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23-ORD-326

December 13, 2023

In re: Kim Striegel/Anchorage Independent School District

Summary: The Anchorage Independent School District ("the District") did not violate the Open Records Act ("the Act") when it withheld records that were preliminary drafts, notes, or correspondence with private individuals under KRS 61.878(1)(i), or preliminary communications concerning the planning of a meeting under KRS 61.878(1)(j) that had not been adopted as the basis of final action. However, the District subverted the intent of the Act, within the meaning of KRS 61.880(4), by imposing excessive fees for copies of electronic records. The District did not violate the Act when it could not provide records that did not yet exist.

Open Records Decision

On October 9, 2023, Kim Striegel ("Appellant") submitted a request for "[a]ll materials that may or will be referenced or used to prepare for and/or during the October 16, 2023 [school] board meeting; digital format preferred." In a timely response on October 16, 2023, the District stated the materials would be available for inspection the following day, and copies could be obtained at the rate of 10 cents per page. On November 5, 2023, the Appellant submitted a request for "[a]ll records prepared for" the school board meeting to occur on November 13, 2023, "including but not limited to agenda-listed reports, superintendent recommendations, and supporting documents." In a timely response, the District denied the request under KRS 61.878(1)(i) and (j) because the "[d]ocuments and communications concerning strategies used to plan a meeting, including discussions relating to the invitation and agenda, are preliminary to resolution of the ultimate issues and as such are exempt unless they are adopted as the basis of final agency action." Additionally, the District stated the requested records "have not yet been prepared, and therefore do not yet exist." This appeal followed.

The Appellant alleges the District violated the Act in two ways. First, she argues she should be able to view the requested school board meeting materials before the meetings occur. Second, she claims the copying fee of 10 cents per page is excessive because she requested the records in electronic format and the District had always provided similar records to her electronically prior to September 2023.

On appeal, the District argues it properly relied on KRS 61.878(1)(i) and (j) to "delay" the Appellant's access to the records requested in October until after the October school board meeting. 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." KRS 61.878(1)(j) exempts from disclosure "[preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended." However, if a public agency adopts such opinions or recommendations as the basis of final action, the exempt status of the record is lost. *See Univ. of Ky. v. Courier-Journal & Louisville Times Co.,* 830 S.W.2d 373, 378 (Ky. 1992); *Univ. of Ky. v. Lexington H-L Services, Inc.,* 579 S.W.3d 858, 863 (Ky. App. 2018).

The District asserts all materials used to prepare for a school board meeting, or which "may or will be referenced" at the meeting, are either preliminary drafts, notes, or correspondence with private individuals under KRS 61.878(1)(i) or preliminary recommendations or memoranda under KRS 61.878(1)(j) that have not been adopted as the basis of final action prior to the meeting. Accordingly, the District does not make such materials available until after the meeting has occurred.

To the extent the requested records are preliminary drafts, notes, or correspondence with private individuals not intended to give notice of final agency action, they are exempt from disclosure under KRS 61.878(1)(i). Furthermore, any 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 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. 2013). Accordingly, such records remain preliminary unless they are adopted as the basis of final agency action. *Id.* at 315. These would include, for example, suggestions for agenda topics and discussions relating to draft documents. *See, e.g.,* 22-ORD-204.

Here, it is the District's policy to make the requested records available to the public after the meeting to which they pertain. Of course, if a particular meeting has not yet occurred, then the school board has not yet adopted as the basis of final action any of the preliminary materials prepared for the meeting. A meeting could, for

example, not occur at all if no quorum appears, or the agenda for a regular meeting could nevertheless change even if the meeting does occur.[1] Accordingly, the District did not violate the Act when it made the preliminary materials for its October 16, 2023, meeting available for inspection after the meeting occurred.

Under KRS 61.880(4), a person requesting records may appeal to the Attorney General if he believes "the intent of [the Act] is being subverted by an agency short of denial of inspection, including but not limited to the imposition of excessive fees." The Act provides that a "public agency may prescribe a reasonable fee for making copies of nonexempt public records requested for use for noncommercial purposes which shall not exceed the actual cost of reproduction, including the costs of the media and any mechanical processing cost incurred by the public agency, but not including the cost of staff required." KRS 61.874(3). A public agency bears the burden of proof that its copying fees reflect the actual cost of reproduction. KRS 61.880(2)(c).

Under KRS 61.874(2)(a), "[n]onexempt public records used for noncommercial purposes shall be available for copying in either standard electronic or standard hard copy format, as designated by the party requesting the records, where the agency currently maintains the records in electronic format." Here, the Appellant's October request for meeting materials sought copies in an electronic format, and the District does not deny that the requested records exist in electronic format. While 10 cents per page is a reasonable fee for hard copies, *see Friend v. Rees,* 696 S.W.2d 325, 326 (Ky. App. 1985), a public agency may not charge the requester for hard copies when electronic copies are requested, nor demand that same fee for electronic copies without substantiating its actual cost. *See, e.g.,* 23-ORD-111. Because the District has not attempted to establish that reproducing the requested records in electronic format results in an actual cost to it of 10 cents per page, KRS 61.874(3), it subverted the intent of the Act by imposing excessive fees within the meaning of KRS 61.880(4).

With regard to the November request, the District advised the Appellant that the requested records did not yet exist. Once a public agency states affirmatively that records do not exist, the burden shifts to the requester to present a *prima facie* case that the requested records do or should exist. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov't,* 172 S.W.3d 333, 341 (Ky. 2005). Here, the Appellant specifically requested "records prepared for" a meeting scheduled to occur eight days later. She has not presented a *prima facie* case that any such records had been prepared at the time of her request. A public agency does not violate the Act when it cannot provide records that do not yet exist. *See, e.g.,* 22-ORD-001. Accordingly, the District did not violate the Act when it denied the Appellant's November request.

[1] Only "special meetings" are required to adhere to an agenda established at least 24 hours in advance of the meeting. *See* KRS 61.823(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:

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