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23-ORD-116

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In re: Staci Ray/Cabinet for Health and Family Services

Summary: The Cabinet for Health and Family Services ("Cabinet") violated the Open Records Act ("the Act") when it redacted records and denied a request to inspect emails without explaining how the claimed exemptions applied. Although the Cabinet did not violate the Act when it redacted identifying information of those who reported abuse, it did violate the Act when it redacted the names of other adults. The Cabinet also violated the Act when it withheld emails under KRS 61.878(1)(j). Nevertheless, the emails it withheld are exempt under KRS 61.878(1)(i).

Open Records Decision

Staci Ray ("Appellant") submitted a request to the Cabinet to inspect a copy of a specified complaint, "[a]ll investigative documents and/or findings regarding [the] complaint," "[a]ll email correspondence regarding [the] complaint, including emails to or from" four named employees, and "[a]ll documentation that was reviewed or analyzed" in the Cabinet's determination that the Appellant's business was "not in compliance with applicable provider qualifications." In a timely response, the Cabinet provided responsive records that had been redacted pursuant to KRS 61.878(1)(a) and denied the request for email correspondence under KRS 61.878(1)(j) because any such emails "ha[ve] been determined to be preliminary." This appeal followed.

Upon receiving a request to inspect public records, a public agency must determine within five business days whether to grant the request or deny it. KRS 61.880(1). If the agency chooses to deny the request, it "shall 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." *Id*. An agency response denying a request for records must explain the denial by "provid[ing] particular and detailed information," not merely a "limited and perfunctory

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response." *Edmondson v. Alig*, 926 S.W.2d 856, 858 (Ky. 1996). "The agency's explanation must be detailed enough to permit [a reviewing] court to assess its claim and the opposing party to challenge it." *Ky. New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76, 81 (Ky. 2013).

Here, the Cabinet merely cited and quoted the text of KRS 61.878(1)(a) and (j). It did not explain how those exemptions applied to records it redacted or the emails it withheld. Accordingly, the Cabinet's limited and perfunctory response violated the Act.

Regarding the merits of the Cabinet's denial, KRS 61.878(1)(a) exempts from inspection "[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." This exception requires a "comparative weighing of the antagonistic interests" between the personal privacy interest at stake and the public interest in disclosure. *Ky. Bd. of Exam'rs of Psychologists v. Courier-Journal & Louisville Times Co.*, 826 S.W.2d 324, 327 (Ky. 1992); *see also Zink v. Commonwealth, Dep't of Workers' Claims*, 902 S.W.2d 825, 828 (Ky. App. 1994). The Cabinet has the burden of proof in sustaining its action. KRS 61.880(2)(c). The Office has found that a public agency violates the Act when it does not describe the material redacted, or explain the privacy interest at stake so that it may be weighed against the public interest in disclosure. *See, e.g.*, 20-ORD-013; 17-ORD-120; 17-ORD-101.

On appeal, the Cabinet explains it redacted the names of "individual participants with disabilities" and "identifying information for individuals reporting the suspected abuse." Alternatively, the Cabinet claims KRS 209.140(1), incorporated as an exemption under KRS 61.878(1)(l), applies to withhold the "source information" of a person alleging abuse of an adult with disabilities. Although KRS 209.140(1) exempts from inspection "names of informants" alleging abuse of adults in violation of KRS Chapter 209, it does not extend to permit the redaction of every name mentioned during an investigation. Nor has this Office interpreted KRS 61.878(1)(a) to permit an agency to withhold the names of any adult appearing in such complaints. *See, e.g.*, 12-ORD-120. Therefore, the Cabinet violated the Act when it withheld the names of "individual participants with disabilities," but did not violate the Act when it redacted "identifying information for individuals reporting the suspected abuse."

The Cabinet claims the remaining emails are exempt under KRS 61.878(1)(j), which exempts from inspection "[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended." This exemption is distinct from KRS 61.878(1)(i), which exempts from inspection "[p]reliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency." The distinction is important because Kentucky courts have held "investigative

materials that were once preliminary in nature lose their exempt status once they are adopted by the agency as part of its action." *Univ. of Ky. v. Courier–Journal & Louisville Times Co.*, 830 S.W.2d 373, 378 (Ky. 1992). But neither KRS 61.878(1)(i) nor (j) discusses preliminary "investigative materials." Rather, KRS 61.878(1)(i) relates to preliminary drafts and notes, which by their very nature are rejected when a final report is approved. In other words, a first draft is not "adopted" when a second draft is written, and the first draft is always exempt under KRS 61.878(1)(i). *See, e.g.*, 21-ORD-089 (agency properly relied on KRS 61.878(1)(i) to deny inspection of the "first draft" of a report that was later adopted).

The same is true of "notes," which constitute the majority of interoffice emails and chat messages. *See, e.g.*, 22-ORD-176 n.6; OAG 78-626. To the extent specific thoughts or beliefs contained within drafts and notes are "adopted," they are adopted into whatever final document the agency produces from those drafts and notes. That final document represents the agency's official action and is subject to inspection. But the initial and preliminary thoughts on what the final product should contain, which are expressed during the drafting process through emails, do not lose their preliminary status once the final end-product is produced. To do so would destroy the "full and frank discussion[s] between and among public employees and officials" as they "hammer[ ] out official action," which is the very purpose of KRS 61.878(1)(i). 14-ORD-014.

To determine whether the Cabinet properly characterized the withheld emails as "[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended," the Office asked the Cabinet to provide copies of them. *See* KRS 61.880(2)(c). Having reviewed the emails, it is clear that all of them would be exempt under KRS 61.878(1)(i), as preliminary drafts and notes, except one which contains correspondence with a private individual not intended to constitute final agency action. However, the Cabinet relied on KRS 61.878(1)(j)—not paragraph (i)—to withhold all the emails. Thus, the Cabinet violated the Act by withholding these emails under KRS 61.878(1)(j). But for the reasons explained below, the emails remain exempt.

The Cabinet provided 11 emails for this Office's confidential review. Of course, the Office cannot disclose the contents of these emails. KRS 61.880(2)(c). Therefore, the Office will refer to the emails by their position in the list the Cabinet provided.

Email 1 is a note referring the recipient to an attachment, which is the unredacted version of the report that was provided to the Appellant. Email 2 is a thread of notes containing the mental impressions of investigators and discussions about which investigator would be assigned the complaint. Email 3 is a thread of notes containing mental impressions of the investigation and discussions about edits

to the report while it was still in draft form. Emails 4 and 5 contain notes about the status of the report, similar to a "for your information" type of note.

Email 6 is a thread containing 12 emails. The bottom three emails were communications exchanged between the complainant and a Cabinet employee. However, those three emails are not drafts, notes, or preliminary policy recommendations. Rather, they constitute "correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency," which is also exempt under KRS 61.878(1)(i). The remainder of this thread of emails contains notes and mental impressions of the investigators about the substance of the correspondence with the private individual, and notes about telephone calls with that same individual. Thus, all of Email 6 is exempt under KRS 61.878(1)(i).

Email 7 is an email transmitting to the records custodian the emails responsive to the Appellant's request. That transmittal email is not responsive to the Appellant's request, and therefore, need not be provided.

Like Email 6, Email 8 is a thread containing five emails. The bottom email is a duplicate of the complainant's original email submitting the complaint, which was provided to the Appellant in redacted form. As explained above, it is appropriate to redact from this email the name and contact information of the complainant under KRS 290.140(1). The other names in that bottom email, however, may not be redacted. The remaining four emails in this thread are notes about the investigators' thoughts on how to proceed with processing the complaint. They are all exempt under KRS 61.878(1)(i).

Email 9 contains notes about the proposed draft report and the investigators' mental impressions of the draft. It is exempt under KRS 61.878(1)(i). Email 10 is the complainant's original email constituting the complaint that initiated the investigation, which was provided to the Appellant in redacted form. As explained above, it is appropriate to redact from this email the name and contact information of the complainant under KRS 290.140(1). The other names in this email, however, may not be redacted.

Finally, Email 11 is a note referring the recipient to two attachments, which were the last drafts of the report before its approval. However, the attachments are themselves drafts because they contain highlights for the reviewer's final attention. One attachment is a draft of "DDID Complaint Report," and the other is a draft of the "Citations and Corrective Action Plan Tracking Report." The final version of both of those reports were provided to the Appellant in redacted form, as explained above. Therefore, this email is a note, its attachments contain drafts, and the whole record is exempt under KRS 61.878(1)(i).

In sum, the Cabinet violated the Act when it redacted names appearing in the records other than the complainant's name, which was properly redacted under KRS 290.140(1). The Cabinet also violated the Act when it claimed the emails were exempt under KRS 61.878(1)(j). However, the emails are exempt from inspection under KRS 61.878(1)(i).

A party aggrieved by this decision may appeal it by initiating an 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:

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