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**22-ORD-262**

December 12, 2022

In re: Sebastian Kitchen/Office of Attorney General

***Summary:*** The Office of Attorney General ("the Office") did not violate the Open Records Act ("the Act") when its response to a request to inspect records complied with KRS 61.880(1).

## *Open Records Decision*

Sebastian Kitchen ("the Appellant") submitted a request to the Office seeking "a copy of any and all records, from December 17, 2019 to present, including correspondence, memoranda, including emails sent or received by [a specific employee], to, from, or referencing" the Attorney General and 29 other private individuals, entities, or topics. In addition, the Appellant sought all emails the same employee had exchanged with the Attorney General and other Executive Staff employees.

In a timely response, the Office advised it possessed no records responsive to 27 of the enumerated entities or topics, but it did provide 21 records responsive to other topics requested.[1] In response to the second part of the Appellant's request, for emails between the Office's employees, the Office stated it withheld 566[2] emails under KRS 61.878(1)(i) and (j). The Office further explained its denial by categorizing the emails the subject employee had exchanged with each Executive Staff employee, stating the number of emails in each category, citing the relevant statutory

[1] The Office initially responded within five business days and invoked KRS 61.872(5) because the requested records were "otherwise unavailable." The Office explained the cause of the delay and provided the Appellant the earliest date on which records would be available. The Appellant does not challenge the Office's initial response, which properly invoked KRS 61.872(5).

[2] On appeal the Office states two emails and one calendar invitation were duplicates, and therefore, the Office has actually withheld 563 records.

exemption, and providing a brief explanation of the type of information contained within each category of emails.

Specifically, the Office withheld 14 emails between the Attorney General and the employee because they constituted "preliminary drafts, notes, and discussions related to public events attended by the Attorney General, ORD decisions and drafts, and constituent outreach." The Office further specified it withheld 14 emails containing calendar invitations, itineraries, and schedules under KRS 61.878(1)(i) and (j) and the authority of *Courier-Journal v. Jones*, 895 S.W.2d 6 (Ky. App. 1995).[3]

The Office withheld 68 emails exchanged between the employee and the former Deputy Attorney General. The Office described these emails as "containing preliminary drafts, notes, and discussions related to litigation, legislation, constituent outreach, job applicants, and scheduling office meetings related to pending matters."[4] Additionally, it withheld 32 emails between these employees containing calendar invitations, itineraries, and schedules under KRS 61.878(1)(i) and (j), and *Jones*.

The Office continued, explaining that 168 emails exchanged between the employee and the Attorney General's Chief of Staff were withheld because they contained "preliminary drafts, notes, and discussions related to constituent outreach, office reports and meetings, trainings, litigation, and administrative human resource matters."[5] Additionally, it withheld 66 emails containing calendar invitations, itineraries, and schedules under KRS 61.878(1)(i) and (j), and *Jones*.

The Office further explained it withheld 113 emails exchanged between the employee and the current Communications Director because they were "preliminary drafts, notes, and discussions related to the Office's public communications, constituent outreach and multiple constituent voicemails from private individuals, events, ordinance resolutions, and press releases." As before, the Office withheld an additional eight emails between these employees that contained calendar invitations, itineraries, and schedules. The Office similarly withheld 59 emails between the

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[3] In *Jones*, the Court of Appeals held calendar invitations of a constitutional officer, in that case the Governor, were preliminary records not subject to inspection even after the meetings were concluded. The Appellant does not appear to challenge the Office's denial of calendar invitations under KRS 61.878(1)(i) and (j). To the extent he does, however, such records are exempt under the binding authority of *Jones*. *See* 895 S.W.2d at 10 ("We view the Governor's appointment schedule as 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").

[4] The Office also stated in the alternative that some of these records were exempt under KRE 503 and the attorney-client privilege.

[5] As before, the Office stated in the alternative that some of these records were exempt under KRE 503 and the attorney-client privilege.

employee and the former Communications Director because they contained "preliminary drafts, notes, and discussions related to the Office's public communications, press interviews and releases, constituent outreach, and public events."

Finally, the Office withheld 21 emails exchanged between the employee and one of his predecessors in the constituent services department because the emails were "preliminary drafts, notes, and discussions related to press conferences and constituent outreach." The Appellant then initiated this appeal, claiming the Office's response was inadequate under KRS 61.880(1).

If an agency denies a request to inspect records, its written response 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). Although KRS 61.880(1) requires the explanation in support of denial to be "brief," the response cannot be "limited and perfunctory." *Edmondson v. Alig*, 926 S.W.2d 856, 858 (Ky. App. 1996). In *Edmondson*, the agency's response to a request stated only that "the information you seek is exempt under KRS 61.878(1)(a)(k)(l) [*sic*]." *Id.* The agency failed to explain how any of the three exemptions applied to the records withheld, and for that reason, the court held, it violated KRS 61.880(1). *Id.*

Kentucky courts have refined the level of detail a "brief explanation" in support of a denial KRS 61.880(1) requires. As stated by the Supreme Court of Kentucky, an agency is *not* "obliged in all cases to justify non-disclosure on a line-by-line or document-by-document basis." *City of Ft. Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 851 (Ky. 2013). Rather, "with respect to voluminous [open records] requests . . . it is enough if the agency identifies the particular kinds of records it holds and explains how [an exemption applies to] the release of each assertedly [*sic*] exempt category." *Id.* (discussing the "law enforcement exception" under KRS 61.878(1)(h)). Of course, "if the agency adopts this generic approach it must itself identify and review its responsive records, release any that are not exempt, and assign the remainder to meaningful categories. A category is meaningful if it allows the court to trace a rational link between the nature of the document and the alleged" exemption. *Id.* (quotation omitted). The Court also has acknowledged the Act must be "workable." *Ky. New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76, 89 (Ky. 2013). As a result, when certain types of information that are routinely kept in public records are routinely exempt, an agency "need not undertake an ad hoc analysis of the exemption's application to such information in each instance, but may apply a categorical rule." *Id.*

The takeaway from these decisions is that—at least with respect to voluminous requests—an agency must break up responsive records into meaningful categories

and explain how the exemptions cited for each category of records applies. Here, the Office separated a voluminous request into meaningful categories, *i.e.*, all responsive emails exchanged between the subject employee and each other member of the Executive Staff. For each category, the Office gave brief explanations of the contents of the records, such as "discussions related to litigation, legislation, constituent outreach, job applicants, and scheduling office meetings related to pending matters" or "discussions related to constituent outreach, office reports and meetings, trainings, litigation, and administrative human resource matters" or other types of essential Office functions. The Office further stated that records containing these types of communications are exempt under KRS 61.878(1)(i) and (j).

Long ago this Office recognized:

> Not every paper in the office of a public agency is a public record subject to public inspection. Many papers are simply *work papers* which are exempted because they are preliminary drafts and notes. KRS 61.878(1)[(i)]. Yellow pads can be filled with outlines, notes, drafts and doodlings which are unceremoniously thrown in the wastebasket or which may in certain cases be kept in a desk drawer for future reference. Such preliminary drafts and notes and preliminary memoranda are part of the *tools which a public employee or officer uses in hammering out official action within the function of his office*. They are expressly exempted by the Open Records Law and may be destroyed or kept at will and are not subject to public inspection."

OAG 78-626 (emphasis added).[6] More recently, the Office reaffirmed the purpose of the preliminary exceptions are "[t]o preserve the integrity of a public agency's internal decision making process by promoting full and frank discussion between and among public employees and officials and by equipping them with the tools needed in hammering out official action." 14-ORD-014; *see also* 22-ORD-176 n.6 (finding it would be unreasonably burdensome to sort through and redact 16,000 Microsoft Teams messages that all were exempt as notes under KRS 61.878(1)(i)).

Here, the Office categorized each batch of responsive emails and explained the contents of each category, such as matters related to litigation, constituent services,

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[6] The Appellant argues that, even if the Office's response provided sufficient detail to support its denial under KRS 61.880(1), the Office must separate the preliminary material from the nonpreliminary material, and make the latter subject to inspection. This would require the Office to redact every single email of everything except the names of the recipients and the dates and times the emails were sent or received. But as stated in OAG 78-628, these types of internal and routine discussions amongst government employees "may be destroyed or kept at will and are not subject to public inspection." It would be untenable to interpret the Act as requiring an agency to redact everything from thousands and thousands of exempt notes except their dates and times. *See, e.g.,* 22-ORD-176 n.6.

drafts of decisions, and other "official actions" that were in the process of being "hammer[ed] out." 14-ORD-014. All of these communications were exchanged to facilitate the performance of the Attorney General's various duties. Moreover, on appeal, the Office dedicated 24 pages of its 35-page response to explain in granular detail the contents of each email withheld. Although maybe the Office could[7] have provided those 24 pages of explanation initially, its original six-page response categorizing the emails and briefly explaining their contents was certainly not "limited and perfunctory." *Edmonson*, 926 S.W.2d at 858 (a single, short sentence citing three exemptions violated KRS 61.880(1)). 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. The Attorney General will accept notice of the complaint e-mailed to OAGAppeals@ky.gov.

**Daniel Cameron**
**Attorney General**

s/ Marc Manley
Marc Manley
Assistant Attorney General

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Distributed to:

Sebastian Kitchen
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[7] The Office notes that, since May 2022, the Appellant has submitted 32 requests that are equally broad and burdensome. The Office has never denied any such request as unreasonably burdensome. And here, the Office's initial response was six pages explaining why 566 emails were exempt as preliminary. The Act did not require the Office to provide its 24 pages of granular detail in lieu of its initial six-page "brief explanation." KRS 61.880(1).