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26-ORD-316

July 15, 2026

In re: Mohamed Aly/Kentucky Real Estate Authority

Summary: The Kentucky Real Estate Authority (“the Authority”) did not violate the Open Records Act (“the Act”) when it withheld correspondence with private individuals exempt under KRS 61.878(1)(i) or correspondence that is protected by the attorney-client privilege.

Open Records Decision

On April 6, 2026, Mohammed Aly (“the Appellant”) submitted a lengthy request to the Authority seeking, in part, 988 pages of records the Authority had previously refused to produce to the Appellant in response to an earlier request under KRS 61.878(1)(h).¹ The Appellant stated that KRS 61.878(1)(h) was no longer applicable because the relevant investigation had concluded. In response, the Authority denied the request, in part, stating that 907 pages of responsive records were exempt under KRS 61.878(1)(i) and 72 pages of records were exempt under the attorney-client privilege. The Authority did produce 14 pages of records that were not exempt under any provision of the Act. This appeal followed.²

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 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.*

¹ The Appellant’s previous request sought all records “on or after June 24, 2025,” associated with a particular case before the Kentucky Real Estate Authority in which the Appellant was the complainant.

² The Appellant’s request sought several other categories of records. The Appellant’s appeal is limited to the records withheld under KRS 61.878(1)(i) and the attorney-client privilege.

Courier–Journal & Louisville Times Co., 830 S.W.2d 373, 378 (Ky. 1992). But neither KRS 61.878(1)(i) nor (j) discusses 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 (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 “correspondence with private individuals.” Unless such correspondence was “intended to give notice of final action of a public agency,” that correspondence remains exempt. *See, e.g.*, 26-ORD-237; 25-ORD-153; 23-ORD-296; 21-ORD-248; 20-ORD-095.

To support its reliance on KRS 61.878(1)(i), the Authority explains that the 907 pages withheld under that exception include “correspondence with investigative interviewees,” and “correspondence with respondents’ counsel.”³ Moreover, the Authority maintains that “all such communications [were] not intended to give notice of final action.” Although the Authority’s investigation has ended, correspondence with private individuals is categorically exempt under KRS 61.878(1)(i). The Authority has explained that 907 pages of the records it withheld fall within that exemption. Therefore, the Authority did not violate the Act when it withheld 907 pages of communications under KRS 61.878(1)(i).

Next, the Appellant challenges the Authority’s withholding of 72 pages of records under the attorney-client privilege. 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).

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 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

³ The Authority further explains that many pages of records are duplicative of one another because the same email would be captured by separate searches for emails related to each participant in the conversation.

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 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).

The Authority explains that the records it withheld under the attorney-client privilege include “confidential communications between Authority and Public Protection Cabinet attorneys and employees, including legal analyses tendered by legal staff.” More specifically, the Authority explains that the correspondence was “between the General Counsel, Staff Attorney, and assigned investigator concerning the investigation and included communication with counsel seeking or providing guidance regarding the issues presented, legal framework, and applicable statutory provisions.” This description is sufficient to determine that the withheld correspondence is protected by the attorney-client privilege under KRE 503 and KRS 61.878(1)(l). Accordingly, the Authority did not violate the Act when it withheld 78 pages of records on that basis.

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/ Zachary M. Zimmerer
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Distributed to:

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