



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-054

March 13, 2023

In re: Barbara Walden/City of Lexington

Summary: The City of Lexington (“the City”) did not violate the Open Records Act (“the Act”) when it withheld its Consent Decree Schedule Modification Request that was exempt from disclosure under KRS 61.878(1)(j).

Open Records Decision

Barbara Walden (“Appellant”) submitted a request to the City for the “Schedule Modification Request of August 19, 2022 referenced in . . . the 2022 Annual Consent Decree Report.” The City denied her request, stating that the Consent Decree Schedule Modification Request is exempt under KRS 61.878(1)(j) as a preliminary record because the policies it recommends “have not been approved, agreed upon, or finalized” by the parties to the Consent Decree and is exempt under KRS 61.878(1)(k), KRE 408, and FRE 408 because the record contains settlement negotiations and offers. This appeal followed.

KRS 61.878(1)(j) exempts from disclosure “[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended.” The City asserts the Consent Decree Schedule Modification Request contains recommendations, policies, and opinions that “have not yet been adopted by the . . . U.S. District Court and the other Parties to the Consent Decree.” More specifically, the City claims the deadlines in the Consent Decree Schedule Modification Request are “likely not the final” deadlines and “more discussion is needed between the Parties and with the U.S. District Court before . . . a final order is entered by the Court.” As such, it claims the Consent Decree Schedule Modification Request is a preliminary record, exempt under KRS 61.878(1)(j), until the parties reach an agreement and a final order is entered by the Court. This Office agrees that

a record containing preliminary opinions and recommendations may be withheld while its contents are being negotiated and remain subject to change. *See, e.g.*, 19-ORD-008; 97-ORD-062; OAG 87-21; OAG 79-326. However, once a record is adopted as part of a public agency's final action, it loses its preliminary status and is subject to inspection, unless another exemption applies. *See Univ. of Ky. v. Courier-Journal & Louisville Times Co.*, 830 S.W.2d 373, 378 (Ky. 1992). Because the City has not yet adopted the recommendations in the draft and taken final action in filing the Consent Decree Schedule Modification Request with the court, it remains a preliminary record at this time.¹ Accordingly, the City did not violate the Act when it withheld this record.²

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 emailed to OAGAppeals@ky.gov.

Daniel Cameron
Attorney General

s/ Zachary M. Zimmerer
Zachary M. Zimmerer
Assistant Attorney General

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Distributed to:

Barbara Walden
Jason Hernandez
Evan P. Thompson

¹ As noted in the *University of Kentucky* case, the act of submitting the record to a third party, here a federal district court, constitutes "final action" and the agency's adoption of the recommended terms. 830 S.W.2d at 378. Although the Consent Decree Schedule Modification Request may not have legal effect until entered by the federal district court, the record does not retain its preliminary status under KRS 61.878(1)(j) while the parties wait for the court's approval.

² Because KRS 61.878(1)(j) is dispositive of the issues on appeal, it is not necessary to address the City's arguments that the record is also exempt under KRS 61.878(1)(k), KRE 408, and FRE 408.