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23-ORD-188

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In re: Robert Moore/Fayette County Public Schools

Summary: Fayette County Public Schools ("FCPS") violated the Open Records Act ("the Act") when it redacted emails under KRS 61.878(i) and (j) without adequately explaining how the exemptions applied. However, FCPS has substantiated on appeal that those exemptions do apply to all but the names of individuals with whom it corresponded. While email addresses may be exempt under KRS 61.878(1)(a), FCPS did not rely on that exemption, and it has not carried its burden that an exception applies to names appearing in emails other than when appearing as part of email addresses.

Open Records Decision

Robert Moore ("Appellant") requested various records, including email correspondence, related to a technology audit conducted by Hanover Research ("Hanover").[1] In response, FCPS provided hundreds of responsive records, including email correspondence with representatives of Hanover. However, FCPS redacted the names and email addresses of Hanover representatives appearing in the emails. Moreover, FCPS entirely redacted a few emails. Citing KRS 61.878(1)(i) and (j), FCPS claimed "the FCPS 2023-2024 budget, [the] Hanover study [and] the Evergreen certified compensation study are preliminary and therefore exempt." This appeal followed.

[1] The Appellant also sought four other categories of records, but he does not challenge the agency's disposition of those requests.

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*. 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 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, FCPS categorized the emails it redacted as those referencing its 2023-2024 budget, "the Hanover study," and "the Evergreen certified compensation study," but it simply asserted they were "preliminary" without describing how. Accordingly, its "limited and perfunctory response" violated the Act. *Edmondson*, 926 S.W.2d at 858.

Regarding the merits of FCPS's redactions, "Preliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency" are exempt from inspection under KRS 61.878(1)(i). And "[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended" are exempt from inspection under KRS 61.878(1)(j). These two exemptions are distinct from one another. 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).

On appeal, FCPS provided the emails again with many of the same redactions, including the names of Hanover representatives with whom it corresponded. However, instead of redacting in their entirety the emails it had so redacted previously, FCPS left unredacted the section headers "Recommendations" and "Key Findings." FCPS explains that it had hired Hanover to conduct a two-part technology audit of the 2022-2023 school year, but as of May 23, 2023, Hanover had not yet provided a final report for consideration. The sections it continues to redact contained draft recommendations and findings that had not been approved when the emails were sent.

In response, the Appellant claims that FCPS has considered certain aspects of the report at various meetings and has taken action on them. However, the Office cannot decide factual disputes in the context of an open records appeal. *See, e.g.*, 21-ORD-163; 18-ORD-150; 96-ORD-070. Therefore, the Office cannot conclude that FCPS has, in fact, adopted a final version of the report. Even if it had, it is clear the recommendations and key findings at issue here were still in draft form at the time they were submitted in the body of an email. The record upon which FCPS will take final action is the final report that Hanover has not yet produced, not drafts of that report communicated via email. Accordingly, FCPS did not violate the Act by redacting under KRS 61.878(1)(i) drafts of the recommendations and key findings contained in the emails.

However, FCPS also redacted from every email the email address of Hanover representatives and the names of those representatives appearing in the email or the signature block of the email.[2] There is nothing "preliminary" about a person's name or email address. Rather, such information may implicate a personal privacy interest such that it may be redacted under KRS 61.878(1)(a), an exemption which FCPS has not invoked here. In reviewing an agency's denial of an open records request based on the personal privacy exemption, the courts and this Office balance the public's right to know what is happening within government against the personal privacy interest at stake in the record. *See Zink v. Commonwealth, Dep't of Workers' Claims*, 902 S.W.2d 825, 828 (Ky. App. 1994). The Office has previously found that the email addresses of private individuals may be withheld under KRS 61.878(1)(a). *See, e.g.*, 22-ORD-228; 14-ORD-157; 07-ORD-120; 06-ORD-031. Those decisions, however, involved the email addresses of individuals appearing in government databases, as opposed to email addresses appearing in emails with government officials.

In contrast to email addresses, however, the Office has also found that a person's name is the least private thing about him and typically cannot be withheld. Indeed, in both 07-ORD-120 and 06-ORD-031, the Office held the agency properly redacted email addresses under KRS 61.878(1)(a), but not the names of the same people with whom the email addresses were associated. The same is true here. The public interest in the names of the Hanover representatives working with FCPS outweighs those representatives' privacy interest in their names. The appropriate balance can be struck by permitting inspection of the representatives' names, while keeping the method with which to contact them by—their email addresses—confidential. Accordingly, FCPS violated the Act by redacting the names of Hanover representatives appearing in the body or signature blocks of the responsive emails.

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

[2] FCPS also redacted the name at the top of each email that indicates the person from whose inbox the email had been printed. Presumably, this is the employee who gathered records to review and fulfill the request, and would be unresponsive to the Appellant's request for emails among certain employees.

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Distributed to:

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