



COMMONWEALTH OF KENTUCKY
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22-ORD-121

May 31, 2022

In re: David Webster/Christian County Board of Education

Summary: The Christian County Board of Education (“the Board”) did not violate the Open Records Act when it withheld a record under KRS 61.878(1)(j) consisting of expressions of opinion and recommendations that were not adopted as the basis of final action.

Open Records Decision

On April 26, 2022, David Webster (“Appellant”) requested inspection of a “2007-2008 letter” to the Board from the Hopkinsville Chamber of Commerce “concerning the district leadership.” The Board denied the request under KRS 61.878(1)(j)—the same grounds upon which the requested letter was previously found exempt in 08-ORD-079. This appeal followed.

KRS 61.878(1)(j) exempts from disclosure “[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended.” However, if a public agency adopts such opinions or recommendations as the basis of final action, the exempt status of the record is lost. *See Univ. of Ky. v. Courier-Journal & Louisville Times Co.*, 830 S.W.2d 373, 378 (Ky. 1992); *Univ. of Ky. v. Lexington H-L Services, Inc.*, 579 S.W.3d 858, 863 (Ky. App. 2018). In 08-ORD-079, the superintendent of the Christian County School District had announced his resignation in February 2008. This Office found no evidence that his resignation stemmed from the letter in question, which had been written and finalized by the Chamber of Commerce but never actually mailed or delivered by the Chamber to the Board. Accordingly, this Office found that the letter “was a written expression of opinion and recommendation that was not adopted

as the basis of final action and it therefore retained its preliminary characterization.” *See* 08-ORD-079 n.3.

The Board contends that for this Office to make a contrary finding in the present appeal would constitute a “reconsideration” of 08-ORD-079. Under 40 KAR 1:030 § 4, “[t]he Attorney General shall not reconsider a decision rendered under the Open Records Law[.]” Thus, in 20-ORD-148, this Office found that a second appeal between the same parties concerning the exempt status of a record would amount to a reconsideration where “the facts and issues [were] identical to those in the previous decision.” Here, however, the Appellant is not the same party who requested the letter in 08-ORD-079. Therefore, 08-ORD-079 does not have the force and effect of law with respect to the Appellant. *See* KRS 61.880(5)(b). For this reason, the Appellant is not seeking a “reconsideration” within the meaning of 40 KAR 1:030 § 4.

Nevertheless, the Board asserts that the facts and issues remain the same as in 08-ORD-079 and affirmatively states that the letter has not been adopted as the basis of any final action. Thus, in order for this Office to reach a different conclusion regarding the exempt status of the letter, the Appellant must provide some evidence to the contrary. But the Appellant’s only argument on appeal is that the letter should not be exempt because 14 years have passed since 2008 and the former superintendent “is no longer serving the district.” The mere passage of time does not, by itself, alter the exempt status of a public record under KRS 61.878(1)(j), nor does a change of administration in a public agency. The fact remains that the letter constitutes a written expression of opinions and recommendations that were not adopted by the Board as the basis of final action, as this Office found in 08-ORD-079. Accordingly, the Board did not violate the Act when it denied the Appellant’s request.

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.

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