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24-ORD-002

January 16, 2024

In re: Daniel Owens/Cabinet for Health and Family Services

**Summary:** The Cabinet for Health and Family Services (“the Cabinet”) violated the Open Records Act (“the Act”) when it entirely withheld from an unsuccessful applicant the interview questionnaire associated with his interview instead of separating the exempt interview questions from the nonexempt notes and assessments of his answers to those questions and providing him the latter for inspection.

### *Open Records Decision*

Daniel Owens (“the Appellant”) submitted a request to the Cabinet for copies of “the three panelists’ notes taken on the questionnaire form” regarding their “interpretations” of the answers he gave during a job interview. In a timely response, the Cabinet denied the request, claiming the records constitute “examination materials” exempt from inspection under KRS 18A.020(4). The Cabinet explained the records qualified as “examination materials” because they are used to “evaluate an applicant’s qualifications for the position and may be used again in future interviews.” The Cabinet also claimed the records were “preliminary drafts and notes” exempt under KRS 61.878(1)(i). This appeal followed.

Public agency employees and applicants for public-agency employment generally possess a greater right of access to records specifically related to them than the public generally has. Specifically, “[n]o exemption in [KRS 61.878] shall be construed to deny, abridge, or impede the right of a public agency employee [or] . . . an applicant for employment . . . to inspect and to copy any record *including preliminary and other supporting documentation* that relates to him or her.” KRS 61.878(3) (emphasis added). Among the records to which a public agency employee or applicant has a broad right of access are “evaluations” and “examination scores.” *Id.* However, KRS 61.878(3) excludes from this broad right of access the “examinations” themselves. *Id.* Likewise, “a state employee” or “an applicant for [state] employment” “shall have the right to inspect and to copy any record and preliminary documentation and other supporting documentation that relates to him,

*except that an applicant . . . or a state employee shall not have the right to inspect or to copy any examination materials.”* KRS 18A.020(4) (emphasis added). KRS 18A.020(4) is incorporated into the Act’s exceptions under KRS 61.878(1)(l), which exempts from inspection “[p]ublic records or information the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly.”

Unlike KRS 61.878(3), KRS 18A.020(4) makes no mention of “evaluations” or “examination scores.”<sup>1</sup> Moreover, the term “examination materials” is not defined in KRS Chapter 18A. *See* KRS 18A.005. The Office, however, has previously found that interview questionnaires, and the notes taken thereon, qualify as “examination materials” under KRS 18A.020(4). *See, e.g.*, 17-ORD-093; 04-ORD-045. The Office’s reasoning in these decisions relied on an earlier decision, 02-ORD-168, which did not involve state employee interview questionnaires, but materials related to the City of Louisville’s civil service examination for promoting police officers and “the assessment” of one police officer’s “performance.” In 02-ORD-168, the Office analyzed the public agency’s denial under KRS 61.878(3), which as discussed, does not extend a public agency employee’s broad right of access to “examinations.” Relying on *Webster’s New World Dictionary* (2d ed. 1974), the Office found the definition of the noun “examination,” as used in KRS 61.878(3), meant “an examining or being examined; investigation; inspection; scrutiny; inquiry; testing.” *Id.* at 9. The Office found the verb “examine” meant “to look at or into critically or methodically in order to find out the facts, conditions, etc. of; . . . scrutinize.” *Id.* The Office then concluded, “While an examination is commonly understood to involve an objective assessment of knowledge and skill, these definitions suggest a broader meaning which encompasses the subjective elements of the promotional examination and records relating thereto that are the subject of this appeal.” *Id.*

The Office previously concluded that “an examination is commonly understood to involve an objective assessment of knowledge and skills.” *Id.* However, it is doubtful that such an interpretation should include “the subjective elements” of assessing an applicant’s answers to interview questions. Rather, to the extent such “subjective elements” have any connection to what is commonly understood to be “an examination,” it more closely resembles an “examination score,” or an “evaluation,” which under KRS 61.878(3), an applicant for employment is entitled to inspect. It is reasonable to conclude that neither the public nor applicants for employment should have access to interview questions that may be used again, because future applicants would have an unfair advantage in being able to prepare answers ahead of time if such information were disseminated. *See* KRS 61.878(1)(g) (exempting from inspection “[t]est questions, scoring keys, and other examination data used to

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<sup>1</sup> However, KRS 18A.020(2) mentions “evaluations” in the context of “personnel action[s]” by requiring every personnel file to contain copies of “changes in status including evaluations” supporting any particular “personnel action.”

administer a licensing examination, examination for employment, or academic examination before the exam is given or if it is to be given again”). However, it is not clear why applicants for employment should be prevented from obtaining an interviewer’s “evaluation” about their own qualifications, or supposed lack thereof, for any particular position. Indeed, it seems the very purpose of KRS 61.878(3) and KRS 18A.020(4) is to give such requesters this type of feedback on their job or interview performances.

Given these concerns with its previous, and expansive, interpretation of the term “examination materials,” the Office asked the Cabinet to provide copies of the disputed records. *See* KRS 61.880(2)(c). While the Office cannot describe the content of the specific records in dispute, a blank version of the “interview questionnaire worksheet” is publicly available.<sup>2</sup> In sum, it contains a section for each question asked; blank space for the interviewer to take notes regarding each question; and a space for the interviewer to indicate by a check mark his or her “assessment” of the interviewee’s answer to each question as “excellent,” “very good,” “good,” “fair,” or “poor.” The last page also contains a place for additional notes and an overall evaluation using the same criteria used for assessing each answer (*i.e.*, “excellent” to “poor”). The only difference between the publicly available form and the records in dispute here is that the spaces for the questions, notes, assessments of each answer, and overall evaluation have been completed. These records are in no way comparable to the general understanding of an “examination,” in which questions with objective answers are asked. Rather, the records are more comparable to a performance evaluation than an “examination,” even though by its very nature an interview cannot fully resemble a performance evaluation. Indeed, the last section of the form is titled “evaluation.” KRS 61.878(3) specifically allows an applicant for employment to review “evaluations.” It is not clear why the General Assembly would give an unsuccessful applicant for a job the right to inspect any records about himself except for the very evaluation that resulted in him not obtaining the job, which is likely the very record in which the unsuccessful applicant would be most interested.

In 17-ORD-093, the Office correctly held that one unsuccessful applicant for employment could not obtain the interview materials of another unsuccessful applicant under KRS 61.878(1)(a). But the personal privacy exemption would not apply to the unsuccessful applicant seeking the materials related to his or her own interview. Moreover, the Office correctly noted that the questions appearing in the interview materials could potentially be used in future interviews, and thus, it would give future candidates for employment an unfair advantage if the questions were subject to inspection. *Id.*; *see also* KRS 61.878(1)(g). Accordingly, the Office correctly held that the questions *themselves* constitute “examination materials” under

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<sup>2</sup> *See*

[https://extranet.personnel.ky.gov/\\_layouts/15/DL/DL.aspx?Library=DHRA&FileName=InterviewQuestionnaireWkst.doc](https://extranet.personnel.ky.gov/_layouts/15/DL/DL.aspx?Library=DHRA&FileName=InterviewQuestionnaireWkst.doc) (last accessed Jan. 16, 2024)

KRS 18A.020(4). But the Office swept too broadly when it also held that the interview notes and assessments could be withheld under KRS 18A.020(4). Such materials are expressly subject to inspection by the unsuccessful applicant under KRS 61.878(3). Accordingly, the Office overrules that portion of 17-ORD-093, and any other previous decision, including 04-ORD-045, which states otherwise.

Simply put, an unsuccessful applicant for employment or promotion has a right to inspect his evaluation and notes evaluating his answers under KRS 61.878(3). This is true even if such materials are “preliminary.” *Id.* Thus, KRS 61.878(1)(i) does not deny the Appellant inspection of the requested records. Moreover, under KRS 61.878(4), the Cabinet must separate exempt information from nonexempt information and provide the latter for inspection. As a result, the Cabinet may redact the interview questions themselves, but not the notes the interviewers took, or their assessment of the Appellant’s answers. Accordingly, the Cabinet violated the Act when it withheld the requested records in their entirety, rather than separating the exempt questions from the nonexempt notes and assessments and providing the latter to the Appellant.

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.

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/s/ Marc Manley  
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#482

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