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25-ORD-387

December 4, 2025

In re: Brandon Gilliam/Harlan County Public Schools

Summary: Harlan County Public Schools ("HCPS") did not violate the Open Records Act ("the Act") when it withheld a private reprimand exempted by KRS 161.790(10) or preliminary communications regarding its investigation exempted by KRS 61.878(1)(i) and (j).

Open Records Decision

On October 22, 2025, Brandon Gilliam ("the Appellant") submitted a request to HCPS seeking "documents related to any disciplinary action, investigative reports, and witness statements involving" an HCPS employee in 2025. In response, HCPS denied the request under KRS 161.790[1] and KRS 61.878(1)(a).

On October 31, 2025, the Appellant submitted a follow-up request to HCPS asking: (1) "Was [the employee] suspended, terminated, demoted, or non-renewed in 2025"; (2) "If yes, provide the final disciplinary record"; and (3) "If no, provide a sworn affidavit stating: No final public disciplinary action was taken." In response, HCPS stated that employee "was not suspended, terminated, demoted, or non-renewed," meaning no such record exists, and it otherwise denied the request for the same reasons expressed in its first response. This appeal followed.

On appeal, HCPS explains that it possesses three categories of records responsive to the Appellant's request: (1) an "investigative suspension letter"; (2) a private reprimand issued under KRS 161.790(10); and (3) "preliminary investigative documentation" exempt under KRS 61.878(1)(i) and (j).[2]

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[1] KRS 161.790 is incorporated into the Act by KRS 61.878(1)(l), which exempts "[p]ublic records or information the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly."

[2] HCPS cited KRS 61.878(1)(g) and (h), which previously were redesignated as KRS 61.878(1)(i) and (j).

After this appeal was initiated, HCPS provided the Appellant with the "investigative suspension letter." Accordingly, any dispute as to that letter is now moot. *See* 40 KAR 1:030 § 6 ("If the requested documents are made available to the complaining party after a complaint is made, the Attorney General shall decline to issue a decision in the matter.").

Regarding the private reprimand, HCPS explains that the letter is exempt under KRS 161.790(10). That statute provides, "As an alternative to termination of a teacher's contract, the superintendent upon notifying the board and providing written notification to the teacher of the charge may impose other sanctions, including suspension without pay, public reprimand, or *private reprimand*." KRS 161.790(10) (emphasis added). HCPS maintains that its superintendent issued a private reprimand, as authorized by KRS 161.790(10), to the specified employee and it is therefore exempt from disclosure under the Act. The Office has previously found that private reprimands issued to teachers under KRS 161.790(10) are exempt from disclosure. *See, e.g.*, 15-ORD-054 (finding a board of education did not violate the Act when it withheld a private reprimand); 08-ORD-128 (finding that a public school district properly withheld private reprimands issued under KRS 161.790(10) but disclosed all other reprimands). The present appeal presents no reason for the Office to depart from this precedent. Because the reprimand in question was a private reprimand under KRS 161.790(10), HCPS did not violate the Act by withholding it.

Next, HCPS has withheld "preliminary investigative documentation" under KRS 61.878(1)(i) and (j). 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. 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 (holding an 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, HCPS has explained that the responsive records include "the opinions, observations, and recommendations of personnel within" HCPS related to the identified investigation. This description, although brief, is sufficient for the Office to find that they consist of the preliminary discussions that informed HCPS ultimate decision and official action. As such, HCPS did not violate the Act when it withheld these records under KRS 61.878(1)(i) and (j).[3]

Finally, the Appellant asserts that HCPS violated the Act because it did not issue a sworn affidavit stating that no final disciplinary letter exists. However, the Act does not "require a public agency to create a record to satisfy a request." 21-ORD-178. Nor does the Appellant cite any provision of the Act requiring it to issue sworn statements regarding what records are in its possession or what actions it has taken. Therefore, HCPS did not violate the Act when it declined to create the "sworn statement" requested by the Appellant.

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/ Zachary M. Zimmerer
Zachary M. Zimmerer
Assistant Attorney General

[3] Because these records are exempt under KRS 61.878(1)(i) and (j), the Office need not address HCPS's alternative argument under KRS 61.878(1)(a).

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Distributed to:

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