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25-ORD-338

October 27, 2025

In re: *Kentucky Lantern*/University of Kentucky

Summary: The University of Kentucky (“the University”) did not violate the Open Records Act (“the Act”) when it denied a request for emails under KRS 61.878(1)(i) and (j).

Open Records Decision

McKenna Horsley, a reporter for the *Kentucky Lantern* (“the Appellant”), requested certain emails sent from the University’s Executive Vice President/Co-Executive Vice President for Health Affairs [“the Vice President”] between July 1, 2023, and June 30, 2024. Specifically, the Appellant requested all “emails including electronic attachments sent from” the Vice President and “include the terms ‘DeShana, Dr. Collett, Professor Collett, Senate Council Chair Collett, SC Chair Collett’ or any other variation of the name, Deshana Collett.” The University denied the request in part under KRS 61.878(1)(i) and (j), insofar as it encompassed preliminary records for the reasons set forth in 25-ORD-047. Similarly, the University denied the request to the extent it included attorney-client privileged communications under KRE 503 for the reasons set forth in 25-ORD-047.¹ This appeal followed.²

KRS 61.878(1)(j) exempts from inspection “[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated

¹ The Appellant has not challenged the University’s reliance on the attorney-client privilege.

² The same emails were previously the subject of 25-ORD-047. There, the requester sought emails mentioning her. Thus, the Office concluded that the University could not withhold preliminary emails otherwise exempt under KRS 61.878(1)(i) or (j) to the extent they related to her. See KRS 61.878(3) (“No exemption in [KRS 61.878] shall be construed to deny, abridge, or impede the right of a public agency employee, including university employees[,] to inspect and to copy any record including preliminary and other supporting documentation that relates to him or her.”).

or recommended.” This exception is distinct from KRS 61.878(1)(i), which exempts from inspection “[p]reliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency.” The distinction is important because Kentucky courts have held “investigative materials that were once preliminary in nature lose their exempt status once they are adopted by the agency as part of its action.” *Univ. of Ky. v. Courier-Journal & Louisville Times Co.*, 830 S.W.2d 373, 378 (Ky. 1992). But neither KRS 61.878(1)(i) nor (j) discusses preliminary “investigative materials.” Rather, KRS 61.878(1)(i) relates to preliminary drafts and notes, which by their very nature are rejected when a final report is approved. In other words, a first draft is not “adopted” when a second draft is written, and the first draft is always exempt under KRS 61.878(1)(i). *See, e.g.*, 21-ORD-089 (agency properly relied on KRS 61.878(1)(i) to deny inspection of the “first draft” of a report that was later adopted).

The same is true of “notes,” which constitute most interoffice emails and chat messages. *See, e.g.*, 22-ORD-176 n.6; OAG 78-626. To the extent specific thoughts or beliefs contained within drafts and notes are “adopted,” they are adopted into whatever final document the agency produces from those drafts and notes. That final document represents the agency’s official action and is subject to inspection. But the initial and preliminary thoughts on what the final product should contain, which are expressed during the drafting process through emails, do not lose their preliminary status once the final end-product is produced. To do so would destroy the “full and frank discussion[s] between and among public employees and officials” as they “hammer[] out official action,” which is the very purpose of KRS 61.878(1)(i). 14-ORD-014.

Here, the University explains that emails sent during the timeframe identified by the Appellant concern efforts “to reform the University’s governing structure” and “numerous conflicts between the University Senate and senior administrators over various issues of university policy.” The University explains that the Vice President “regularly communicated” with senior administrators about those matters during that timeframe. Describing the contents of emails created during its “decision-making process,” the University explains that the emails contain “(1) early drafts of documents; (2) communications between various university officials; and (3) communications between the University’s attorneys and other university officials, including requests for advice and providing information necessary for the University attorneys to formulate legal advice.” The “early drafts” of any documents are within the scope of KRS 61.878(1)(i). The University characterizes its internal communications as discussions among senior administrators who sought advice

regarding the described conflicts. While minimal, this description of the withheld records is sufficient to sustain the University's reliance on KRS 61.878(1)(j) as to the remaining requested emails.

For its part, the Appellant has provided an email from counsel for the individual mentioned in the requested emails waiving "any privilege that would prevent [Appellant] from obtaining records from the University of Kentucky related to her employment while employed at UK." This waiver is of no moment. The basis of the University's denial is KRS 61.878(1)(i) and (j). The individual mentioned in the requested emails has greater rights than the general public as to records which relate to her. *See* KRS 61.878(3). But those rights are not transferable. *See* 25-ORD-047 ("A member of the general public cannot obtain an exempt preliminary record under KRS 61.884, whereas a public agency employee can obtain an otherwise-exempt preliminary record that 'relates to him or her' under KRS 61.878(3)."). Thus, the provided waiver does not alter the Office's analysis of KRS 61.878(1)(i) and (j).

A party aggrieved by this decision may appeal it by initiating an action in the appropriate circuit court under KRS 61.880(5) and KRS 61.882 within 30 days from the date of this decision. Under 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/ Zachary M. Zimmerer
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