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23-ORD-222

August 18, 2023

In re: Raymond Lauk/Eastern Kentucky University

Summary: Eastern Kentucky University ("the University") violated the Open Records Act ("the Act") when it initially failed to explain how exceptions to the Act applied to certain records. However, the University did not violate the Act when, under KRS 61.878(1)(j), it withheld emails consisting of preliminary recommendations and expressions of opinion that were not adopted as the basis of final agency action.

Open Records Decision

On May 27, 2023, Raymond Lauk ("Appellant"), an associate professor at the University, requested "all materials related to the employment and appointment" of another individual as "Executive in Residence" and as "a tenured associate professor." In a timely response, the University provided various responsive records, but withheld "approximately eight (8) pages of emails that the University has determined are not subject to inspection as such are 'preliminary' in nature and not 'intended to give notice of final action of a public agency' as contemplated by KRS 61.878(1)(i)-(j)."[1] This appeal followed.

When a public agency denies inspection of public records, it 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). The agency must "provide particular and detailed information," not merely a "limited and perfunctory 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*

[1] Although the University also withheld or redacted certain other records on different grounds, the Appellant's objections on appeal are limited to these eight pages of emails.

Hopkinsville, 415 S.W.3d 76, 81 (Ky. 2013). Furthermore, as this Office has recognized, KRS 61.878(1)(i) and (j) are two separate exemptions, and public agencies must explain how each of those separate exemptions applies to the withheld records if an agency chooses to rely on both provisions. *See*, *e.g.*, 21-ORD-168; 21-ORD-169. Here, however, the University's response was "limited and perfunctory" because it did not explain how either of the two claimed exemptions applied to the records it withheld. *See, e.g.,* 22-ORD-007; 21-ORD-202. The University therefore violated KRS 61.880(1).

On appeal, the University provides additional explanation in support of withholding the records. The University states the emails consist of discussions preliminary to a "reassignment" of the individual to the position of Executive in Residence, including preliminary recommendations regarding "salary and title" as well as "recommendations involving 'matters of concern' to the University" and "various opinions . . . openly expressed." Thus, the emails are subject to KRS 61.878(1)(j), which exempts from disclosure "[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended."

Records exempt under KRS 61.878(1)(j) may lose their preliminary status and become subject to disclosure under the Act if they are "adopted as the basis of the final action taken." *See, e.g.,* 01-ORD-83 (citing *City of Louisville v. Courier-Journal & Louisville Times Co.,* 637 S.W.2d 658, 659-60 (Ky. App. 1982); *see also Ky. State Bd. of Medical Licensure v. Courier-Journal & Louisville Times Co.,* 663 S.W.2d 953, 956 (Ky. App. 1983); *University of Kentucky v. Courier-Journal & Louisville Times Co.,* 830 S.W.2d 373, 378 (Ky. 1992)). A record is adopted as the basis of final agency action insofar as the action "necessarily stem[s] from" that document. *Palmer v. Driggers,* 60 S.W.3d 591, 595 (Ky. App. 2001). Here, the University states that three other pages of emails, clarifying such matters as the individual's budgeted salary, "leave approver," and effective date of reassignment, were provided to the Appellant because the reassignment necessarily stemmed from those emails. However, the University asserts the final action of reassignment did not necessarily stem from any of the discussions or recommendations contained in the eight pages of emails it withheld.

Pursuant to KRS 61.880(2)(c), the Office has reviewed the disputed records confidentially. One string of emails dated August 31, 2022, relates to the planning and scheduling of a meeting. The same is true of certain emails dated August 8, August 9, and September 8, 2022. Communications concerning "strategies used to plan [a] meeting, including discussions relating to the invitation and agenda, are preliminary to resolution of the ultimate issue" and thus are exempt under KRS 61.878(1)(j) because "the meeting is merely a step along the road to deciding the ultimate issue." *Univ. of Louisville v. Sharp,* 416 S.W.3d 313, 316 (Ky. App. 2016).

Accordingly, such records remain preliminary unless they are adopted as the basis of final agency action. *Id.* at 315.

The remaining emails in dispute consist of statements of opinion and preliminary recommendations concerning proposed terms of the faculty member's employment, including salary terms that do not match those appearing in his personnel file. These likewise fall within the scope of the exemption in KRS 61.878(1)(j) and remain preliminary unless they are adopted as the basis of final action.

The University states no final action has occurred with regard to making the individual a "tenured associate professor" because he has not yet been granted or denied tenure by the University's board of regents in accordance with the University's bylaws. Accordingly, the University claims any recommendations concerning a status of "tenured associate professor" necessarily remain preliminary under KRS 61.878(1)(j) prior to final action by the board of regents.

The Appellant, however, points to documents from the individual's personnel file that show his current status as "tenured" and his compensation as equivalent to that of a tenured associate professor. According to the Appellant, these documents show that the University has circumvented its board of regents and granted tenure to the individual in violation of its own bylaws. However, the "specific conditions" on the form titled "Terms of Faculty Appointment" indicate the position is an "Admin. appt. to 12-month Exec-in-Residence with" a specified annual salary, and if the appointee "returns to FT faculty, his salary will be adjusted back to base." Furthermore, his appointment term is listed on the same form as "[t]welve months." It is not clear, from these documents alone, that final action has been taken to award tenure to the individual in the position of associate professor.

The Appellant claims to "believe that the eight (8) pages of undisclosed emails will in fact disclose [a] scheme that was devised to 'gift' Associate Professor rank and tenure in violation of university policy and [Board] Bylaws." Having reviewed the disputed emails, the Office notes that they contain no evidence of any such "scheme." To the extent the Appellant complains the University has paid excessive compensation to the individual in question, that issue cannot be decided in the context of an open records appeal under KRS 61.880(2) because it does not arise under the Act. It is clear, however, that the University's board of regents is the body authorized to take final action regarding tenure. *See* KRS 164.360(1)(a) ("Each board of regents for the universities may appoint a president, and on the recommendation of the president may, in its discretion, appoint all faculty members and employees and fix their compensation and tenure of service. . . ."). Although the Appellant claims the University has attempted to grant tenure to the individual in violation of its own

policy and bylaws, he admits no recommendation had been presented to the Board on this matter prior to this appeal,[2] nor had the Board taken any action.

Preliminary recommendations under KRS 61.878(1)(j) retain their preliminary status until they are acted on by the individual or entity who "alone determines what final action is to be taken." *City of Louisville,* 637 S.W.2d at 659. Thus, the actions of a person or group of persons having "no independent authority to issue a binding decision" cannot alter the preliminary status of a recommendation. *Id.; see also* 15-ORD-003; 07-ORD-117; 93-ORD-109. Here, it is undisputed that the board of regents possesses the exclusive lawful authority to grant rank and tenure. Accordingly, the eight pages of emails in question remain preliminary. Therefore, the University did not violate the Act when it withheld the emails under KRS 61.878(1)(j).[3]

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:

Dr. Raymond A. Lauk

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[2] After the appeal was initiated, the Appellant submitted a new request to the University after business hours on August 16 claiming the board of regents took final action on the matter earlier that day, and therefore, the records are no longer preliminary. Other than acknowledging receipt of the Appellant's new request, the University has not indicated whether final action indeed occurred or if it would be providing the Appellant with the responsive records.

[3] The University also claims the emails are exempt under KRS 61.878(1)(i) because they contain preliminary drafts and notes. It is unnecessary to address this argument because KRS 61.878(1)(j) is dispositive of the exempt status of the emails.

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