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23-ORD-207

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In re: Ashley Gruner/Louisville Metro Government

Summary: Louisville Metro Government (“Metro”) did not violate the Open Records Act (“the Act”) when it withheld a “preliminary draft” under KRS 61.878(1)(i).

Open Records Decision

On May 11, 2023, Ashley Gruner (“Appellant”) requested “a copy of the compensation study that was conducted for all of Metro Government and recently completed.” Metro denied the request under KRS 61.878(1)(i) and (j) “because the document deals with preliminary drafts and notes, and preliminary recommendations in which opinions are expressed or policies formulated or recommended and which do not form the basis of final agency action.” On June 28, 2023, the Appellant again requested “a copy of the recently completed compensation study.” Metro denied the renewed request on the grounds that “there are no responsive records.” This appeal followed.

On appeal, Metro states the compensation study is still “in a preliminary draft form” and thus no final or “completed” version exists because Metro “has yet to receive the final version from the consulting group that is compiling the results of the study.” Metro also asserts the draft document contains “preliminary recommendations in which opinions are expressed or policies are formulated and/or recommended, and no final agency action has been taken.” 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 is “a tentative version, sketch, or outline” of a final document. 05-ORD-179. It does not lose its preliminary status when the agency takes final action. See 21-ORD-089. Because the final version of the document would no longer be exempt under KRS 61.878(1)(i) or (j) once it has been approved, the

Appellant is not entitled to obtain a copy of a preliminary draft of that document, either now or after the final document is approved.

The Appellant, however, claims a finalized version of the compensation study exists and should have been provided to her. Once a public agency states affirmatively that a record does not exist, the burden shifts to the requester to present a *prima facie* case that the requested record does exist. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov’t*, 172 S.W.3d 333, 341 (Ky. 2005). A requester’s bare assertion that an agency must possess requested records is insufficient to establish a *prima facie* case that the agency actually possesses such records. *See, e.g.*, 22-ORD-040. Rather, to present a *prima facie* case that the agency possesses or should possess the requested records, the requester must provide some statute, regulation, or factual support for that contention. *See, e.g.*, 21-ORD-177; 11-ORD-074. Here, the Appellant claims a final version of the compensation study must exist because she possesses a copy of an email from the Louisville Metro Police Human Resources Director to commanding officers and civilian supervisors dated June 27, 2023, which states that an “overview of [the] study is supposed to be posted on-line sometime next week.” However, one person’s mere expectation that an “overview” of the document “is supposed to be posted” in the near future does not establish a *prima facie* case that a finalized version of the document already exists. Therefore, Metro did not violate the Act when it denied the Appellant’s request for a record that exists only in preliminary draft form.¹

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

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Distributed to:

¹ Because KRS 61.878(1)(i) is dispositive as to the exempt nature of the draft compensation study, it is unnecessary to address Metro’s argument under KRS 61.878(1)(j).

Ms. Ashley Gruner

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