns [sic] Owners of America ['GOA'] Pennsylvania Director and/or other representatives of [GOA] appear[ ] as a participant in the expense generated[,]" including receipts, and other documents.[1]

In a timely written response, the Deputy Judge/Executive partially denied the request under KRS 61.878(1)(i) and (j) because "Lance Cary is a private individual and has never been an employee of the Marshall County Fiscal Court in any capacity."[2] The Deputy Judge/Executive further stated that Mr. Cary does not have a public email account, "nor has he ever had a public [email] account here. We have searched our servers to confirm this." After searching "all possible locations, both electronic and otherwise," the Judge/Executive's Office also denied possessing any records responsive to Appellant's request for all documents regarding the county officials' processing of Appellant's previous open record requests. The Deputy Judge/Executive stated that office staff "checked all possible files and the request cannot be fulfilled because no such records exist." Likewise, after searching "all possible locations, both electronic and otherwise," for records responsive to Appellant's requests for financial records related to all three of the identified people, the Judge/Executive's Office produced one billing invoice for legal services rendered by Kent Masterson and denied possessing any other responsive financial records. According to the Deputy Judge/Executive, Mr. Cary "has never submitted an invoice to the county. No public monies have been paid to Mr. Cary."

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[1] In his March 27, 2020, e-mail to Deputy Judge/Executive Warning, Appellant made a number of claims regarding the failure by the Judge/Executive's Office to remedy the violations of the Act identified by this Office in 20-ORD-044. However, 20-ORD-044 related to a previous request and the agency's previous response. As such, it is not relevant to the merits of this appeal. A party seeking to enforce the Attorney General's decision must file an action in circuit court. KRS 61.880(5)(b).

[2] The Deputy Judge/Executive did not deny the existence of communications between county officials and Mr. Cary.

Thereafter, Appellant initiated this appeal. The parties primarily dispute Mr. Cary's status as a private citizen.[3] According to the Appellant, Mr. Cary is associated with the Judge/Executive's campaign for reelection. However, the Deputy Judge/Executive responded as follows:

> Why [Mr. Cary] referred to himself as an "executive assistant" to Judge-Executive Kevin Neal is a question that should be posed to Mr. Lance Cary, as that position literally does not exist. Mr. Cary is not an employee of the county. He has never been an employee of the county. There are no records pertaining to Lance Cary, payroll or otherwise, in the possession of Judge Neal's office, which in any way pertain[ ] to Lance Cary, except for the one email from Val Finnel which mentions his name in passing. That document was produced and disclosed months ago.

The Judge/Executive's Office continued to assert both KRS 61.878(1)(i) and (j) "as the exemption[s] pertaining to communications between Judge Neal and [Mr.] Cary, the latter being a 100% private citizen." Regarding all other requests, the Judge Executive's Office continued to assert that it searched for records in good faith but no responsive records existed.

The right to inspect and copy records only attaches if the records are "prepared, owned, used, in the possession of or retained by a public agency." KRS 61.870(2). A public agency cannot produce that which it does not have nor is a public agency required to "prove a negative" to refute an unsubstantiated claim that certain records exist. *See Bowling v. Lexington-Fayette Urban Cty. Gov't*, 172 S.W.3d 333, 341 (Ky. 2005) (holding that "before a complaining party is entitled to such a hearing [to refute the agency's claim that records do not exist], he or she must make a *prima facie* showing that such records do exist"). However, a public agency has the burden of proof in justifying the denial of a request to inspect records. KRS 61.880(2)(c). To satisfy that burden, it is incumbent on "the custodian of records to provide particular and detailed information in response to a request

[3] Appellant also challenged the adequacy of the search conducted by the Judge Executive's Office. According to the Deputy Judge Executive, he attempted to record himself while searching the county's files to demonstrate his adequate search in good faith. However, the Appellant was unable to view the video recording of the search.

for documents." *Edmondson v. Alig*, 926 S.W.2d 856, 858 (Ky. App. 1996); *see also* KRS 61.880(1). Therefore, if a public agency denies a request because the requested records do not exist, the public agency must expressly state the records do not exist. *See, e.g.*, 20-ORD-044 (finding that the Office of Judge/Executive violated the Act in failing to affirmatively state no responsive records existed).

Except for the requested communications between Mr. Cary and county officials, the Judge/Executive's Office denied each of Appellant's requests by expressly stating, after conducting a search, that no responsive records existed. The burden then shifted to Appellant to present a *prima facie* case that the requested records exist or should exist. *See Bowling*, 172 S.W.3d at 341. Appellant established a *prima facie* case for only one category of requested documents – all communications between county officials regarding the processing of Appellant's previous open records requests. Appellant previously submitted an open records request to the Judge/Executive's Office that resulted in an appeal to this Office. *See* 20-ORD-044. These facts constitute sufficient evidence that the Judge/Executive's Office should possess at least some records associated with processing that open records request. Because Appellant established a *prima facie* case, the burden shifted to the Judge/Executive's Office to prove the adequacy of its search. It did so by identifying all of the locations that it searched and even went so far as to record its employees conducting the search. With regard to his remaining requests, Appellant did not make any showing that responsive records exist or should exist.[4] Therefore, this Office cannot find that the Judge/Executive's Office violated the Act in denying these requests based on the nonexistence of the records.

The only records that remain in dispute are communications between Mr. Cary and county officials.[5] The Judge/Executive's Office denied Appellant access

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[4] This Office has no authority "to conduct an investigation in order to locate records whose existence or custody is in dispute[.]" 01-ORD-36, p. 2. Moreover, when a public agency discloses some of the documents requested, such as the financial record related to Mr. Masterson that was disclosed in this case, the Attorney General has generally declined to "adjudicate a dispute regarding a disparity, if any, between records for which inspection has already been permitted, and those sought but not provided." OAG 89-81, p. 4; 12-ORD-087; 14-ORD-204; 17-ORD-276. Because this Office's ability to gather facts is limited, Appellant must provide more than speculation that additional records exist.

[5] To be sure, it is not entirely clear if any communications between county officials and Mr. Cary exist in the Judge/Executive Office's possession. In its initial response, the Judge/Executive's

to these communications based on KRS 61.878(1)(i) and (j). However, it is important to note that KRS 61.878(1)(i) and KRS 61.878(1)(j) are two independent exceptions. Quite often public agencies rely on both of these exceptions and conflate them. At times, our courts have done the same. *See City of Louisville v. Courier-Journal and Louisville Times Co.* 637 S.W.2d 658 (Ky. App. 1982); *Kentucky State Bd. of Medical Licensure v. Courier-Journal and Louisville Times Co.,* 663 S.W.2d 953 (Ky. App. 1983). In fact, the Kentucky Court of Appeals has referenced KRS 61.878(1)(i) and (j) interchangeably and held that when a public agency adopts as part of its final action "preliminary drafts" (KRS 61.878(1)(i)) or "preliminary opinions or recommendations" (KRS 61.878(1)(j)), those records lose their preliminary status and are subject to inspection.

However, the records described in KRS 61.878(1)(i) are themselves "preliminary" to the records described in KRS 61.878(1)(j). That is, preliminary drafts, notes, and correspondence with private individuals are all types of records that may become a part of "[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended[.]" KRS 61.878(1)(j). If the public agency "adopts" the preliminary memorandum that contains a policy opinion or recommendation, then *that* record may lose its preliminary status. *See Univ. of Ky. v. Courier-Journal & Louisville Times Co.*, 830 S.W.2d 373, 378 (Ky. 1992). But the General Assembly has declared that a preliminary – *i.e.* not final – draft of the policy memorandum, notes taken by the author in the process of drafting the policy memorandum, and correspondence with private individuals that might guide the drafting of the policy memorandum, are separately and distinctly exempt under KRS 61.878(1)(i). Moreover, Kentucky courts have not applied the "adoption" rule to correspondence with private individuals. And this Office declines to extend that rule any further than it must.

Applying this reasoning and the text of the exemptions enacted by the General Assembly to the facts presented here, this Office notes the Judge/Executive's Office initially quoted the language of both KRS 61.878(1)(i) and (j), but it has consistently emphasized that it is withholding "correspondence

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Office indicated such communications exist. However, on appeal, the Judge/Executive's Office claims only one e-mail exists, and it has already been produced to Appellant. Because the Judge/Executive Office's initial response indicated such communications do exist, this Office presumes that communications between Mr. Cary and county officials exist.

with private individuals, other than correspondence which is intended to give notice of final action of a public agency." KRS 61.878(1)(i). Accordingly, KRS 61.878(1)(j) is inapplicable here, and this decision will address only whether the Judge/Executive's Office properly relied upon the "correspondence with private individuals" exception under KRS 61.878(1)(i) as the basis for withholding any existing responsive communications.

The Judge/Executive's Office has not disputed that Mr. Cary identified himself as both Judge Neal's Campaign Manager and his Executive Assistant on different occasions. But the agency has steadfastly maintained that Mr. Cary is a private citizen and that he is not currently, nor has he ever been, a county employee. Appellant has attempted to rebut this claim by providing social media posts, purportedly from Mr. Cary. But a private individual's claims on social media are nothing more—claims on social media. Even if such claims were credible evidence upon which this Office could rely, this Office has declined to resolve such factual disputes between Appellants and agencies. *See, e.g.,* 09-ORD-120. And in the absence of conclusive evidence that Mr. Cary is anything more than a private citizen, this Office declines to resolve this factual dispute.

Because there is no basis to conclude that Mr. Cary is anything more than a private individual, the next step is to determine whether his communications with county officials are exempt under KRS 61.878(1)(i). In discharging its duty to "ascertain and give effect to the intent of the General Assembly," this Office is "not at liberty to add or subtract from the legislative enactment nor discover meaning not reasonable ascertainable from the language used." *Beckham v. Bd. of Educ. of Jefferson Cnty.*, 873 S.W.2d 575, 577 (Ky. 1994) (citation omitted). This Office must refer to the text of the statute as enacted rather than surmising what the General Assembly might have intended but did not articulate. *Stogner v. Commonwealth* 35 S.W.3d 831, 835 (Ky. 2000). Likewise, this Office "must construe all words and phrases according to the common and approved uses of language." *Withers v. Univ. of Ky.*, 939 S.W.2d 340, 345 (Ky. 1997); *see also* KRS 446.080(4). KRS 61.878(1)(i) exempts "correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency."

This Office has previously imposed additional requirements on a public agency's reliance on this exemption. For example, in 18-ORD-117 this Office examined whether the private individual "petition[ed] or advocate[d] for particular action by a public agency on a specific matter in which the agency was empowered to make a decision." *Id*. at p. 2. The decision also examined whether

the private individual expressed an intent that the correspondence remain confidential, either due to the subject matter of the letter or by express statements requesting confidentiality. *Id*. at p. 3. Those requirements are not supported by the plain text of KRS 61.878(1)(i). The Act does not only exempt correspondence with a private individual who requests confidentiality or only that correspondence in which the private individual does not "petition" the agency; rather, it exempts "correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency." KRS 61.878(1)(i). Although it is true that the Act's exemptions must be narrowly construed to achieve the public policy of free examination of public records, KRS 61.871, that does not mean this Office can add words to the statutory text. *Beckham*, 873 S.W.2d at 577. And it can't eliminate them either. *Id*. Here, the addition of requirements not found in the text would operate to eliminate an exemption the General Assembly crafted. We decline to do so.

The record before this Office demonstrates that Mr. Cary is a private citizen. Any communications between him and county officials are exempt unless those communications were intended to give notice of final agency. KRS 61.878(1)(i). Accordingly, the Judge/Executive's Office did not violate the Act.

A party aggrieved by this decision shall 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 shall be notified of any action in circuit court, but shall not be named as a party in that action or in any subsequent proceeding.

Daniel Cameron
Attorney General

/s/ Marc Manley

Marc Manley
Assistant Attorney General

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Distributed to:

Perry Boxx
Brad Warning
Jason Darnall