



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

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22-ORD-026

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In re: Daniel Phelps/Office of Attorney General

Summary: The Office of Attorney General (the “Office”) did not violate the Open Records Act (“Act”) when it denied inspection of emails that discuss the scheduling of events, or certain videos taken during the event, as preliminary under KRS 61.878(1)(i).

Open Records Decision

Daniel Phelps (“the Appellant”) submitted to the Office a request to inspect records that contained six subparts. The Appellant sought to inspect the following records related to the Attorney General’s visit to the Ark Encounter facility (“the facility”) in 2021: any correspondence, including email, between the Office and representatives of the facility; receipts, fee ledgers, or other similar documentation that evidences the use of taxpayer funds for the visit; any video or audio recordings of the visit; a list of attendees “employed by the Commonwealth of Kentucky in connection with” the visit; any mileage logs or travel receipts reflecting travel to or from the facility; and any written or promotional material provided to the Attorney General or other state employees during the visit.

The Office responded by partially granting and partially denying the request. The Office provided responsive video recordings and photographs of the event, but denied the request for emails between the Office and the facility under KRS 61.878(1)(i) and (j). Citing case law and prior open records decisions, the Office explained that these emails “related to meetings and calendar invitations and entries,” which the Court of Appeals has held are preliminary drafts and notes exempt from inspection under KRS 61.878(1)(i).

See Courier-Journal v. Jones, 895 S.W.2d 6, 10 (Ky. App. 1995). This appeal followed.

The Appellant claims that not all of the records he requested could be considered preliminary records. He therefore claims that the Office's response was deficient, because the Office failed to explain how travel documentation, receipts, and other financial records could qualify as preliminary. On appeal, the Office explains that it:

does not possess documents itemizing or indicating travel expenses or taxpayer funds allocated specifically for the Attorney General's trip to the [facility]. The Office does not possess any documents reflecting a list of state employees who accompanied the Attorney General on the visit. Finally, the Office does not possess any written materials that the Attorney General or other attendees may have been provided during or following the trip.

If a public agency denies a request for records, it must "include a statement of the specific exception authorizing the withholding of the record and a brief explanation of how the exception applies to the record withheld." KRS 61.880(1). The "brief description" required under KRS 61.880(1) must "provide particular and detailed information in response to a request for documents." *Edmondson v. Alig*, 926 S.W.2d 856, 858 (Ky. App. 1996). The response must contain enough information to enable a requester, and a reviewing court, to determine whether the claimed exemption applies to the record withheld. *See City of Ft. Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 852 (Ky. 2013).

Here, the Office's initial response explained only that certain emails related to "meetings and calendar invitations" were being withheld under KRS 61.878(1)(i) and (j).¹

¹ In its initial response, the Office did not explain why it was not providing other records that were requested, such as receipts of expenditures, travel documentation, promotional materials, and a list of any state employees that attended the visit. On appeal, the Office explains that it did not produce the records because they do not exist. If a public agency cannot comply with a request for records because no responsive records exist, it must affirmatively state that as the basis for denying the request. *See, e.g.*, 10-ORD-048 (finding that an agency commits a "procedural violation" of the Act when it fails to initially state the basis of denial is that no responsive records exist). The Office committed a procedural violation of the Act when it failed to state initially that requested records did not exist in its possession. The Office has remedied the violation on appeal, and the Appellant has not presented a *prima facie* case that the requested records do exist.

Regarding the emails that contain scheduling information for the visit, the Office properly denied the request because the records are preliminary under KRS 61.878(1)(i). That provision exempts from inspection “[p]reliminary drafts, notes, [and] correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency.” *Id.* As the Office explained in its initial response, the Court of Appeals has held that an “appointment schedule [is] nothing more than a draft of what may or may never take place; a notation for inter or intra office use, so the daily affairs of the chief executive can be conducted with some semblance of orderliness; and all of which should be free from media interference.” *Jones*, 895 S.W.2d at 10. Subsequent decisions of this Office have held that correspondence exchanged for the purpose of scheduling events for public officers are also exempt under KRS 61.878(1)(i). *See, e.g.*, 16-ORD-039 (“The Governor’s Office did not violate the Open Records Act in withholding emails concerning the Governor’s schedule.”); 08-ORD-217 (same). The same is true for the Attorney General’s itinerary and emails that establish it. Accordingly, the Office did not violate the Act when it withheld emails that were exchanged to schedule an event for the Attorney General.

Finally, although the Office provided the Appellant with videos and photographs of the event that were published to various social media accounts of the Office, the Appellant seeks the “raw” or “unedited” videos. On appeal, the Office states that any video which was recorded was done for the express purpose of creating a “final video message,” which was provided to the Appellant. The Office claims that the video that was not included in the “final video message” is a preliminary draft.

As stated previously, preliminary “drafts” and “notes” are exempt from inspection under KRS 61.878(1)(i). This Office has long defined a “draft” to mean “a tentative version, sketch, or outline of a formal and final written product.” 97-ORD-183. In 02-ORD-193, this Office extended its interpretation of the word “draft” to include audio recordings of witnesses used for the purpose of creating a final investigative report, and found that such audio recordings were properly withheld under KRS 61.878(1)(i). We see little difference in audio recordings and video recordings. The video was recorded for the purpose of creating a “final video message.” Any portion of the video that was not included in the “final video message” is similar to any portion of a writing that was excluded from a final draft. It may be true that certain preliminary records may lose their exempt status if such records are “adopted” by the agency when taking final action. *See Univ. of Kentucky v. Courier-Journal & Louisville Times Co.*, 830 S.W.2d 373, 378 (Ky. 1992). But here, the only portions of the

video that were “adopted” were those portions appearing in the “final video message.” All video that was not included in the “final video message” was not adopted by the Office as part of its final action, and such video retains its exempt status. *See, e.g.*, 02-ORD-193. Accordingly, the Office 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 within 30 days from the date of this decision. 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 proceedings. The Attorney General will accept notice of the complaint emailed to OAGAppeals@ky.gov.

Daniel Cameron
Attorney General

/s/Marc Manley
Marc Manley
Assistant Attorney General

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Distributed to:

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