



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

**23-ORD-009**

January 20, 2023

In re: Adam Lye/Oldham County School District

**Summary:** The Oldham County School District (the “District”) did not violate the Open Records Act (“the Act”) when it denied a request for records related to an ongoing disciplinary proceeding involving a public employee under KRS 61.878(1)(i) and (j) because no final action has occurred.

***Open Records Decision***

Adam Lye (“Appellant”) submitted a request to the District for “emails, texts, memos, [and] policies” related to the suspension of one of its employees. In a timely response, the District denied the Appellant’s request under KRS 61.878(1)(i) and (j) because “there has been no final action and . . . the records . . . are preliminary.” This appeal followed.

The District denied the request under both KRS 61.878(1)(i) and (j), which this Office has recognized are two separate and distinct exemptions. *See, e.g.*, 21-ORD-168 (regarding preliminary “notes”).<sup>1</sup> KRS 61.878(1)(i) exempts from inspection

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<sup>1</sup> 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. KRS 61.878(1)(j) relates to “preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended.” Thus, 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). But a recommended policy may or may not be “adopted.” If it is, then the memorandum expressing

records which are “preliminary drafts, notes, 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 inspection records that are “preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended.”

The Office has previously held that records related to an ongoing investigation or disciplinary proceeding are preliminary and exempt from inspection under KRS 61.878(1)(i) and (j). *See, e.g.*, 21-ORD-169 (records related to a licensure proceeding involving a nurse); 16-ORD-231 (records pertaining to ongoing investigation into allegations of public employee misconduct or discipline); 14-ORD-234 (records related to the suspension and ongoing investigation into a medical physician). Such records are exempt from disclosure unless and until such records are adopted and made a part of the investigative agency’s final action. *See Univ. of Ky. v. Courier-Journal & Louisville Time Co.*, 830 S.W.2d 373, 378 (Ky. 1992) (finding that “investigative materials that were once preliminary in nature lose their exempt status once they are adopted by the agency as part of its action”).

Here, the District states that “there has been no final action” in the disciplinary proceedings pertaining to the records responsive to the Appellant’s request. Accordingly, the District did not violate the Act when it denied the Appellant’s request.<sup>2</sup>

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court under KRS 61.880(5) and KRS 61.882 within 30 days from the date of this decision. Under 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 emailed to [OAGAppeals@ky.gov](mailto:OAGAppeals@ky.gov).

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that proposed policy is no longer preliminary and is subject to inspection. If it is not, then the memorandum remains preliminary and is exempt under KRS 61.878(1)(j).

<sup>2</sup> The District additionally claimed that some of the withheld records are protected by the attorney-client privilege and exempt from inspection under KRS 447.154, KRE 503, and CR 26.02(3). However, because this Office finds the District properly withheld the records under KRS 61.878(1)(i) and (j), it declines to further address the District’s reliance on the attorney-client privilege.

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

s/ Matthew Ray  
Matthew Ray  
Assistant Attorney General

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Distributed to:

Adam Lye  
Eric G. Farris  
Jason Radford