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23-ORD-095

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In re: Mark Lamkin/Department of Financial Institutions

Summary: The Department of Financial Institutions (“the Department”) did not violate the Open Records Act (“the Act”) when it withheld “preliminary drafts” or “notes” under KRS 61.878(1)(i) or records confidentially disclosed to the Department under KRS 292.500(19)(c).

Open Records Decision

On March 23, 2022, Mark Lamkin (“Appellant”) asked the Department to provide various records related to an investigation and an administrative action concerning the Appellant. At that time, the Department withheld certain records under KRS 61.878(1)(h), (i), and (j). On January 3, 2023, after the investigation and administrative action had concluded, the Appellant made a second request for “all documents withheld in connection with” his previous request, and for “copies of all documents or correspondence from, or on behalf of, the Financial Industry Regulatory Authority (‘FINRA’), evidencing FINRA expressly deeming as confidential any of the materials previously withheld.”

In response to the January 3 request, the Department provided numerous records to the Appellant. However, it withheld certain categories of records, including “preliminary drafts of the administrative action,” “preliminary drafts [of] pleadings,” and “drafts of memos of law” under KRS 61.878(1)(i) and (j) and “correspondence from federal regulatory authorities, including letters, records and information provided by [FINRA] to [the Department] which the federal regulatory body deems to be confidential” under KRS 292.500(19)(c).¹ This appeal followed.

¹ The Department also withheld from inspection email discussions with attorneys protected by the attorney-client privilege or the work product doctrine, and personal information redacted under KRS 61.878(1)(a). The Appellant has not challenged the Department’s denial of these records.

The Appellant claims the Department may no longer withhold any records as “preliminary” under KRS 61.878(1)(i) or (j) because the Department has taken final action and the records do not relate to “any ongoing investigation or administrative action.” 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.” A preliminary draft does not lose its preliminary status when the agency takes final action. *See* 21-ORD-089. Further, on appeal, the Department states, “The remaining records consist of attorneys’ notes and investigative notes that were preliminary to the Department deciding to pursue or otherwise formalize an administrative action.” This Office has described “notes” as records “created as an aid to memory or as a basis for a fuller statement.” 05-ORD-179. Such records do not lose their preliminary status when an agency takes final action. *See, e.g.,* 21-ORD-150. Accordingly, the Department did not violate the Act when it withheld preliminary drafts or notes under KRS 61.878(1)(i).

The Appellant further argues the Department violated the Act by withholding records obtained from FINRA because the Department did not provide “any record wherein FINRA sent materials to [the Department] and expressly deemed them confidential.” Under KRS 292.500(19), certain “materials, documentation, and other information are deemed to have been confidentially disclosed to the department and to be confidential information under the [Act] and, specifically, under KRS 61.878(1)(b).”² This includes “[a]ny materials, documentation, or other information provided to or otherwise obtained by the department from any other regulatory or governmental body, including . . . any self-regulatory organization[,] and which the other body expressly deems to be confidential.” KRS 292.500(19)(c). The Appellant does not dispute that FINRA is a regulatory body within the meaning of KRS 292.500(19)(c). Rather, the Appellant claims the Department has failed to demonstrate that FINRA expressly deemed any of the requested records to be confidential.

On appeal, the Department explains that FINRA designated records as confidential by adding a line on each page stating “CONFIDENTIAL TREATMENT REQUESTED BY FINRA.” In addition, FINRA’s cover letter listing the confidentially disclosed documents was itself designated as confidential by FINRA.³ Thus, all FINRA records responsive to the Appellant’s request were confidential under

² KRS 61.878(1)(b) exempts from disclosure “[r]ecords confidentially disclosed to an agency and compiled and maintained for scientific research.” However, any records made confidential under KRS 292.500(19)(c) are also exempt from disclosure under KRS 61.878(1)(l), which applies to all “[p]ublic records or information the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly.”

³ As evidence, the Department has provided a copy of the cover letter from FINRA, which clearly contains this designation of confidentiality.

KRS 292.500(19)(c), including the designation of confidentiality. Accordingly, the Department did not violate the Act when it denied the Appellant's request.

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
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s/ James M. Herrick
James M. Herrick
Assistant Attorney General

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