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26-ORD-263

June 8, 2026

In re: John Reynolds/Department of Education

Summary: The Department of Education (“the Department”) did not violate the Open Records Act (“the Act”) when it withheld records pertaining to an ongoing investigation under KRS 61.878(1)(i) and (j).

Open Records Decision

John Reynolds (“the Appellant”) submitted a request to the Department for copies of “records maintained by the Education Professional Standards Board [“the Board”] concerning [a certain] former instructor.” Specifically, the Appellant requested “[c]omplaints, reports, or referrals submitted to” the Board; “[a]ny superintendent reports and supporting materials submitted to” the Board; the Board’s “investigative or review materials, including intake materials, correspondence, notices, determinations, recommendations, and any supporting documentation”; “[a]ny responses, rebuttals, submissions, or correspondence from” the instructor to the Board; “[a]ny conference materials, proposed resolutions, agreed orders, assurances of voluntary compliance, or settlement/consent documents”; “[a]ny disciplinary records or outcomes”; “[a]ny hearing-related materials, including notices of hearing, pleadings/filings, exhibits, hearing officer materials, transcripts or recordings[,] final orders, and appeal-related correspondence”; “[a]ny certification/licensure files maintained by [the Board] that reflect discipline, restrictions, conditions, or adverse actions (if maintained as part of the [Board’s] file”]; “[a]ny communications between [the] Board and [certain school] districts concerning” the instructor; and “[r]ecords sufficient to identify all [other] Kentucky school districts that [the Board’s] records reflect as having employed, reported, or otherwise submitted information to [the Board] concerning” the instructor.

In a timely response, the Department denied the Appellant’s request under KRS 61.878(i) and (j) on the grounds that “[c]omplaints or reports of educator misconduct filed with the [Board] that have resulted in an educator case, and any records pertaining to the educator case, are exempt from disclosure until final action has been taken by” the Board. This appeal followed.

KRS 61.878(1)(i) exempts from inspection “[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.” KRS 61.878(1)(j) exempts from disclosure “[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended.” Regarding administrative investigative files, 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).” 25-ORD-248 (quoting 23-ORD-009); *see also* 21-ORD-169; 16-ORD-231; 14-ORD-234. Such records, including the initiating complaint, are exempt from disclosure before the agency has taken final action. *See, e.g.*, 24-ORD-201 (holding “[r]ecords that are part of an ongoing administrative investigation, including the initiating complaint, are exempt from public inspection under KRS 61.878(1)(i) and (j) until final action is taken on the matter”); *see also Univ. of Ky. v. Courier-Journal & Louisville Times Co.*, 830 S.W.2d 373, 378 (Ky. 1992) (holding “investigative materials that were once preliminary in nature lose their exempt status once they are adopted by the agency as part of its action”); *Ky. State Bd. of Medical Licensure v. Courier-Journal & Louisville Times Co.*, 663 S.W.2d 953, 956 (Ky. App. 1983) (holding “once final action is taken by the [agency], the initial complaints must be subject to public scrutiny”).

“Not every agency action is final action.” 14-ORD-234. Final action in an educator case occurs when the Board adopts a final order. *See, e.g.*, 24-ORD-201. On appeal, the Department reiterates that “[t]he case requested by [the Appellant] is still pending before the [Board] and a final order has not been entered.” A public agency is not required to release records prior to final disposition of a disciplinary action because “piecemeal disclosure along the path of the decision-making process is not mandatory.” *Univ. of Louisville v. Sharp*, 416 S.W.3d 313, 315 (Ky. App. 2013).

The Appellant, however, argues the Department has a duty under KRS 61.878(1)(i) and (j) to separate the Board’s investigative records into categories and articulate how the release of each category of records “poses a concrete risk of harm.” He claims this obligation was imposed by *Shively Police Dep’t v. Courier-Journal, Inc.*, 701 S.W.3d 430 (Ky. 2024). But *Shively* was a case decided under KRS 61.878(1)(h), an exemption that expressly requires the agency to show that “the disclosure of the information could pose an articulable risk of harm to the agency or its investigation.” A showing of harm is required under KRS 61.878(1)(h) because otherwise “the statute’s ‘harm’ requirement becomes mere surplusage.” *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 850 (Ky. 2013). Due to the specific “harm” requirement, KRS 61.878(1)(h) requires the separation of law enforcement records into “meaningful categories” in order for “the court to trace a rational link between the nature of the document and the alleged likely harm to the agency.” *Id.* at 851 (citation and brackets omitted). By contrast, KRS 61.878(1)(i) and (j) contain

no requirement of a showing of harm. Accordingly, the analysis under *Fort Thomas* and *Shively* is inapplicable.

Nevertheless, the Appellant claims the Court in *Shively* extended the *Fort Thomas* analysis “to all exemptions under [the Act], not just law enforcement exemptions.” However, he does not quote any portion of *Shively* where the Court supposedly did this. According to the Appellant’s position, a showing of harm to the agency would have to be made in every case involving an invasion of personal privacy (KRS 61.878(1)(a)), confidential disclosures for scientific research (KRS 61.878(1)(b)), proprietary information (KRS 61.878(1)(c)), a prospective business location (KRS 61.878(1)(d)), supervision of financial institutions (KRS 61.878(1)(e)), a real estate appraisal (KRS 61.878(1)(f)), examination data (KRS 61.878(1)(g)), a preliminary draft (KRS 61.878(1)(i)), a preliminary recommendation (KRS 61.878(1)(j)), a record made confidential by federal or state law (KRS 61.878(1)(k)-(l)), homeland security (KRS 61.878(1)(m)), a record donated to an archive (KRS 61.878(1)(n)), a pending procurement process (KRS 61.878(1)(o)), a Department of Public Advocacy case file (KRS 61.878(1)(p)), a record depicting a violent crime (KRS 61.878(1)(q)), a law enforcement wellness program (KRS 61.878(1)(r)), or a purely personal communication (KRS 61.878(1)(s)). The Office will not presume that the Court intended to take such sweeping action *sub silentio*.

While the Appellant cites no specific part of the lengthy *Shively* opinion, his argument appears to hinge on a passage in which the Court cited *University of Kentucky v. Kernel Press, Inc.*, 620 S.W.3d 43, 54–55 (Ky. 2021), for the proposition that a public agency could not “treat[] an entire 470-page investigative file as one record unable to be separated or compartmentalized.” *Shively*, 701 S.W.3d at 437. Although the *Kernel Press* case related, in part, to KRS 61.878(1)(i) and (j), it did not involve a pending investigation. Rather, it involved an employee matter that had been terminated by final action. *Kernel Press*, 620 S.W.3d at 47.¹ Thus, neither *Shively* nor *Kernel Press* addressed the exempt status of records pertaining to an *ongoing* investigation or disciplinary proceeding under KRS 61.878(1)(i) and (j). Moreover, the above-quoted passage from *Shively* concerned the general duty to segregate exempt from nonexempt records under KRS 61.878(4), *not* the specific duty under KRS 61.878(1)(h) to assign records to categories for the purpose of demonstrating a “risk of harm” to the agency. Simply put, *Shively* does not require an agency to articulate a risk of harm for any exemption other than KRS 61.878(1)(h). Accordingly, the Appellant has not shown that the harm analysis under *Fort Thomas* applies here, or that *Shively* otherwise altered the analysis to be applied under

¹ In a disciplinary context, final agency action on an internal investigation may take the form of either disciplinary action or a decision to take no action. *See, e.g., Palmer v. Driggers*, 60 S.W.3d 591, 600 (Ky. App. 2001). Thus, in *Kernel Press*, the employee action was terminated by an agreed separation from employment. 620 S.W.3d at 47.

KRS 61.878(1)(i) and (j) to records pertaining to an ongoing investigation or disciplinary proceeding prior to final agency action.

Next, the Appellant claims the Department failed to separate some exempt records from nonexempt records as required by KRS 61.878(4).² Specifically, he argues that some of the Board's records relating to the case are "likely administrative in nature," as opposed to "evaluative or deliberative." Additionally, he states "transmittal emails, scheduling communications, and logistical materials" may exist that "do not require protection under [the] exemptions." Lastly, he claims "final orders or decisions" or other "materials reflecting completed agency action" may exist, which "are not preliminary." These arguments, however, discount the fact that the Board has not yet taken final action. As the Appellant correctly states, "[i]nvestigative materials that were once preliminary in nature lose their exempt status once they are adopted by the agency as part of its action." *See, e.g., City of Louisville v. Courier-Journal & Louisville Times Co.*, 637 S.W.2d 658 (Ky. App. 1982). Here, however, the Department indicated in its response, and affirms on appeal, that the Board has taken no final action.³ Further, the Department specifically states that the records responsive to all categories of the Appellant's request pertain to the open educator case, not to some prior case in which final action was taken. Therefore, the Department did not violate the Act when it denied the Appellant's request for records pertaining to an ongoing investigation by the Board under KRS 61.878(1)(i) and (j).

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

² "If any public record contains material which is not excepted under this section, the public agency shall separate the excepted and make the nonexcepted material available for examination."

³ The Appellant claims the Department's response to his request failed to state whether the Board has taken final action in the matter. However, it was clear from the face of the Department's response that no final action had been taken.

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