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25-ORD-343

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In re: Fisher Phillips LLP/Education and Labor Cabinet

Summary: The Education and Labor Cabinet ("the Cabinet") did not violate the Open Records Act ("the Act") when it withheld emails under KRS 61.878(1)(i).

Open Records Decision

On August 1, 2025, Mandi Hendrickson submitted a request on behalf of Fisher Phillips LLP, a law firm ("Appellant"). That request sought the "complete inspection file" related to an workplace inspection involving a named corporation. In response, the Cabinet granted the request in part but stated that it was withholding emails under KRS 61.878(1)(i) and (j), or under KRE 503 and 408, because they contained preliminary settlement discussions and are emails with their counsel regarding those settlement discussions.[1] This Appeal followed.

The Appellant challenges the Cabinet's decision to withhold the "the parties' communications" related to the "executed Settlement Agreement."

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

[1] The Cabinet also redacted certain information under KRS 61.878(1)(a) and KRS 338.101(1)(a). The Appellant has not challenged those redactions.

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 include 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 in whatever final document the agency produces from those drafts and notes. That final document represents the agency's official action and is therefore subject to inspection. But the initial and preliminary thoughts on what the final product should contain, which are expressed during the drafting process in 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 Cabinet denied "[c]ertain emails with counsel . . . as they are preliminary in nature and created as they contain settlement talks which are not final in nature, do not represent final agency action, and thus not subject to release as they discuss potential offers of settlement." On appeal, the Cabinet further explains that the withheld emails were communications exempt "because they contain recommendations and offered proposed and draft terms of settlement from both parties." Discussions of potential settlement, proposed terms, and opinions on those terms cannot give "notice of final action" by the Cabinet. Accordingly, such records are preliminary and are exempt under KRS 61.878(1)(i) and (j). *See, e.g.,* 23-ORD-296; 21-ORD-248; 20-ORD-095.

For its part, the Appellant argues that the settlement communications should be released because the "public policy interests" of the Act requires "public access to the conduct of governmental business." As support for this position, the Appellant cites 12-ORD-201. However, that decision addressed whether a confidentiality clause, standing alone, could make a record exempt under the Act. It did not dictate that the public interest be weighed against a record's preliminary nature.[2] Accordingly, the

[2] Indeed, the public interest is relevant only when an agency relies on KRS 61.878(1)(a) and the public interest in the records disclosure must be weighed against the privacy interests implicated by the records.

alleged "public policy interests" do not require that the Cabinet disclose preliminary settlement discussions made exempt by KRS 61.878(1)(i) and (j).[3]

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
Attorney General

/s/ Matthew Ray
Matthew Ray
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[3] Because the records are exempt under KRS 61.878(1)(i) and (j), the Office need not address the Cabinet's alternative arguments under KRE 503, or KRE 408.