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23-ORD-077

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In re: Mark Payne/Northern Kentucky University

Summary: Northern Kentucky University ("the University") did not violate the Open Records Act ("the Act") when it withheld entirely emails that are exempt under the Act.

Open Records Decision

Mark Payne ("the Appellant") submitted to the University a request to inspect all emails sent to or received by the former president between October 17 and November 17, 2022. This Office previously found the University's initial response to his request violated the Act because it delayed access to responsive records without properly invoking KRS 61.872(5). *See* 23-ORD-004. After the Appellant initiated his original appeal, the University produced 629 responsive emails, but withheld others under various exceptions. Because the University's denial presented new issues on appeal, the Office's review was limited to the University's initial procedural violation. The Office noted the Appellant could initiate a new appeal to challenge the merits of the University's denial by providing a copy of his original request and the University's final denial. The Appellant exercised that option, and brings this appeal to challenge the University decision to withhold several emails under KRS 61.878(1)(i), (j), (r), and the attorney-client privilege. He also argues that, even if the content of the withheld emails is exempt, KRS 61.878(4) requires the University to redact the body of the emails and provide the "headers" containing the sender, recipient, subject, and the date and time when the email was sent or received.

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 KRS 61.880(1) requires for a "brief explanation" in support of a denial. 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, in response to the request, the University provided 629 responsive emails. However, on December 5, 2022, the University informed the Appellant it was withholding "any records containing preliminary drafts and notes not intended to give notice of final University action and preliminary recommendations and memoranda in which opinions are expressed or policies formulated or recommended

pursuant to KRS 61.878(1)(i) and KRS 61.878(1)(j), respectively." The University also withheld "any records containing legal opinions or advice given by [the University's] General Counsel as such records are protected by the attorney-client privilege. KRS 61.878(1)(k) and KRE 503." The University's December 5, 2022 description of the records withheld did not provide sufficient detail about the records withheld to permit the Appellant to determine whether the claimed exceptions applied. However, when the Appellant challenged the University's claimed exceptions, the University sent another response on December 9, 2022, in which it more fully described the records withheld and how the claimed exceptions applied to them.

In its December 9, 2022 response, the University separated the records into meaningful categories by the exemption it claimed applied to each category. For each category, the University gave brief explanations of the contents of the records. It described the records it was withholding under KRS 61.878(1)(i) as "internal discussion, draft Q&As, draft timelines, draft talking points, and related material pertaining to the Governor's Scholars Program, Charter Schools, potential real estate transactions, potential personnel actions still under consideration, and future potential partnerships with area leaders and businesses." The University further stated it had not taken final action with respect to any of these drafts.

The University described the records it withheld under KRS 61.878(1)(j) as emails containing "opinions, advice, and feedback regarding the Governor's Scholars Program, Charter Schools, potential personnel actions still under consideration, potential real estate transactions, implementation of the Faculty Voluntary Separation Program, and University Repositioning items still under consideration." Again, the University stated no final action had occurred with respect to any of these topics.

With respect to these two categories, the University's December 9 response complied with KRS 61.880(1) because it described the records withheld and explained such records remained exempt because no final action had been taken with respect to these emails. Moreover, the University properly relied on KRS 61.878(1)(i) and (j) to withhold these emails. 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). 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)). Accordingly, the University did not violate the Act by denying inspection of these emails under KRS 61.878(1)(i) and (j).

The University also withheld emails under the attorney-client privilege. It described these emails as "correspondence between University faculty, staff, and administrators and the University's General Counsel sent for purposes of seeking and receiving legal advice regarding requirements pertaining to budget and employment matters." The attorney-client privilege protects from disclosure "confidential communication[s] made for the purpose of facilitating the rendition of professional legal services to [a] client." KRE 503(b). "A communication is 'confidential' if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." KRE 503(a)(5). KRS 61.878(1)(l) operates in tandem with KRE 503 to exclude from inspection public records protected by the attorney-client privilege. *Hahn v. Univ. of Louisville*, 80 S.W.3d 771 (Ky. App. 2001). Here, the University has provided a sufficient, although minimal, description of the topic of the emails to determine whether the attorney-client privilege applies. Specifically, the University stated the emails were exchanged between University employees and its General Counsel for the purpose of obtaining legal services related to "budget and employment matters." Accordingly, the University did not violate the Act by withholding these emails under the attorney-client privilege.

Finally, the University described the emails it withheld under KRS 61.878(1)(r), which exempts from inspection "[c]ommunications of a purely

personal nature unrelated to any governmental function," as emails that "include personal, non-University related, conversations between the President and private individuals and correspondence related to the President's service on various boards as a private individual." Here, the University explained the emails were sent by the former President in his capacity as a private individual, in which he discussed matters unrelated to his governmental role as a University President. Accordingly, the University did not violate the Act in withholding these emails.

Nevertheless, the Appellant argues KRS 61.878(4) requires the University to redact all of these emails, notwithstanding their exempt status, and provide the "headers," which he describes as the names of the sender and recipient, the dates, and the subject lines of the emails. Under KRS 61.878(4), "[i]f any public record contains material which is not excepted under this section, the public agency shall separate the excepted and make the nonexcepted material available for examination." However, the information the Appellant demands the University separate from the emails is itself exempt. As stated previously, the purpose of KRS 61.878(1)(i) and (j) is to allow employees to freely communicate thoughts and ideas. The same is true with respect to attorney-client communications. Thus, the subject lines of emails describing the contents of opinions, drafts, or legal advice is part and parcel of the drafts and opinions expressed in the email. And although the identities of those who authored such drafts or expressed such opinions may not divulge as much information as the subject line, the release of such information could still burden the agency's ability to engage in frank discussions. The same is true in the context of attorney-client communications, as it could reveal who sought the legal advice. And with respect to purely private communications exempt under KRS 61.878(1)(r), the email and all of its parts is the "communication" that is exempt.

Moreover, if taken to its logical conclusion, the Appellant's theory would result in no agency ever being able to withhold any public record from inspection in its entirety. Every public record will contain *some* "material" that is not exempt. Some examples include page numbers, letterheads, and yes, dates. It would be untenable to require public agencies, in response to every request to inspect records they receive, to produce in redacted form otherwise exempt public records simply because they contain dates or page numbers. This is especially true when it comes to emails, the numbers of which can reach thousands depending on the breadth of the request. Accordingly, the University did not violate the Act by withholding in their entirety records that are exempt from inspection.

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.

Daniel Cameron
Attorney General

s/ Marc Manley
Marc Manley
Assistant Attorney General

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Distributed to:

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