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25-ORD-218

August 13, 2025

In re: Jill Charles/Transportation Cabinet

Summary: The Transportation Cabinet (“the Cabinet”) violated the Open Records Act (“the Act”) when it withheld from inspection records that were not “preliminary drafts” under KRS 61.878(1)(i) or “preliminary recommendations” or “preliminary memoranda” under KRS 61.878(1)(j).

Open Records Decision

Jill Charles (“the Appellant”) requested copies of certain records submitted to the Cabinet on behalf of a developer as part of a pending encroachment permit application. Specifically, the Appellant requested a Memorandum of Understanding (“MOU”) prepared and submitted by SHA Engineering on February 27, 2025; an updated version of the same MOU submitted on March 5, 2025; and an XL spreadsheet file containing historic traffic count data from the Cabinet. Both the MOU and the spreadsheet were used in preparing a traffic impact study, which was submitted to the Cabinet as part of the permit application.¹ The Cabinet denied the Appellant’s request under KRS 61.878(1)(i) on the grounds that the requested records were “preliminary drafts.”² This appeal followed.

On appeal, the Cabinet claims it “properly denied inspection to the two exempt records pursuant to KRS 61.878(1)(i) and (j), as preliminary drafts, notes, or correspondence with private individuals, and recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended.” The Cabinet thus invokes both KRS 61.878(1)(j) and KRS 61.878(1)(i). However, a

¹ The traffic impact study was also submitted to the Boone County Planning Commission (“the Commission”) as part of a zone change application, which the Commission denied on May 7, 2025. The Appellant received a copy of the traffic impact study from the Commission, but explains she requested the MOU and spreadsheet from the Cabinet because the applicant had not made those documents part of the record before the Commission.

² The Cabinet also cited KRS 61.878(1)(j), but did not explain how that subsection purportedly applied to the records withheld.

public agency has the burden of proof as to whether any exemption applies to a particular record. *See KRS 61.880(2)(c)* (“The burden of proof in sustaining the action shall rest with the agency.”). Thus, to establish that either exemption applies, the Cabinet must show that the MOU and the spreadsheet fit under one of the statutory definitions.

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.” The Office has interpreted the word “draft” to mean “a tentative version, sketch, or outline of a formal and final written product.” 05-ORD-179. The exemption for drafts may apply to any “public record” a public agency possesses, and is not limited to drafts that are prepared by public agencies.³

As described by the Cabinet, “[t]he purpose of the MOU in the encroachment permit process is to outline the parameters of the traffic impact study required by [the] Cabinet for the proposed development,” while “[t]he purpose of the [spreadsheet] is to guide decisions for the growth rate to be used in the traffic impact study.” The traffic impact study, in turn, “helps guide [the] Cabinet in making decisions on required highway improvements.” The Cabinet argues the MOU and the spreadsheet are “preliminary” because the Cabinet “has taken no final action on the encroachment permit application.” The Cabinet explains it has not taken action “because the developer is continuing to pursue approval of the development zoning change” with the Commission, and that approval “may depend upon revisions to the development zoning request which may require revisions to the encroachment permit request.”

While the Cabinet claims the permit request may be revised in the future, it does not allege that either the MOU or the spreadsheet is itself a tentative version subject to revision. As the Appellant points out, the traffic impact study based on those documents is in final form and has already been made public. Furthermore, the Appellant cites a passage in the traffic impact study noting that the Cabinet “approved the MOU” on March 5, 2025. Accordingly, the Cabinet has not met its burden of proof that either the MOU⁴ or the spreadsheet is a “preliminary draft” under KRS 61.878(1)(i).

³ Cf. 08-ORD-079 (noting similarly that, although KRS 61.878(1)(j), which applies to preliminary recommendations and preliminary memoranda, “is commonly relied upon to protect the integrity of an agency’s internal decision-making process, it is neither expressly nor impliedly restricted to intra-agency communications”).

⁴ Although there are two versions of the MOU, the original and the “updated” version, the Cabinet has not shown that the original version was unexecuted or otherwise established that it was a preliminary draft.

KRS 61.878(1)(j) exempts from disclosure “[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended.” As the Office has observed, KRS 61.878(1)(i) and (j) are not the same, but “are two separate and distinct exemptions.” 23-ORD-009. This distinction is important because “a recommended policy may [be] ‘adopted’ as part of a public agency’s final action and thus lose its preliminary status under KRS 61.878(1)(j),⁵ whereas a “draft is always exempt under KRS 61.878(1)(i)” because “a first draft is not ‘adopted’ when a second draft is written.” 23-ORD-009 n.1.

Here, the Cabinet claims the MOU and the spreadsheet are exempt under KRS 61.878(1)(j) because it has not taken final action on the encroachment permit application. However, to rely on KRS 61.878(1)(j), the Cabinet must explain “how the exception applies to the record withheld.” KRS 61.880(1). The MOU, as described by the Cabinet, serves to outline the parameters for the traffic impact study, which has since been completed. It is not a recommendation, an opinion, or a formulation of policy. Similarly, the spreadsheet is not a recommendation, opinion, or policy memorandum, but merely an aggregation of historical traffic data from the Cabinet that was used in completing the traffic impact study. Thus, the Cabinet has not met its burden of proof that either KRS 61.878(1)(i) or (j) applies to the withheld records. Accordingly, the Cabinet violated the Act when it denied the Appellant’s request for the two versions of the MOU and the spreadsheet.

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

⁵ See, e.g., *Univ. of Ky. v. Lexington H-L Servs., Inc.*, 579 S.W.3d 858, 863 (Ky. App. 2018).

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Distributed to:

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