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26-ORD-172

April 21, 2026

In re: Mark Stevens/Board of Optometric Examiners

Summary: The Board of Optometric Examiners (“the Board”) violated the Open Records Act (“the Act”) when it withheld the requested record in its entirety. But, under KRS 61.878(1)(a), it may redact licensed individuals’ exam scores.

Open Records Decision

Mark Stevens (“the Appellant”) submitted a request to the Board seeking the “communications sent to [the Board] from the National Board of Examiners in Optometry” (“the NBEO”) between November 1, 2025, and January 23, 2026. The Appellant further requested any replies sent by the Board. In response, the Board denied the Appellant’s request because “it seeks records that are 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, it possesses a single letter from the NBEO that is responsive to the request. On appeal, the Office requested that the Board provide it with a copy of the NBEO letter. *See* KRS 61.880(2)(c). Generally, the letter can be broken down into two parts. In one part, NBEO refers to a previous letter it sent to the Board, explains that it has identified new information about the licensure of particular optometrists, and asks that the Board respond to its letter. The second portion provides specific details about persons licensed as optometrists in Kentucky. Upon the Office’s review of the NBEO

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).

letter, it concludes that the Board violated the Act when it withheld the letter in its entirety, but the Board may redact certain information under KRS 61.878(1)(a).

KRS 61.878(1)(c)1. 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 if openly disclosed would permit an unfair commercial advantage to competitors of *the entity that disclosed the records*” (emphasis added). As support for its reliance on this exemption, the Board stated that the information in NBEO’s letter “could be utilized by competitors of the correspondence recipients for an unfair commercial advantage when marketing their business or soliciting patients and/or customers.” The Board provides no explanation of how disclosure would provide NBEO’s competitors with an unfair commercial advantage.² Moreover, it is of no moment that disclosure of NBEO’s letter might put “correspondence recipients”³ at any type of commercial disadvantage because those individuals are not the entity that “disclosed the records” to the Board.

KRS 61.878(1)(c)2.d. 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 [f]or the grant or review of a license to do business.” The Board asserts that this letter is exempt under this section because it is responsible for the licensing of individuals seeking to practice optometry in Kentucky. *See* KRS 320.220(1) (“No person shall practice optometry in this Commonwealth . . . unless he or she is the holder of a license duly issued to him or her by the [B]oard”). However, KRS 61.878(1)(c)2.d. makes exempt records related to “the grant or review of a license *to do business*” (emphasis added). It is not immediately apparent that a license to practice optometry is included in the meaning of a “license to do business.”

“[S]tatutes should be construed together, should be harmonized where possible and should result in effectiveness of all provisions.” *Jefferson Cnty. Bd. of Educ. v. Fell*, 391 S.W.3d 713, 720 (Ky. 2012). KRS 61.878(1)(c)2. contains four sections exempting “[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:

- a. In conjunction with an application for or the administration of a loan or grant;
- b. In conjunction with an application for or the administration of assessments, incentives, inducements, and tax credits as described in KRS Chapter 154;

² It also is not apparent who a competitor of the NBEO could be.

³ The Board never explains to whom the term “correspondence recipients” refers. The Office assumes that “correspondence recipients” refers to the licensed optometrists identified in the NBEO letter.

- c. In conjunction with the regulation of commercial enterprise, including mineral exploration records, unpatented, secret commercially valuable plans, appliances, formulae, or processes, which are used for the making, preparing, compounding, treating, or processing of articles or materials which are trade commodities obtained from a person; or
- d. For the grant or review of a license to do business.

KRS 61.878(1)(c) as a whole makes exempt records that would not be public records but for a private business's necessary submissions to a public agency. KRS 61.878(1)(c)2.a.-c. each are limited to records associated with the intersection of the operation of a business and government involvement in that business. The Board's proposed interpretation of KRS 61.878(1)(c)2.d. would render that section entirely unlike the other provisions of KRS 61.878(1)(c)2. Specifically, while the first three provisions would be limited to records associated with business operations, KRS 61.878(1)(c)2.d. would include all records having to do with any type of license issued by any public agency. Given the clear meaning of the other provisions of KRS 61.878(1)(c)2. and need to maintain the harmony of the statute, *see Fell*, 391 S.W.3d at 720, it is the opinion of the Office that KRS 61.878(1)(c)2.d. should not be interpreted so expansively.

This conclusion is further supported by Kentucky courts' understanding of what information is "generally recognized as confidential or proprietary" within the meaning of KRS 61.878(1)(c). In *Hoy v. Kentucky Industrial Revitalization Authority*, 907 S.W.2d 766, 768 (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." 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.'" *Hoy*, 907 S.W.2d at 768. Similarly, in *Marina Management Services, Inc. v. Commonwealth, Cabinet for Tourism*, 906 S.W.2d 318, 319 (Ky. 1995), the Court found KRS 61.878(1)(c)1.⁴ 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." Accordingly, the Office has recognized that information about "how well-capitalized [a] company is" constitutes confidential or proprietary information. 17-ORD-243; 17-ORD-198.

⁴ KRS 61.878(1)(c)1. contains the same language regarding records "generally recognized as confidential or proprietary."

The NBEO letter describes the circumstances of NBEO's previous letter to the Board and provides details about licensed Kentucky optometrists who have not passed all parts of NBEO's licensing exam. Neither category is information "generally recognized as confidential or proprietary." Thus, the NBEO letter is not exempt under KRS 61.878(1)(c)2.d..

Next, the Board relies on KRS 61.878(1)(g), which exempts from disclosure "[t]est questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examination before the exam is given or if it is to be given again." Here, no portion of the NBEO letter contains "[t]est questions, scoring keys, [or] other examination data used to administer a licensing examination." The only information it contains related to a licensing examination is whether certain licensed individuals passed or failed certain parts of the NBEO licensing exam. Thus, the NBEO letter is not exempt under KRS 61.878(1)(g).

The Board also relies on KRS 61.878(1)(i), which exempts "[p]reliminary drafts, notes, [and] correspondence with private individuals, other than correspondence which is intended to give notice of a final action of a public agency." A preliminary draft is "a tentative version, sketch, or outline" of a final document. 05-ORD-179. Notes are records "created as an aid to memory or as a basis for a fuller statement." 05-ORD-179. The withheld record is a letter sent to the Board by a national licensing entity. Such a record is not a draft of a final document, nor is it a note. Further, a national licensing body is not a "private individual." Therefore, the NBEO letter is not exempt under KRS 61.878(1)(i).

Next, the Board relies on KRS 61.878(1)(j), which exempts from disclosure "[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended." 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-231; 14-ORD-234). Here, however, the withheld record is an external communication sent to the Board, which happens to touch on the subject of its ongoing investigation. Importantly, the content of the letter indicates that NBEO sent the letter absent any request from the Board. Thus, although the NBEO letter does touch on the subject of the Board's investigation, it is not apparent that it is a part of and related to the investigation. Moreover, the letter does not contain any "preliminary recommendations," nor is it a "preliminary memorandum in which opinions are expressed or policies formulated or recommended."⁵ Rather, it is an external communication sent to the Board. Such a record is not exempt under KRS 61.878(1)(j).

⁵ The preliminary recommendations and preliminary opinions made exempt by KRS 61.878(1)(j) are those made internally by a public agency, not those submitted by an outside entity.

Last, the Board argues that withholding the records was appropriate under KRS 61.878(1)(a) because the NBEO letter contains “personal information[,] including personally identifiable information and scoring information[,] disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” That provision 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.” *Id.* It requires a “comparative weighing of the antagonistic interests” between 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). In previous decisions, the Office has recognized the “cognizable privacy interest in test scores and examination results when those scores or results are disclosed in conjunction with the employee’s name or other personally identifiable information.” 99-ORD-113; *see also* OAG 78-382. Therefore, the test scores of an employee or applicant are exempt under KRS 61.878(1)(a) “[i]n the absence of a superior public interest in disclosure.” 96-ORD-45; *see also* 23-ORD-091; 06-ORD-145; OAG 79-128.

For his part, the Appellant argues that there is a strong public interest in knowing whether the Board has licensed individuals who may not be qualified to practice optometry in Kentucky. Thus, he argues that the Board cannot withhold communications “questioning the qualifications of additional optometrists that hold licenses in this state.”

The portion of the NBEO letter identifying licensed individuals lists their name, their optometry exam tracker number, the university from which they graduated, the year they graduated, the part of the NBEO licensing exam they did not pass, the date NBEO sent their score report to the Board, and when the Board granted them a license. The Board has only asserted that there is a privacy interest in an individual’s “scoring information.” It has provided no further explanation on appeal. Given the Office’s previous decisions, the Board may redact the portions of the NBEO letter that describe the licensed individual’s specific test scores. *See* 99-ORD-113. However, because of the strong privacy interest expressed by the Appellant, and because of the lack of further explanation from the Board, this is the only portion of the NBEO letter that may be redacted under KRS 61.878(1)(a). Therefore, the Board violated the Act when it withheld the NBEO letter in its entirety under KRS 61.878(1)(a), but it may redact exam results under that exemption.

In summary, the Board violated the Act when it withheld the NBEO letter in its entirety. But, under KRS 61.878(1)(a), it may redact licensed individual’s exam scores.

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.

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Attorney General

/s/ Zachary M. Zimmerer
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Distributed to:

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