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25-ORD-406

December 16, 2025

In re: Michael McDaniel/University of Kentucky

Summary: The University of Kentucky ("the University") violated the Open Records Act ("the Act") when its initial response failed to explain how the cited exemptions applied to the records withheld and when it directed the Appellant to its website to search for the requested records in lieu of providing the records directly. The University further violated the Act when it failed to meet its burden of proof that records were exempt from disclosure under KRS 61.878(1)(a) or KRS 61.878(1)(j), or that a request constituted an "unreasonable burden" under KRS 61.872(6). However, the University did not violate the Act insofar as it withheld "preliminary drafts" or "notes" under KRS 61.878(1)(i) or attorney-client privileged communications under KRE 503(b).

Open Records Decision

Michael McDaniel ("the Appellant") submitted a three-part request for records to the University. In Part 1 of the request, the Appellant sought "[a]ny disciplinary records, investigative reports, correspondence, or memoranda concerning the suspension, administrative leave, or investigation of [a named employee] in September 2025." In Part 2, he requested "[a]ny university policies, internal memoranda, or procedural documents defining 'speech-related violations' or governing disciplinary action for employee speech, social media activity, or political commentary since January 2015." In Part 3, he requested "[a]ny email correspondence between Communications Director Jay Blanton and other [U]niversity officials referencing this matter from September 8, 2025, to October 10, 2025." The University, in response to Part 1, stated that "the records are exempt pursuant to KRS § 61.878(1)(i) & (j), as they are considered preliminary in nature." In response to Part 2, the University provided a link to its Regulations website. In response to Part 3, the University stated that "the records are attorney-client privileged information and are protected pursuant to KRE 503(b)." This appeal followed.

Regarding Part 1 of the request, a public agency denying inspection of public records must "include a statement of the specific exception authorizing the withholding of the record and a brief explanation of how the exception applies to the record withheld." KRS 61.880(1). The agency must "provide particular and detailed information," not merely a "limited and perfunctory response." *Edmondson v. Alig,* 926 S.W.2d 856, 858 (Ky. 1996). "The agency's explanation must be detailed enough to permit [a reviewing] court to assess its claim and the opposing party to challenge it." *Ky. New Era, Inc. v. City of Hopkinsville,* 415 S.W.3d 76, 81 (Ky. 2013). As this Office has recognized, KRS 61.878(1)(i) and (j) are two separate exemptions, and public agencies must explain how each exemption applies to the withheld records if an agency chooses to rely on both provisions. *See*, *e.g.*, 21-ORD-168; 21-ORD-169. Here, however, the University's response was "limited and perfunctory" because it did not explain what records it was withholding or how either of the two claimed exemptions applied to those records. *See, e.g.,* 22-ORD-007; 21-ORD-202; 21-ORD-035. The University therefore violated KRS 61.880(1).[1]

On appeal, the Appellant claims the records pertaining to the investigation are no longer "preliminary" because the employee in question "has been returned to active employment." While the University does not dispute that the matter involving the employee is completed, it asserts that "many" of the records at issue are exempt from disclosure on various grounds. First, the University states that some records are preliminary drafts or notes. Under KRS 61.878(1)(i), "[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," are exempt from disclosure and remain exempt after the agency takes final action. *See, e.g.,* 24-ORD-035; 21-ORD-168. Therefore, to the extent the withheld records consist of preliminary drafts or notes, the University did not violate the Act.

The University also claims that "communications between various university officials" relating to the personnel matter are exempt under KRS 61.878(1)(j), which applies to "[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended." Unlike preliminary drafts or notes, preliminary recommendations and preliminary memoranda under KRS 61.878(1)(j) "may form the basis of a public agency's final action [and] may thereby be 'adopted' once final action is taken." 21-ORD-168. Such records, when "adopted by the [agency] as the basis of its final action, become releasable" because "the preliminary characterization is lost, as is the exempt status." *Ky. State Bd. of Medical Licensure v. Courier-Journal & Louisville Times Co.,* 663 S.W.2d 953, 956 (Ky. App. 1983). Here, the University asserts the exemption applies despite the fact

[1] The Office has consistently "held that records related to an ongoing investigation or disciplinary proceeding are preliminary and exempt from inspection under KRS 61.878(1)(i) and (j)." 23-ORD-009 (citing 21-ORD-169; 16-ORD-321; 14-ORD-234). However, if the requested records did relate to an ongoing investigation or disciplinary proceeding, the University failed to say so.

that "the University has made a final decision," but it fails to state whether any of the preliminary recommendations or preliminary memoranda constituting "communications between various university officials" were adopted as the basis of that final decision. Thus, the University has not met its burden of proof that the exemption under KRS 61.878(1)(j) applies.[2] *See, e.g.,* 22-ORD-068. Accordingly, the University violated the Act when it withheld "communications between various university officials" pertaining to the personnel matter at issue.[3]

Next, the University states that some of the records relating to Part 1 of the Appellant's request are exempt communications with legal counsel. The attorney-client privilege protects from disclosure "confidential communication[s] made for the purpose of facilitating the rendition of professional legal services to [a] client." KRE 503(b). "A communication is 'confidential' if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." KRE 503(a)(5). The privilege applies to communications between a client or representative of a client and the lawyer, KRE 503(b)(1), as well as between representatives of the client, KRE 503(b)(4). "Representative of the client" is defined broadly to include a "person having authority to obtain professional legal services, or to act on advice thereby rendered on behalf of the client." KRE 503(a)(2)(A).

KRS 61.878(1)(l) operates in tandem with KRE 503 to exclude from inspection public records protected by the attorney-client privilege. *Hahn v. Univ. of Louisville,* 80 S.W.3d 771 (Ky. App. 2001). However, when a party invokes the attorney-client

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[2] The University refers to 24-ORD-153, 24-ORD-157, and 25-ORD-338—decisions in which it was a party—as requiring that the Office uphold its denial under KRS 61.878(1)(j). This is incorrect. In 24-ORD-157, the Office upheld the University's denial under KRS 61.878(1)(i) and made no finding regarding KRS 61.878(1)(j). In 24-ORD-153, the Office upheld the University's denial under KRS 61.878(1)(j) because it asserted the relevant records were not adopted as the basis of final agency action. And 25-ORD-338 did not present the same type of clear admission that "the University has made a final decision" in the underlying matter.

[3] The University argues that the concept of preliminary recommendations "adopted" as the basis of final agency action applies only when the records pertain to an "investigation." In this instance, the University claims the personnel matter was not an investigation, but merely a "constitutional analysis of [the employee's] speech, and what, if anything, the University should do in response to [his] speech." At the same time, however, it admits "the University used the term 'investigation'" when referring to that matter. This illustrates the inherent difficulty of the University's position that a bright line should be drawn between "investigations" and other actions by public agencies. Furthermore, the courts have not limited the adoption analysis to "investigation" records. *See, e.g., Univ. of Ky. v. Lexington H-L Services, Inc.,* 579 S.W.3d 858, 863 (Ky. App. 2018) (finding certain audit documents were "adopted" as the basis of the University's decision to refund payments); *Louisville/Jefferson Cnty. Metro Gov't v. Courier-Journal, Inc.,* 605 S.W.3d 72, 79 (Ky. App. 2019) (finding preliminary recommendations in Louisville Metro Government's proposal of financial incentives to Amazon.com for the location of its second headquarters "lost their exempt status once the final action occurred").

privilege to shield documents in litigation, that party carries the burden of proof. That is because "broad claims of 'privilege' are disfavored when balanced against the need for litigants to have access to relevant or material evidence." *Haney v. Yates*, 40 S.W.3d 352, 355 (Ky. 2000) (quoting *Meenach v. Gen. Motors Corp.*, 891 S.W.2d 398, 402 (Ky. 1995)). So long as the public agency provides a sufficient description of the records it has withheld under the privilege in a manner that allows the requester to assess the propriety of the agency's claims, then the public agency will have discharged its duty. *See City of Fort Thomas v. Cincinnati Enquirer,* 406 S.W.3d 842, 848–49 (Ky. 2013) (providing that the agency's "proof may and often will include an outline, catalogue, or index of responsive records and an affidavit by a qualified person describing the contents of withheld records and explaining why they were withheld"). Here, the University characterizes the records withheld under KRE 503 as "communications between the University's attorneys and other university officials, seeking professional legal services from the University's attorneys, including requests for advice, and providing information necessary for the University's attorneys to formulate legal advice." While minimal, this description is sufficient to determine that the withheld communications are protected by the attorney-client privilege. *See, e.g.,* 25-ORD-038. Therefore, the University did not violate the Act when it withheld those communications.

Next, the University claims all records relating to the personnel matter are exempt under KRS 61.878(1)(a), which exempts from disclosure "[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." This exception requires a "comparative weighing of the competitive interests" between personal privacy and the public interest in disclosure. *Ky. Bd. of Exam'rs of Psychologists v. Courier-Journal & Louisville Times Co.,* 826 S.W.2d 324, 327 (Ky. 1992). However, when the public agency fails to articulate a privacy interest, "the balance is decisively in favor of disclosure." 10-ORD-082; *see also* 20-ORD-033; 19-ORD-227. Here, the University merely claims "records related to [the employee's] speech and the University's actions" are part of "a personnel matter which implicates his privacy." However, the privacy interest asserted must be sufficient to outweigh the public's interest in disclosure, which is fundamentally "the citizens' right to know what their government is doing and [to] subject agency action to public scrutiny." *Zink v. Commonwealth, Dep't of Workers' Claims, Labor Cabinet,* 902 S.W.2d 825, 829 (Ky. App. 1994).

"Disciplinary action taken against a public employee is a matter related to his job performance and a matter about which the public has a right to know." OAG 88-25. Further, even if disciplinary action is not taken, "the public has a right to know what complaints have been made against public employees and what final action is taken against them." OAG 91-41 (citing *City of Louisville v. Courier-Journal & Louisville Times Co.,* 637 S.W.2d 658 (Ky. App. 1982); *Ky. State Bd. of Medical*

Licensure, 663 S.W.2d at 953)). Given the manifest public interest in disclosure, the University has not articulated a sufficient privacy interest to meet its burden of proof that KRS 61.878(1)(a) applies to the records relating to this personnel matter. Accordingly, with the exception of preliminary drafts, notes, and privileged attorney-client communications, the University violated the Act when it withheld all records responsive to Part 1 of the Appellant's request.

Part 2 of the request concerns "university policies, internal memoranda, or procedural documents defining 'speech-related violations' or governing disciplinary action for employee speech, social media activity, or political commentary since January 2015." Regarding this part of the request, the Appellant claims the University's response directing him to its current Regulations website was insufficient, as "the request plainly encompasses internal guidance, instructions, and procedures that may never have been published on the website." When a public agency receives a request to inspect records, that agency must decide within five business days "whether to comply with the request" and notify the requester "of its decision." KRS 61.880(1). A public agency cannot simply ignore portions of a request. *See, e.g.,* 21-ORD-090. If the requested records exist, an exemption applies, and the agency denies inspection, the agency must cite the exemption and explain how it applies. Conversely, if the records do not exist, then the agency must affirmatively state that such records do not exist. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov't,* 172 S.W.3d 333, 341 (Ky. 2005). Here, the University initially failed to respond to the Appellant's request for "internal memoranda" or other responsive documents that do not constitute "regulations." Moreover, a public agency does not comply with the Act when it merely directs a requester "to its website to conduct his own search for records" instead of providing the specific records requested. 21-ORD-129; *see also* 17-ORD-177; 06-ORD-131. Therefore, the University's initial response to Part 2 of the request violated the Act.

On appeal, regarding Part 2, the University again invokes KRS 61.878(1)(i) and (j), the attorney-client privilege under KRE 503(b), and personal privacy under KRS 61.878(1)(a). To the extent the responsive records constitute preliminary drafts or notes, they are exempt under KRS 61.878(1)(i). However, because the University has not disclosed whether any responsive "preliminary recommendations" or "preliminary memoranda" were adopted as the basis of final agency action, it has not met its burden of proof that such records are exempt under KRS 61.878(1)(j). Insofar as the records constitute attorney-client privileged communications, as the University previously described, they are exempt under KRE 503(b). Because the University has articulated no privacy interest at stake in "university policies, internal memoranda, or procedural documents defining 'speech-related violations' or governing disciplinary action for employee speech, social media activity, or political commentary," it has not met its burden of proof that KRS 61.878(1)(a) applies to this portion of the Appellant's request.

The University's primary argument concerning Part 2 of the request is that it imposes an "unreasonable burden." If a request for records "places an unreasonable burden in producing public records[,] the official custodian may refuse to permit inspection of the public records or mail copies thereof. However, refusal under this section shall be sustained by clear and convincing evidence." KRS 61.872(6). "When determining whether a particular request places an unreasonable burden on an agency, the Office considers the number of records implicated, whether the records are in a physical or electronic format, and whether the records contain exempt material requiring redaction." 22-ORD-221. Of these, the number of records implicated "is the most important factor to be considered." 22-ORD-182.

Quoting *City of Fort Thomas,* 406 S.W.at 855, the University states a requester must "describe the records he or she seeks so as to make locating them reasonably possible." As the Attorney General has observed in the context of KRS 61.872(3)(b),[4] a request that does not precisely describe the records "places an unreasonable burden on the agency to produce often incalculable numbers of widely dispersed and ill-defined public records." 99-ORD-14. Here, the University claims Part 2 of the request describes the records so broadly as to make it practically impossible to locate them. The University characterizes the request as seeking "all records created since January 1, 2015[,] that relate to employee speech." Noting that it "has 33,000 employees spread across all 120 counties," the University asserts it "would have to search every single record in its possession," paper or electronic, "that was created on or after January 1, 2015," to find every record that "concerns employee expression" and then review all of those records for exempt material.[5]

In so arguing, however, the University refrains from quoting the actual language of the request. The Appellant did not request "all records created since January 1, 2015[,] that relate to employee speech." Rather, he requested "any university *policies,* internal memoranda, or procedural documents *defining* 'speech-related violations' or *governing* disciplinary action for employee speech, social media activity, or political commentary since January 2015" (emphasis added). This distinction is significant. While any of the University's 33,000 employees could have written materials "that relate to employee speech" since January 2015, it is most likely that only a small subset of employees have drafted "university policies" or produced memoranda or documents "defining" a category of violations or "governing"

[4] KRS 61.872(3)(b) provides, in part, that "[t]he public agency shall mail copies of the public records to a person whose residence or principal place of business is outside the county in which the public records are located after he or she precisely describes the public records which are readily available within the public agency." Here, the University does not explicitly rely upon KRS 61.872(3)(b).

[5] The University provides an affidavit from its Director of Open Records attesting, *inter alia,* that it takes 66.67 hours at four minutes per page for the University to review and redact 1,000 pages of records.

disciplinary actions. And the identities of those individuals are "more readily available to the University than to the Appellant." 25-ORD-169 n.1. For this reason, under the Act, the public agency "is the party responsible for ascertaining the location of responsive records or the personnel who may possess them." 24-ORD-089. Here, the University has not addressed its argument to the burden imposed by the *actual* scope of the request. Therefore, the University has not met its burden of proof by "clear and convincing evidence" that Part 2 of the Appellant's request is unreasonably burdensome.[6] Accordingly, the University violated the Act when it denied that portion of the request under KRS 61.872(6).

Part 3 of the Appellant's request concerns "email correspondence between Communications Director Jay Blanton and other university officials referencing [the personnel] matter from September 8, 2025, to October 10, 2025." On appeal, as to this portion of the request, the University again invokes KRS 61.878(1)(i) and (j) and the attorney-client privilege under KRE 503(b). As with Parts 1 and 2 of the request, to the extent the records responsive to Part 3 constitute preliminary drafts or notes, they are exempt under KRS 61.878(1)(i). However, because the University has not disclosed whether any responsive "preliminary recommendations" or "preliminary memoranda" were adopted as the basis of final agency action, it has not met its burden of proof that such records are exempt under KRS 61.878(1)(j). To the extent that the records are attorney-client privileged communications, as the University has sufficiently described on appeal, they are exempt under KRE 503(b). However, in its initial response to the request, the University failed to include a sufficient description of those communications to determine whether the privilege was applicable. Therefore, the University's response violated KRS 61.880(1). *See, e.g.,* 24-ORD-038.

In sum, the University violated the Act when its initial response failed to explain how the cited exemptions applied to the records withheld and when it directed the Appellant to its website to search for the requested records in lieu of providing the records directly. The University further violated the Act when it failed to meet its burden of proof that records were exempt from disclosure under KRS 61.878(1)(a) or KRS 61.878(1)(j) or that a request constituted an "unreasonable burden" under KRS 61.872(6). However, the University did not violate the Act insofar as it withheld "preliminary drafts" or "notes" under KRS 61.878(1)(i) or attorney-client privileged communications under KRE 503(b).

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[6] As part of its claim of an "unreasonable burden," the University stresses the difficulty of determining whether responsive records are within the scope of KRS 61.878(3), which provides that "[n]o exemption in this section shall be construed to deny, abridge, or impede the right of a public agency employee, including university employees, an applicant for employment, or an eligible on a register to inspect and to copy any record including preliminary and other supporting documentation that relates to him or her." Because the Appellant requested only "policies," "memoranda," and "procedural documents" that define certain violations or govern disciplinary actions, and did not specifically request records that relate to him, it is unclear how conducting an analysis under KRS 61.878(3) is relevant.

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.

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/s/ James M. Herrick
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