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22-ORD-263

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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 emails” the Attorney General has exchanged with six current or former employees. He also asked for a copy of any of the Attorney General’s emails “to, from, or referencing” 33 other individuals, entities, or topics.

In a timely response, the Office advised it possessed no records responsive to 31 of the 33 enumerated individuals, entities, or topics, but it did provide one record responsive to other topics requested.¹ The Office also stated it was withholding 357 responsive emails under KRS 61.878(1)(i) and (j). The Office further explained its denial by categorizing the emails the Attorney General had exchanged with the specified employees, stating the number of emails in each category, citing the relevant statutory exemption, and providing a brief explanation of the type of information contained within each category of emails.

Specifically, the Office withheld 107 emails between the Attorney General and the former Deputy Attorney General because they contained “preliminary drafts, notes, and discussions related to litigation, legislation, amicus briefs, and various

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).

administrative office matters.” The Office also stated in the alternative that some of these records were exempt under KRE 503 and the attorney-client privilege. The Office further specified it withheld three emails containing calendar invitations under KRS 61.878(1)(i) and (j) and the authority of *Courier-Journal v. Jones*, 895 S.W.2d 6 (Ky. App. 1995).²

The Office withheld 85 emails exchanged between the Attorney General and the former Solicitor General. The Office described these emails as containing “preliminary drafts, notes, and discussions related to amicus briefs, litigation, and interoffice notes.” The Office also stated in the alternative that some of these records were exempt under KRE 503 and the attorney-client privilege. Similarly, the Office withheld 14 emails exchanged between the Attorney General and the current Solicitor General because they contained “preliminary drafts, notes, and discussions related to amicus briefs, litigation, and drafts concerning an Attorney General law review article.” The Office also stated in the alternative that some of these records were exempt under KRE 503 and the attorney-client privilege.

The Office continued, explaining that 143 emails exchanged between the Attorney General and former Communications Director were withheld because they contained “preliminary drafts, notes, and discussions related to the Office’s public communications, press clips and briefings, and press releases.” Additionally, it withheld three emails containing calendar invitations under KRS 61.878(1)(i) and (j), and *Jones*.

Finally, the Office withheld two emails exchanged between the Attorney General and a former employee in the constituent services department because the emails contained “preliminary drafts, notes, and discussions related to legislative updates and constituent services.” 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

² 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”).

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 Attorney General and various current or former members of the Executive Staff. For each category, the Office gave brief explanations of the contents of the records, such as “preliminary drafts, notes, and discussions related to litigation, legislation, amicus briefs, and various administrative office matters” or “preliminary drafts, notes, and discussions related to the Office’s public communications, press clips and briefings, and press releases” 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).³ 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, drafts of briefs, 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 16 pages of its 25-page response to explain in granular detail the contents of each email withheld. Although maybe the Office could⁴ have provided those 16 pages of explanation initially, its original four-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’s response complied with KRS 61.880(1).⁵

³ 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.

⁴ 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 four pages explaining why 357 emails were exempt as preliminary. The Act did not require the Office to provide its 16 pages of granular detail in lieu of its initial four-page “brief explanation.” KRS 61.880(1).

⁵ The Appellant also complains that the Office’s response did not affirmatively state the Office did not possess emails exchanged between the Attorney General and U.S. Senator Mitch McConnell, who was one of the 33 individuals, entities, or topics the Appellant listed in his request for emails “to, from,

The Appellant further argues that, even if the Office's response complied with KRS 61.880(1), "drafts lose their preliminary status when they are incorporated in a final action." Not so. KRS 61.878(1)(i) is an exemption separate and distinct from KRS 61.878(1)(j). The distinction is important because Kentucky courts have held "investigative materials that were once preliminary in nature lose their exempt status once they are adopted by the agency as part of its action." *Univ. of Ky. v. Courier-Journal & Louisville Times Co.*, 830 S.W.2d 373, 378 (Ky. 1992). But neither KRS 61.878(1)(i) nor (j) discuss preliminary "investigative materials." Rather, KRS 61.878(1)(i) relates to preliminary drafts and notes, which by their very nature are rejected when a final report is approved. In other words, a first draft is not "adopted" when a second draft is written, and the first draft is always exempt under KRS 61.878(1)(i). *See, e.g.*, 21-ORD-089 (agency properly relied on KRS 61.878(1)(i) to deny inspection of the "first draft" of a report that was later adopted). The same is true of "notes," which constitute the majority of interoffice emails and chat messages. *See, e.g.*, 22-ORD-176 n.6; OAG 78-626. To the extent specific thoughts or beliefs contained within drafts and notes are "adopted," they are adopted into whatever *final document* is produced. That *final document* represents the agency's official action and is subject to inspection. But the thoughts expressed along the way through emails do not lose their preliminary status because a final end-product is produced. To do so would destroy the "full and frank discussion[s] between and among public employees and officials" as they "hammer[] out official action," which is the very purpose of KRS 61.878(1)(i). 14-ORD-014.

In sum, the Office's response to the Appellant's voluminous request provided the "brief explanation" KRS 61.880(1) requires to support a denial of a request. The emails withheld contain drafts and notes that are exempt under KRS 61.878(1)(i) and do not lose their preliminary status when final action is taken. 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.

or referencing." On appeal, the Office explains that, although it does not possess emails exchanged between the Attorney General and Senator McConnell, it does possess records "referencing" Senator McConnell, and therefore, it could not claim it did not possess emails "referencing" him in the Office's original response. Of course, the Appellant's broadly framed request was an "any-and-all request" about an ill-defined subject matter, the likes of which the Office has routinely held need not be honored. *See, e.g.*, 19-ORD-084; 19-ORD-064; 17-ORD-197. Despite the long line of decisions dating back to OAG 76-375 holding broad requests for documents "referencing" a subject matter need not be honored, this Office's response on appeal identifies each of the emails containing reference to Senator McConnell and the subject matter of those emails.

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