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24-ORD-035

February 14, 2024

In re: Rachana Pradhan/Cabinet for Health and Family Services

Summary: The Cabinet for Health and Family Services (“the Cabinet”) did not violate the Open Records Act (“the Act”) when it withheld records that were “preliminary drafts” under KRS 61.878(1)(i) or “preliminary recommendations” under KRS 61.878(1)(j).

Open Records Decision

On December 18, 2023, Rachana Pradhan (“Appellant”) requested a copy of a “change order” submitted by the Cabinet to a government contractor, Deloitte Consulting LLP (“Deloitte”), concerning the removal of an electronic system barrier blocking access to the Kentucky Health Benefit Exchange Self Service Portal for individuals determined ineligible for Supplemental Security Income benefits. The Appellant also requested copies of “all emails, attachments, text messages and other communications sent between [Cabinet] personnel and employees of [Deloitte] whose email domains include ‘@deloitte.com’ since January 1, 2023. In response, the Cabinet denied the request “because the responsive records are preliminary records consisting of the change order, interoffice emails, and correspondence with private individuals not intended to give notice of final agency action, under KRS 61.878(1)(i), [and] ‘preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended[,]’ which are exempt from disclosure under KRS 61.878(1)(j).” This appeal followed.

The Appellant claims the change order is a final agency action because the Cabinet has submitted it to Deloitte. However, the Cabinet asserts that the change order, at this time, is merely a preliminary draft subject to “additional revisions” following discussions between the Cabinet and Deloitte. The Cabinet further describes some of the withheld emails as discussions of “whether additions should be made to the current draft of the change order or whether a new change order should be created.” According to the Cabinet, “[c]hange orders can be altered, and until implemented, are not a final submission from the Cabinet.” Rather, “[s]ubmitting the

change order to Deloitte was just the first step in a process that requires multiple levels of review, discussion, approval, and changes.”

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. Furthermore, emails containing edits or suggested changes to a preliminary draft are within the scope of the “preliminary drafts” exception under KRS 61.878(1)(i). *See, e.g.,* 22-ORD-204; 21-ORD-089; 16-ORD-180. Once the change order is finalized, the Appellant will be able to obtain a copy of the final document if no other exception applies, but preliminary drafts of the change order will remain exempt from disclosure under KRS 61.878(1)(i).

The Cabinet describes the remaining withheld emails as “interoffice emails between agency employees discussing how to proceed with the change order, discussing how to proceed with the Supplemental Security Income renewal process, and exchanging draft responses and thoughts on what to include for the Cabinet’s responses to the questions submitted prior to and during a town hall meeting.” Clearly, the “draft responses and thoughts” constitute part of the process of drafting the Cabinet’s written responses to questions, and therefore may be characterized as “preliminary drafts” under KRS 61.878(1)(i). *See* 23-ORD-116. Further, because the Cabinet has not taken any final action with respect to its policy discussions, these emails clearly retain their preliminary status. Accordingly, the Cabinet did not violate the Act.

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.

Russell Coleman
Attorney General

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

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Distributed to:

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