



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

RUSSELL COLEMAN
ATTORNEY GENERAL

1024 CAPITAL CENTER DRIVE
SUITE 200
FRANKFORT, KY 40601
(502) 696-5300

26-ORD-056

February 20, 2026

In re: Mark Stevens/Board of Optometric Examiners

Summary: The Board of Optometric Examiners (“the Board”) did not violate the Open Records Act (“the Act”) when it withheld preliminary communications regarding its investigation, which are exempt under KRS 61.878(1)(j).

Open Records Decision

Mark Stevens (“the Appellant”) submitted a request to the Board seeking the “notices, letters, or other communication[s] sent to licensees impacted by the [B]oard’s proposed emergency rule filed on New Years [sic] Eve.” The Appellant limited his request to records dated between December 31, 2025, and January 15, 2026. In response, the Board denied the Appellant’s request because “it seeks records that would be exempt under KRS 61.878(1)(a), KRS 61.878(1)(c), KRS 61.878(1)(g), KRS 61.878(1)(i) and KRS 61.878(1)(j).” The Board then explained how each exemption applied to the records withheld. This appeal followed.

In both its initial response and on appeal, the Board explains that it is currently reviewing “the licensure of optometrists who were licensed under waiver and alternative testing measures to ensure they [meet] the licensure requirements as established in regulations under KRS [Chapter] 13A.”¹ According to the Board, its “investigation into the individual licenses affected by its previous waivers and alternative testing measures has not been completed,” and the responsive records are therefore exempt 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

¹ For additional factual background concerning the Board’s “waivers” and “alternative testing measures” that were in place from 2020 to 2023 and form the basis of the Appellant’s request, see OAG 25-13, 2025 WL 3307336 (Oct. 1, 2025).

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) mentions 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 under the Act. 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 Board explains that the “only responsive records” it possesses are “correspondence” sent to “the individuals impacted by waivers and alternative testing measures.” According to the Board, this correspondence will be used “in its investigation into the status of certain licenses,” which is not yet complete. Thus, the Board maintains that the responsive records are exempt under KRS 61.878(1)(j) because they have not been “adopted as the basis of final agency action.” The Office agrees. Because the responsive records are being used as part of an ongoing investigation and have not yet been adopted by the Board as part of its final action, the records remain preliminary and exempt under KRS 61.878(1)(j). Therefore, the Board did not violate the Act when it withheld the records in their entirety.²

² The Board has also explained that the responsive records contain personal information exempt under KRS 61.878(1)(a), records confidentially disclosed to it and therefore exempt under KRS 61.878(1)(c), and examination data exempt under KRS 61.878(1)(g). Because these records are exempt in total under KRS 61.878(1)(j), the Office need not address the Board’s alternative arguments.

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

#059

Distributed to:

Mark Stevens, Appellant

Christi LeMay, Board of Optometric Examiners, Executive Director

Kristen Webb, Board of Optometric Examiners, Board Counsel

Mary P. Turner, Board of Optometric Examiners, Administrative Assistant