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26-ORD-115

March 23, 2026

In re: John Carlton/Kentucky Capital Development Corporation

Summary: The Kentucky Capital Development Corporation ("the Corporation") did not violate the Open Records Act ("the Act") when it withheld confidential or proprietary records maintained in conjunction with an application for a loan under KRS 61.878(1)(c)2.a. and correspondence with private individuals under KRS 61.878(1)(i).

Open Records Decision

John Carlton ("the Appellant") submitted a request to the Corporation for records relating to certain individuals and businesses "owned, co-owned, managed, or operated" by them. In relevant part, the Appellant requested "all documents pertaining to grants, loans, or financial transactions between Timothy Luscher, or any of [his] businesses, and [the Corporation] between January 2022 and present" and "all emails and communications between board members or staff of [the Corporation] and Timothy Luscher . . . between January 2022 and present." In a timely response, the Corporation granted the request in part, but it withheld "a loan application and confidential business plan pursuant to KRS 61.878(1)(c)1. and 2.a.," as they "were produced to [the Corporation] by the loan applicant in conjunction with an application for a loan and are generally recognized as confidential or proprietary, which if openly disclosed would permit an unfair commercial advantage to competitors of the applicant." The Corporation also withheld "[f]our emails between [the Corporation] and Timothy Luscher . . . pursuant to KRS 61.878(1)(i) as correspondence between private individuals, and/or as being transmitted in conjunction with the loan application," which it stated "do not pertain to final action." This appeal followed.

KRS 61.878(1)(c)2.a. exempts from disclosure "[r]ecords confidentially disclosed to an agency or required by an agency to be disclosed to it, generally recognized as confidential or proprietary, which are compiled and maintained [i]n conjunction with an application for or the administration of a loan or grant." Here, the loan application and business plan are clearly "compiled and maintained" by the

Corporation "[i]n conjunction with an application for [a] loan." As for whether the records were "confidentially disclosed," the Corporation states that "[b]y definition, a loan application contains private financial information and a business plan contains confidential business strategy," and "[b]y comparison, a commercial bank would be prohibited from and under no circumstances be allowed to release or disclose the information from a loan applicant." Further, the Corporation notes that the business plan "begins with the following language: 'The provisions of this plan are privileged and confidential.'" Thus, it is apparent that the documents were submitted to the Corporation with an expectation of confidentiality. Accordingly, the loan application and business plan were "confidentially disclosed to an agency" within the meaning of KRS 61.878(1)(c)2.

The remaining question is whether the records are "generally recognized as confidential or proprietary." In *Hoy v. Kentucky Industrial Revitalization Authority,* 907 S.W.2d 766 (Ky. 1995), the Court considered the applicability of KRS 61.878(1)(c)2. to required disclosures of "a financial history of [a] corporation, projected cost of the project, the specific amount and timing of capital investment, copies of financial statements and a detailed description of the company's productivity, efficiency and financial stability." *Id.* at 768. The Court concluded, "It does not take a degree in finance to recognize that such information concerning the inner workings of a corporation is 'generally recognized as confidential or proprietary.'" *Id.* Similarly, in *Marina Management Services, Inc. v. Commonwealth, Cabinet for Tourism,* 906 S.W.2d 318 (Ky. 1995), the Court found KRS 61.878(1)(c)1.[1] applicable to "information on asset values, notes payable, rental amounts[,] related party transactions, profit margins, net earnings, and capital income," which would provide "the ability to ascertain the economic status of [private] entities without the hurdles systematically associated with acquisition of such information about privately owned organizations." *Id.* at 319. Further, the Office has recognized business plans and strategies as information that is confidential or proprietary. *See, e.g.,* 12-ORD-213; 92-ORD-1134. Here, although it is not described in great detail, the "private financial information" and "confidential business strategy" submitted to the Corporation is information of the type "generally recognized as confidential or proprietary" within the meaning of KRS 61.878(1)(c)2.

The Appellant argues the Corporation has not shown that the disclosure of the loan application and business plan would "permit an unfair advantage to competitors of the entity that disclosed the records." However, that is an element of the exemption under KRS 61.878(1)(c)1., but not under KRS 61.878(1)(c)2. Because the loan application and business plan satisfy the elements of KRS 61.878(1)(c)2.a., it is unnecessary to consider the applicability of KRS 61.878(1)(c)1.

[1] Although KRS 61.878(1)(c)1. is separate from the subparagraph at issue here, it contains the same language regarding records "generally recognized as confidential or proprietary."

The Appellant further claims the records should be disclosed in this instance because Mr. Luscher is a member of the Frankfort/Franklin County Planning Commission ("the Commission"), which considered "a zoning application co-presented by" the Corporation while his loan application with the Corporation was pending. The Appellant argues that the public interest in knowing whether a conflict of interest exists outweighs the "privacy interest" in the loan application and business plan under *Zink v. Commonwealth,* 902 S.W.2d 825 (Ky. App. 1994). But the *Zink* case concerned the exemption under KRS 61.878(1)(a) for "[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." KRS 61.878(1)(a) is the only statutory exemption to the Act's disclosure requirement that involves a "balancing test" between public and private interests. Because the exemption under KRS 61.878(1)(c)2. is categorical and does not require a balancing of interests, the Corporation did not violate the Act when it denied the Appellant's request for the loan application and business plan.

As to the four emails withheld by the Corporation, KRS 61.878(1)(i) exempts from public disclosure "correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency." The Appellant makes three arguments against applying this exemption to the emails between Mr. Luscher and the Corporation. First, he claims Mr. Luscher "is not a purely private individual" because he is a member of the Commission. Correspondence between a public agency and a public official, acting in his official capacity, does not fall within the definition of "correspondence with private individuals." *See, e.g.,* 21-ORD-189; OAG 90-140. Here, however, in applying for a loan from the Corporation, Mr. Luscher was not acting in an official capacity as a member of the Commission, but in his individual capacity as a private business owner. Nor, based on the Office's *in camera* inspection, do the emails relate or refer to any Commission business. Accordingly, Mr. Luscher's membership on the Commission does not exclude his private business emails from the meaning of "correspondence with private individuals" under KRS 61.878(1)(i).

Next, the Appellant argues that, because Mr. Luscher's emails with the Corporation were transmitted in connection with his loan application, they are not exempt under KRS 61.878(1)(i) because the Commission "was expected to rely [on them] in considering whether to approve" the loan. However, in 20-ORD-095, the Attorney General expressly rejected the argument that KRS 61.878(1)(i) applies only to "that correspondence in which the private individual does not 'petition' the agency" to take some action. Accordingly, the fact that the emails relate to a loan application does not exclude them from the scope of KRS 61.878(1)(i).

Finally, the Appellant claims the emails have lost their "preliminary" status under KRS 61.878(1)(i) because the Corporation has taken "final action" on the loan

application. It is true that some records, such as complaints submitted to a public agency, lose their "preliminary" exempt status "[i]nasmuch as whatever final actions are taken necessarily stem from them," so that "they must be deemed incorporated as a part of those final determinations." *City of Louisville v. Courier–Journal & Louisville Times Co.,* 637 S.W.2d 658, 660 (Ky. App. 1982). Here, however, the Corporation asserts it has not yet approved or denied Mr. Luscher's loan application, which has not been withdrawn and "remains pending."

The Appellant points out that a "decision to take no action" can, in some cases, operate as a final agency action. *See, e.g.,* 17-ORD-081 (citing *Palmer v. Driggers,* 60 S.W.3d 591 (Ky. App. 2001)); 01-ORD-47. Here, he argues that the Corporation decided to take no action at a meeting on July 10, 2025, when it discussed the loan application in a closed session but did not vote on the application. However, merely deferring action on a matter is not a *final* decision to take no action. *See, e.g.,* 25-ORD-320. Accordingly, the Appellant cannot argue the emails constitute the basis of "final action" by the Corporation. Because the emails are "correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency," within the meaning of KRS 61.878(1)(i), the Corporation did not violate the Act.[2]

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.

Russell Coleman
Attorney General

/s/ James M. Herrick
James M. Herrick
Assistant Attorney General

[2] Because KRS 61.878(1)(i) is dispositive as to the withheld emails, it is unnecessary to address the Corporation's alternative argument that they are exempt under KRS 61.878(1)(c) "as being transmitted in conjunction with the loan application."

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Distributed to:

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