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25-ORD-306

October 14, 2025

In re: Brandon Bryan/Nelson County Judge/Executive's Office

Summary: The Nelson County Judge/Executive's Office ("the Agency") did not violate the Open Records Act ("the Act") when it did not provide a record that does not exist or records that were "notes" under KRS 61.878(1)(i).

Open Records Decision

Brandon Bryan ("the Appellant"), the Chief Deputy in the Nelson County Sheriff's Office, submitted a request to the Agency for "a list of the previous deputies that have conducted a[n] exit interview with a member of the Judge Executive's Office in the last 3 years" and "a copy of any paperwork, email, notes or text messages that related to the exit interviews." In a timely response, the Agency stated there was "no list" responsive to the Appellant's request. The Agency denied the remainder of the request "under KRS 61.878(1)(i) and KRS 61.878(1)(k) [*sic*] as being preliminary drafts, notes, correspondence with private individuals, or a preliminary memoranda [*sic*] in which opinions are expressed," which do not "relate to any final action of the Nelson Fiscal Court." This appeal followed.

Once a public agency states affirmatively that a requested record does not exist, the burden shifts to the requester to make a *prima facie* case that additional records do exist. See *Bowling v. Lexington-Fayette Urb. Cnty. Gov't*, 172 S.W.3d 333, 341 (Ky. 2005). A requester must provide some evidence to make a *prima facie* case that the requested record exists, such as the existence of a statute or regulation requiring the creation of the requested record, or other factual support for the existence of the records. See, e.g., 21-ORD-177; 11-ORD-074. A requester's bare assertion that certain records should exist is insufficient to make a *prima facie* case that the records actually do exist. See, e.g., 22-ORD-040.

Here, the Appellant claims a list of deputies who conducted exit interviews within the past three years exists because the Judge/Executive allegedly admitted during a meeting that such a list does exist. However, the Appellant provides no

evidence to support this allegation. Because the Appellant has not made a *prima facie* case that a list exists, the Agency did not violate the Act when it did not provide the requested list.

Regarding the remainder of the request, the Appellant does not specifically respond to the Agency's claim that all responsive records are "preliminary drafts, notes, correspondence with private individuals, [or] preliminary memoranda in which opinions are expressed." 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," whereas KRS 61.878(1)(j) exempts "[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended."

On appeal, the Agency provides further information regarding the records in question. In an affidavit, the Judge/Executive asserts the records consist of his "notes" from the exit interviews, which "do not reference the final action of any public agency [but] are personal notes, preliminary drafts, or preliminary memoranda in which opinions are expressed." "Notes" are clearly within the scope of the exemption under KRS 61.878(1)(i).

Further, the Agency states the exit interviews and the Judge/Executive's notes are part of an ongoing "human resources investigation" conducted by the Judge/Executive, of which the Appellant is the subject, and which has not yet resulted in final agency action. As a public agency employee, the Appellant has "the right . . . to inspect and to copy any record including preliminary and other supporting documentation that relates to him," but "shall not have the right to inspect or to copy . . . any documents relating to ongoing criminal or administrative investigations by an agency." KRS 61.878(3). Because the Judge/Executive's notes relate to an ongoing administrative investigation, they remain exempt under KRS 61.878(1)(i). Therefore, the Agency did not violate the Act when it denied the Appellant's request.

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
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Assistant Attorney General

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Distributed to:

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