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23-ORD-296

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In re: Peter Cummins/Daviess County Fiscal Court

Summary: The Daviess County Fiscal Court (the "Fiscal Court") violated the Open Records Act ("the Act") when it denied a request to inspect records without explaining how the claimed exceptions applied to the records withheld. The Fiscal Court also violated the Act when it failed to separate exempt information from nonexempt information and provide the latter for inspection. However, the Fiscal Court did not violate the Act when it withheld several emails under KRS 61.878(1)(i) and (j).

Open Records Decision

Peter Cummins ("Appellant") submitted a request to the Fiscal Court for a variety of records related to plans for a building located in Owensboro.[1] In a timely response, the Fiscal Court denied the request under KRS 61.878(1)(i) and (j) because "the matter [the Appellant] request[ed] information about has had no final action—and the records [he] request[ed] are preliminary drafts, notes, and/or correspondence with private individuals." The Fiscal Court also cited *University of Louisville v. Sharp*, 416 S.W.3d 313 (Ky. App. 2013), for the proposition that "preliminary records

[1] Specifically, the Appellant sought "[a]ny and all documents and communications, from January 2022 to present, including but not limited to internal and external emails and memoranda; text messages on devices whose data plans are reimbursed by the County; calendar entries for meetings or phone calls; and any other communication and/or record of communication, relating or referring to" four private companies; the "Towne Square Mall" building; the "[a]mendment, repeal, or revisions to the City of Owensboro ordinance regarding use of smoke and/or smokeless tobacco products"; and "[d]e-annexation of the parcel leased to" one of the previously mentioned private companies "located at 5000 Frederica Street." He also sought "any and all communications" with two of the private companies regarding any real property in Daviess County "and revisions to any City of Owensboro ordinance."

relating to correspondence with private individuals, without final agency action, are not subject to open records." 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 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). In the event a request implicates a great many records, an agency discharges its duty under KRS 61.880(1) by assigning the withheld records to meaningful categories, describing the nature of the documents in each category, and explaining how the claimed exception applies to the documents in each category. *See, e.g.*, 22-ORD-007 (agency violated the Act when it merely stated the withheld records were exempt under KRS 61.878(1)(i) and (j) because they had never been adopted as part of final agency action without describing the records withheld or the potential final action that was being contemplated).

Here, the Fiscal Court merely paraphrased the text of KRS 61.878(1)(i) and (j) and stated no final action had occurred in connection to responsive records. It did not describe the type of records it was withholding (*e.g.*, emails, letters, text messages, or reports), the general content of those records, or how the cited exceptions applied to the records it withheld. Accordingly, the Fiscal Court's limited and perfunctory response violated the Act.

On appeal, the Fiscal Court has agreed to provide records responsive to all portions of the Appellant's request except for emails involving two of the four private companies.[2] With respect to the emails it continues to withhold, the Fiscal Court reiterates that KRS 61.878(1)(i) and (j) apply because they contain "preliminary discussions" with two private companies and no final action has been taken with respect to potential plans for those companies to locate in Owensboro.

[2] While the appeal was pending, the parties agreed to "suspend" the Fiscal Court's production of records while settlement talks involving one of the private companies continued. However, those negotiations apparently broke down, and the Appellant now seeks those records. It is not clear whether those records have in fact been provided to the Appellant as of the date of this decision.

KRS 61.878(1)(j) exempts from inspection "[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended." This exception 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 most 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 Fiscal Court properly invoked the claimed exemptions, the Office asked the Fiscal Court to provide copies of the withheld records. *See* KRS 61.880(2)(c). The Fiscal Court provided 156 emails, some with attachments, and two other records containing lists of projects for this Office's confidential review.[3] Of course, the Office cannot disclose the contents of these records. *Id*. But having reviewed the records, it is clear that, except for portions of the two lists, all the records are exempt under KRS 61.878(1)(i) and (j).

[3] The Fiscal Court did not indicate which exception applied to specific records nor did it explain why the records were exempt.

Most of the emails provided to the Office are exempt under KRS 61.878(1)(i) as "correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency." In total, 78 of the 156 records provided are exempt under this exception. The emails take the form of either correspondence with private entities about the specific subject matter of the Appellant's request or correspondence with entities inquiring about the Fiscal Court's handling of the subject matter of the Appellant's request. None of the emails contain notice of final action contemplated by the Fiscal Court. As such, the emails are exempt under KRS 61.878(1)(i).

Fifty-four of the 156 emails are notes under KRS 61.878(1)(i). This category of emails involves internal communications among Fiscal Court employees discussing the contents of emails with private individuals, emails proposing responses to private individuals, emails suggesting what position the Fiscal Court should take in response to correspondence from private individuals, and emails containing the mental impressions of Fiscal Court employees about negotiations with private individuals.

Most of the records at issue are from a single email chain that was saved as a separate record each time a Fiscal Court employee or private individual replied. As such, these emails all contain the same attachments. These attachments include original and redline versions of documents, and therefore, are preliminary drafts. Thus, the emails among Fiscal Court employees commenting on the attachments are notes, and the emails exchanged between the private companies and Fiscal Court employees constitute preliminary correspondence with private individuals not intended to give notice of final action. The attachments to the emails are all drafts of the documents about which no final action had been taken. As such, all these records are exempt under KRS 61.878(1)(i).

The last broad category of exempt emails involves the scheduling of meetings. The Court of Appeals has held that emails related to meetings and calendar invitations and entries are preliminary drafts and notes exempt from inspection under KRS 61.878(1)(i). *See Courier-Journal v. Jones*, 895 S.W.2d 6, 10 (Ky. App. 1995). Of the 156 records provided to the Office, 22 involve scheduling meetings, including calendar invitations, and are therefore exempt under KRS 61.878(1)(i).

The final two records the Fiscal Court provided to the Office are not emails, but rather, are two documents containing lists of projects that have either been proposed or have been initiated in 2023. The Fiscal Court has not explained why either of these lists is exempt under KRS 61.878(1)(i) or (j), other than its general

assertion that all records are exempt because the Fiscal Court has not taken final action. The projects that have merely been proposed, but have not yet been approved, are "preliminary recommendations" and could be redacted from the list under KRS 61.878(1)(j). *See* KRS 61.878(4) (requiring an agency to separate exempt information from nonexempt information and providing the latter for inspection). However, it is not clear from these documents which projects have been approved, and which (if any) remain as preliminary recommendations. As such, the Fiscal Court violated the Act when it failed to separate the projects that had been approved, which should be provided to the Appellant, from the projects that remain as preliminary recommendations contemplated by the Fiscal Court and can be withheld.

In sum, the Fiscal Court violated the Act when it responded to the Appellant's request with a limited and perfunctory response that merely paraphrased KRS 61.878(1)(i) and (j) without explaining how the exceptions applied to each category of the records withheld. The Fiscal Court also violated the Act when it withheld entirely two lists that appear to contain projects that had already been approved, instead of separating those projects from the future projects that are still only preliminary recommendations being contemplated by the Fiscal Court. However, the remaining records are emails that are exempt from inspection under KRS 61.878(1)(i) because they contain drafts of documents, notes discussing potential responses to emails and edits to the drafts, and correspondence with private individuals that were not intended to give notice of final action by the Fiscal Court.

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.

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s/ Zachary M. Zimmerer
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Distributed to:

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