



COMMONWEALTH OF KENTUCKY
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23-ORD-015

January 30, 2023

In re: Melissa Thornsberry/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

On behalf of a client her law firm represents, Melissa Thornsberry (“the Appellant”) submitted a request to the Office to inspect “any and all records” related to a former resident of a specific long-term care facility. In a timely response, the Office stated it possessed:

(1) a 2 page copy of KSP CAD report concerning [the former resident’s] injuries and death; (2) a [1] page preliminary un-signed diagnosis report for [the former resident] and an email from the Fayette County Coroner office forwarding a copy of the same to our Office; (3) [1] page Office summary regarding the complaint received about [the former resident’s] death; (4) 2 email records reflecting communications between the Office and the KSP concerning [the former resident’s] death; (5) 1 email forwarding a voicemail message recording from a private citizen who may have information concerning [the former resident’s] death; and (6) 2 internal Office emails among Office staff concerning the complaint received concerning [the former resident’s] death and the preliminary diagnosis report from the Fayette County Coroner’s Office.

The Office further stated inspection of all these records would be denied because the records were “part of investigative files that are preliminary under KRS 61.878(1)(i) and (j) until such time as the Office takes final agency action, if any.”

The Office explained the records “contain only unsubstantiated allegations and the Office has not made a determination on how to proceed.” Citing precedent from Kentucky’s appellate courts, the Office explained the Act “exempts any such records or information compiled in the process of investigating these alleged violations until after the investigation is completed.” See *Ky. Bd. of Examiners of Psychologists v. Courier–Journal & Louisville Times Co.*, 826 S.W.2d 324, 326–27 (Ky. 1992); *Ky. State Bd. of Med. Licensure v. Courier–Journal & Louisville Times Co.*, 663 S.W.2d 953, 956 (Ky. App. 1983).¹ The Appellant then initiated this appeal, claiming the Office’s response was inadequate under KRS 61.880(1), and that all responsive records should be made available for inspection.

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). Nevertheless, the Office did specify each document it possessed, and explained that KRS 61.878(1)(i) and (j) applied to exempt each of those documents from inspection. Accordingly, the Office’s response complied with KRS 61.880(1) when it identified and described responsive records, specified an exemption that applied to withhold them, and explained how that exemption applies.

After the appeal was initiated, the Office provided the Appellant with a copy of the CAD Report and the one-page summary regarding the complaint. However, relying on KRS 209.140(1), which is an exemption incorporated into the Act under KRS 61.878(1)(l), the Office redacted from those records the name of an informant.²

¹ In the alternative, the Office denied inspection under both law enforcement exceptions, KRS 61.878(1)(h) and KRS 17.150(2). However, because the records in issue are exempt under KRS 61.878(1)(i) and (j), it is unnecessary to examine the Office’s alternative grounds for denial.

² Because the Office no longer relies on KRS 61.878(1)(i) and (j) to withhold these records, it is unnecessary to determine whether those exceptions apply to these records.

KRS 209.140 makes confidential “[a]ll information obtained by the department staff or its delegated representative, as a result of an investigation made pursuant to” KRS Chapter 209. However, “[p]ersons suspected of abuse or neglect or exploitation” may have access to the information, “provided that in such cases names of informants may be withheld, unless ordered by the court.” KRS 209.140(1).

The Appellant’s law firm is defense counsel for a long-term care facility involved in a civil action related to the death of the former resident. As such, her firm is an agent of an entity that may receive access to the information made confidential under KRS 209.140. Consistent with the statute, the Office redacted only the name of an informant, until otherwise ordered by a court to provide it. *See* KRS 209.140(1).

As for the remaining records, the Office properly relied on KRS 61.878(1)(i) and (j) to withhold them. “Preliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency” may be exempt from inspection under KRS 61.878(1)(i). And “[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended” may be exempt from inspection under KRS 61.878(1)(j). Kentucky courts have held that public records that are adopted as part of a public agency’s final action may lose their preliminary status and become subject to inspection. *See Univ. of Ky. v. Courier–Journal & Louisville Times Co.*, 830 S.W.2d 373, 378 (Ky. 1992). Drafts, notes, and preliminary recommendations that are part of an investigation may be exempt from disclosure until the public agency has taken final action concerning the investigation. *City of Louisville v. Courier–Journal & Louisville Times Co.*, 637 S.W.2d 658, 660 (Ky. App. 1982); *see also* 21-ORD-088 (investigative files related to inmate grievances remained preliminary until final action on the grievances occurred).

On appeal, the Office further explained how each of the remaining records are exempt under KRS 61.878(1)(i) and (j). The Office withheld a “diagnosis report,” marked with the descriptor “preliminary,” which contains preliminary opinions concerning the former resident’s “cause and manner of death.” The Office further explained that “the report is an unsigned draft,” which is also exempt under KRS 61.878(1)(i). Because the opinion regarding the cause of death remains preliminary and remains an unsigned draft, this record is exempt under both KRS 61.878(1)(i) and (j). The Office therefore did not violate the Act by withholding this record.

The Office withheld a voicemail message under KRS 61.878(1)(i) “because it is correspondence from a private individual in no way related to giving notice of final agency action.” KRS 61.878(1)(i) not only exempts from inspection drafts and notes, but also “correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency.” The voicemail message constitutes correspondence with a private individual, and final action has not been taken with respect to the investigation. The Office therefore did not violate the Act by withholding this record under KRS 61.878(1)(i).

Finally, the Office withheld emails containing preliminary discussions between Office employees and Kentucky State Police troopers about the investigation. Because the emails contain preliminary discussions regarding opinions of an investigation in which final action has not yet occurred, the Office did not violate the Act by withholding these records under KRS 61.878(1)(j).

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.

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Distributed to:

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