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23-ORD-075

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In re: *The Cincinnati Enquirer*/City of Covington

Summary: The City of Covington (“the City”) violated the Open Records Act (“the Act”) when it withheld from inspection records that were not “preliminary drafts” under KRS 61.878(1)(i).

Open Records Decision

On February 7, 2023, *The Cincinnati Enquirer* (“Appellant”) requested that the City provide “any conceptual [or] rendering designs that [two architectural firms] gave to Covington officials during or after the RFP^[1] process for Covington’s newly proposed city hall.” In a timely response, the City denied the request because the requested records were exempt under KRS 61.878(1)(i) as “drafts [and] have not been adopted as the basis for any final action.” This appeal followed.

On appeal, the Appellant claims the conceptual designs the architects submitted in response to the City’s Request for Qualifications (“RFQ”) cannot be considered “drafts” under the Act because they were created by private businesses, not by a public agency. KRS 61.878(1)(i) exempts from disclosure “[p]reliminary drafts, notes, [and] correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency.” This Office has interpreted the word “draft” to mean “a preliminary version of a plan, document, or picture.” *See, e.g.*, 15-ORD-087; 07-ORD-136; 97-ORD-183. The exemption applies to any “public record” a public agency possesses, and is not limited to drafts that are prepared by public agencies.² Indeed, this Office has stated that a

¹ As the parties have subsequently clarified, the process initiated by the City was not a Request for Proposals (“RFP”), but a Request for Qualifications (“RFQ”).

² *Cf.* 08-ORD-079 (noting similarly that although KRS 61.878(1)(j), which applies to preliminary recommendations and preliminary memoranda, “is commonly relied upon to protect the integrity of an

design plan created by a private consultant would qualify as a “preliminary draft” if it did not represent a final plan adopted by a public agency. *See* 07-ORD-136. Accordingly, a record submitted to a public agency may be a “preliminary draft” under KRS 61.878(1)(i) regardless of whether it is prepared by a private entity.³ Here, however, the architects’ conceptual designs are not, in fact, “preliminary drafts.” They were part and parcel of the architects’ final proposal seeking selection to complete the project.⁴ *Cf. Univ. of Ky. v. Courier-Journal & Louisville Times Co.*, 830 S.W.2d 373, 378 (Ky. 1992) (holding a university’s recommendation to the National Collegiate Athletic Association represented the university’s final submission to that entity, and therefore was not “preliminary” to any action taken by the university).

On January 24, 2023, the City’s Board of Commissioners approved the selection of the architects to design the new city hall and authorized the mayor to enter into negotiations with the two firms for a design contract. The City argues on appeal that the architects’ “theoretical renderings or concepts were submitted with no expectations of the City selecting one for the design of City Hall,” and that the City did not “rely on [those] renderings or concepts submitted in selecting a firm to design City Hall.”⁵ But the City’s January 24, 2023 order approving the selection of the architects contradicts the City’s assertions. The order states the City received 13 responses to the RFQ, which a committee evaluated based on the criteria in the RFQ and narrowed down to six applicants, who were then subsequently narrowed down to three after interviews. The three finalists then “submitted detailed drawings of their concepts for a new building,” which “were carefully reviewed and considered by the committee . . . and agreement was reached by the Committee on the best of the final three applicants.” Thus, the City’s order selecting the winning architectural firm stated the selection was made based on the concept drawings submitted in this final stage of the process.

agency’s internal decision-making process, it is neither expressly nor impliedly restricted to intra-agency communications”).

³ In regard to this issue, the City points out that KRS 61.878(1)(i) also exempts “correspondence with private individuals” from disclosure. However, the City does not claim that the concept drawings themselves are “correspondence with private individuals.”

⁴ The drawings, at the time they were submitted, were arguably “preliminary recommendations” under KRS 61.878(1)(j) for why the architects should be selected, but the City does not argue this. Moreover, even if the drawings were preliminary recommendations, they would have lost their preliminary status when the City approved the selection of the architects on the basis of those drawings.

⁵ As evidence, the City submits a copy of the RFQ, which it issued on September 6, 2022. Under the terms of the RFQ, architects’ proposals were to be evaluated and scored based on five factors: “History of Qualifications of Firm,” “Experience with legacy buildings and civic spaces,” “Work Samples,” “Lead staff and their professional qualifications,” and “Project Schedule.” Firms were awarded up to 20 possible points for each of these factors, whereas no points were awarded for design concepts submitted by the architects.

For this reason, the Appellant claims the concept drawings are no longer preliminary drafts because the City “took final action based on those designs.” As noted, the City’s Board of Commissioners approved the selection of the architects to design the new city hall and authorized the mayor to enter into negotiations with the two firms for a design contract. The Appellant argues the concept drawings ceased to be preliminary drafts because the City “adopted” them as the basis of its decision to select the architects.

“Adoption” is a concept generally associated with KRS 61.878(1)(j), which exempts from disclosure “[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended.” Kentucky courts have held that, if a public agency adopts such opinions or recommendations as the basis of final action, the exempt status of the records is lost. *See Courier-Journal*, 830 S.W.2d at 378; *Univ. of Ky. v. Lexington H-L Services, Inc.*, 579 S.W.3d 858, 863 (Ky. App. 2018). But the same concept is not so easily applied to records exempt from disclosure under KRS 61.878(1)(i). *See* 20-ORD-095 (declining to extend the “adoption” rule any further than necessary).

Nevertheless, the concept drawings are not “preliminary drafts” under KRS 61.878(1)(i) because they are not a “draft” of anything. As the City admits, the drawings “were submitted with no expectations of the City selecting one for the design of City Hall.” Thus, the drawings could not be “preliminary drafts” of City Hall. Rather, the designs were submitted to demonstrate the architects’ skill and understanding of the basic criteria for the project as part of a bid to obtain a public contract.⁶ Thus, the concept drawings were not “preliminary drafts” of the actual plan for the building, but a final product submitted by a bidding architectural firm to persuade the City to choose it for the project. Accordingly, the concept drawings are not “preliminary drafts” exempt from disclosure. Thus, the City violated the Act when it withheld the concept drawings under KRS 61.878(1)(i).

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.

⁶ The City describes the criteria for the project as “the building being iconic, long-lasting, and having an appearance that reflects an obvious government/civic purpose.” Although the City tries to distinguish RFPs from the bidding process here, the fact remains that proposals were submitted by competing firms for the chance to obtain a public contract. The conceptual drawings were part of the winning architectural firm’s bid, and the City selected it over two others based on the three firms’ conceptual drawings.

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s/ James M. Herrick
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Distributed to:

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