



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

22-ORD-204

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In re: Sebastian Kitchen/Department of Agriculture

Summary: The Department of Agriculture (“the Department”) violated the Open Records Act (“the Act”) when it failed to explain how specific exemptions applied to the records withheld. However, the Department did not violate the Act when it withheld communications of staff members that were exempt from disclosure under KRS 61.878(1)(i) or (j).

Open Records Decision

On June 26, 2022, Sebastian Kitchen (“Appellant”) requested that the Department provide all “records or communications” between members of its executive staff and five listed e-mail addresses. The Department provided most of the requested records, but withheld 15 e-mails under KRS 61.878(1)(i), KRS 61.878(1)(j), or *Univ. of Louisville v. Sharp*, 416 S.W.3d 313 (Ky. App. 2013). For each withheld e-mail, the Department listed the date, the sender and recipient, and the authority under which it was withheld. When citing *Sharp*, the Department stated whether the e-mail was “sent prior to a meeting” or consisted of a “draft agenda for a meeting.” This appeal followed.

When a public agency denies a request under the Act, it must give “a brief explanation of how the exception applies to the record withheld.” KRS 61.880(1). The agency’s explanation must “provide particular and detailed information,” not merely a “limited and perfunctory response.” *Edmondson v. Alig*, 926 S.W.2d 856, 858 (Ky. 1996). “The agency’s explanation must be detailed enough to permit [a reviewing] court to assess its claim and the opposing party to challenge it.” *Kentucky New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76, 81 (Ky. 2013); *see also City of Ft. Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 848–49 (Ky. 2013) (noting the agency’s “proof may and often will include an outline, catalogue, or index of responsive records and

an affidavit by a qualified person describing the contents of withheld records and explaining why they were withheld”). Here, when citing KRS 61.878(1)(i) or (j), the Department merely quoted the language of the applicable subsection without further explanation.¹ An agency response that does “little more than recite the language of [the] exception” does not meet the requirements of KRS 61.880(1). *See* 19-ORD-191; 05-ORD-179. Therefore, as to the e-mails for which the Department merely quoted the language of KRS 61.878(1)(i) or (j) without further explanation, it violated the Act.

KRS 61.878(1)(j) exempts from disclosure “[preliminary 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).

Because the Department, in several instances, did not provide a description of the contents of the withheld records, this Office has conducted a confidential review of the records under KRS 61.880(2)(c). Five of the e-mails, as noted in the Department’s response to the request, concern the planning and scheduling of meetings.² Under *Sharp*, communications concerning “strategies used to plan [a] meeting, including discussions relating to the invitation and agenda, are preliminary to resolution of the ultimate issue” and thus exempt under KRS 61.878(1)(j) because “the meeting is merely a step along the road to deciding the ultimate issue.” 416 S.W.3d at 316. Accordingly, such records remain preliminary unless they are adopted as the basis of final agency action. *Id.* at 315. Here, because the five e-mails withheld under *Sharp* have not been adopted as the basis of final agency action, the Department properly withheld them under KRS 61.878(1)(j). *See, e.g.*, 22-ORD-068.

The Department withheld four additional e-mails under KRS 61.878(1)(j). One of these, dated January 7, 2022, is a preliminary list of agenda topics for a meeting and thus is exempt from disclosure under *Sharp* as preliminary discussion relating to a meeting agenda. The remaining three³ are discussions related to draft documents and constitute “preliminary memoranda in which . . . policies [are] formulated or recommended” under KRS 61.878(1)(j). This exception to the Act is “intended to protect the integrity of [an] agency’s decision-making process by encouraging the free exchange of opinions and ideas, and to promote informed and frank discussions of matters of concern to the agency.” *See* 00-ORD-139. Thus, the Act promotes “an open

¹ In contrast, in the five instances where it cited *Sharp*, the Department provided more detailed information about the e-mails.

² These five e-mails are dated April 27, 2020; April 29, 2020; May 5, 2020; and May 13, 2020 (two e-mails).

³ These e-mails are dated March 23, 2020; April 28, 2020; and May 18, 2020.

atmosphere among staff members whereby they may express their opinions, give recommendations and otherwise engage in a preliminary process in support of the ultimate decision-maker's final decision." See OAG 88-85. Because the three e-mails represent part of this preliminary process, they are exempt from disclosure under KRS 61.878(1)(j).

KRS 61.878(1)(i), the other exception upon which the Department relies, 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." Here, the Department cited KRS 61.878(1)(i) for 14 of the 15 e-mails it withheld. Upon examination, it appears that three of these contain draft meeting agendas within the body of the e-mail.⁴ As "preliminary drafts," these agendas are exempt under KRS 61.878(1)(i),⁵ while the remainder of the discussion in the e-mail is exempt under *Sharp*. One e-mail, dated January 7, 2022, consists entirely of a draft list of agenda topics for a meeting and is therefore exempt under KRS 61.878(1)(i) as a "preliminary draft."

The remaining ten e-mails withheld under KRS 61.878(1)(i) include attachments consisting of draft documents that are exempt from disclosure as "preliminary drafts."⁶ Furthermore, the text of one of these e-mails⁷ contains edits or suggested changes to a draft document. These edits also constitute "preliminary drafts" under KRS 61.878(1)(i). See, e.g., 21-ORD-089; 16-ORD-180. With regard to the rest of the e-mails accompanying the draft attachments, the Department has already sustained its denial as to four of these under KRS 61.878(1)(j).⁸ The remaining e-mails must be addressed individually.

An e-mail dated March 24, 2020, relates to an effort to schedule a meeting and is therefore exempt from disclosure under KRS 61.878(1)(j), as noted in the *Sharp* case. Another e-mail dated May 17, 2020, consists of preliminary recommendations regarding preparation for a meeting, which do not relate to final agency action and are therefore exempt under KRS 61.878(1)(j). Finally, e-mails dated April 15, 2020; April 21, 2020; May 13, 2020; and May 26, 2020, are essentially cover letters for preliminary drafts, which contain no content that could have been adopted as the

⁴ The three e-mails are from the Chief of Staff to the Commissioner; one is dated May 5, 2020, and two are dated May 13, 2020.

⁵ Where evidence shows that a purported draft is identical to the final version of a document, the "preliminary drafts" exception does not apply. See 18-ORD-196. However, there is no such evidence as to any of the draft documents in this appeal.

⁶ Although the review copy provided to this Office for one e-mail (dated May 17, 2020) does not include a copy of the attached document, the attachment line indicates that a draft document was attached.

⁷ This e-mail is from the Chief of Staff to the General Counsel and is dated April 15, 2020.

⁸ These four are dated March 23, 2020; March 27, 2020; March 28, 2020; and May 18, 2020.

basis of final action. Communications of this nature may be regarded as “preliminary recommendations” exempt from disclosure under KRS 61.878(1)(j). *See, e.g.*, 16-ORD-256. Accordingly, all of the disputed e-mails were properly withheld under KRS 61.878(1)(i) or (j).

On appeal, the Appellant argues that KRS 61.878(1)(i) and (j) should not apply to communications between public and private e-mail addresses. However, he cites no authority for this position. There is no basis in the Act for the assertion that records of this nature are not subject to the same exemptions from disclosure as any other public records. Accordingly, the Department did not violate the Act when it withheld the disputed records under KRS 61.878(1)(i) and (j).⁹

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

Attorney General

/s/ James M. Herrick

James M. Herrick

Assistant Attorney General

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Distributed to:

Mr. Sebastian Kitchen
Joseph A. Bilby, Esq.

⁹ The Appellant further argues that Department personnel failed to follow policies issued by the Commonwealth Office of Technology, or the employee handbook issued by the Personnel Cabinet, when they conducted official business using privately owned e-mail accounts. Because these issues do not arise under the Act, they are outside this Office’s authority to decide under KRS 61.880(2).