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22-ORD-068

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In re: David Webster/Christian County Board of Education

Summary: The Christian County Board of Education ("the Board") violated the Open Records Act ("the Act") when it failed to meet its burden of proof that records were exempt from disclosure under KRS 61.878(1)(i) or (j).

Open Records Decision

On February 1, 2022, David Webster ("Appellant") requested that the Board provide "any and all information dealing with Ford." The Board construed this request as seeking records pertaining to the school system's partnership with Ford Next Generation Learning ("Ford"), and provided the Appellant with certain documents relating to that topic. However, the Board withheld various records as purely personal communications under KRS 61.878(1)(r) or "preliminary" documents "not intended to give notice of final agency action" under KRS 61.878(1)(i) and (j). This appeal followed.

The Appellant does not question whether the Board properly relied on KRS 61.878(1)(r). However, he asserts that the Board's reliance on KRS 61.878(1)(i) and (j) is, in some cases, "not factual." KRS 61.878(1)(i) exempts from disclosure "[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." KRS 61.878(1)(j) exempts from disclosure "[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended."

On appeal, the Board has submitted a detailed log of the e-mails and other records it withheld and its legal basis for doing so. Several of these log entries merely represent communications relating to planning or scheduling

discussion meetings with Ford, or calendar invitations and acceptances for such meetings. Records of this nature are exempt from disclosure as preliminary recommendations when they relate solely to "strategies used to plan the meeting, including discussions relating to the invitation and agenda, [which] are preliminary to resolution of the ultimate issue" because "the meeting is merely a step along the road to deciding the ultimate issue." *University of Louisville v. Sharp,* 416 S.W.3d 313, 316 (Ky. App. 2013).

However, many of the log entries are not limited to the planning of meetings, but contain substantive discussions, recommendations, opinions, "mental impressions," spreadsheets, models, timelines, and other matters. As to these records, the Board's log uniformly relies upon an improper interpretation of KRS 61.878(1)(i) and (j). Specifically, the Board cites OAG 91-117 for the proposition that "documents generated by an agency prior to a final action that are not *incorporated* into that action may be properly withheld" (emphasis added).

Since 2001, this Office has consistently rejected the argument that records retain their preliminary status under KRS 61.878(1)(i) or (j) unless they are "incorporated" into final agency action. Rather, such records must be disclosed under the Act if they have been "adopted as the basis of the final action taken." *See, e.g.,* 01-ORD-83 (citing *City of Louisville v. Courier-Journal & Louisville Times Co.,* 637 S.W.2d 658, 659-60 (Ky. App. 1982); *see also Ky. State Bd. of Medical Licensure v. Courier-Journal & Louisville Times Co.,* 663 S.W.2d 953, 956 (Ky. App. 1983); *University of Kentucky v. Courier-Journal & Louisville Times Co.,* 830 S.W.2d 373, 378 (Ky. 1992)). A public agency need not formally "incorporate" a record by reference for the record to lose its preliminary status. Rather, if the recommendations proposed in the preliminary record are "adopted" as part of the agency's final action, then the adopted recommendation is no longer preliminary. *University of Kentucky,* 830 S.W.2d at 378. Therefore, the Board's explanation does not address the proper legal standard for whether preliminary communications are exempt from disclosure.

In an open records appeal, a public agency bears the burden of proof to sustain its action. KRS 61.880(2)(c). Here, the Board admits that it has taken final action with respect to at least "some" of its partnership plans with Ford. However, the Board claims that many of the records it withheld as "preliminary" were not *incorporated* into such final agency action. As stated above, the proper standard is not whether the records were formally incorporated, but whether any recommendations made within those records

were "adopted" by the Board as part of its final action. For example, the Appellant points to an e-mail from May 6, 2021, that references a "phase one commitment letter," yet the Board recently voted to move the project with Ford to phase two. Thus, to the extent any recommendations about phase one were adopted in completing phase one, such recommendations would no longer be preliminary and exempt from inspection under KRS 61.878(1)(i).

The Board has not carried its burden to substantiate its claim that none of the recommendations made in any of the records withheld were not "adopted" by the Board. Accordingly, this Office finds that the Board violated the Act to the extent that it withheld as "preliminary" records in which recommendations were adopted as part of the Board's final action. However, the Board did not violate the Act when it withheld correspondence that was limited to the planning and scheduling of meetings.

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 e-mailed to OAGAppeals@ky.gov.

Daniel Cameron
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/s/ James M. Herrick

James M. Herrick
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Distributed to:

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