



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-318

July 15, 2026

In re: Jimmy Shaw/Kentucky Personnel Cabinet

Summary: The Kentucky Personnel Cabinet (“the Cabinet”) did not violate the Open Records Act (“the Act”) when it withheld preliminary correspondence exempt under KRS 61.878(1)(i) or when it did not provide records it does not possess.

Open Records Decision

On April 27, 2026, Jimmy Shaw (“the Appellant”) submitted a lengthy request to the Cabinet that sought ten categories of records.¹ In response, the Cabinet stated that it did not possess records responsive to parts 1, 2, 3, 6, 8, or 10 of the request. The Cabinet stated that it has previously provided the Appellant with all records that are responsive to parts 5, 7, and 9. Finally, the Cabinet denied parts 4 and 10 of the request under KRS 61.878(1)(i) and (j) because those records are preliminary. This appeal followed.

¹ Specifically, the request sought: (1) “IT job classification review” records “referenced in locality premium request forms” dated between February 16 and June 16, 2025; (2) “records showing whether the Network Engineer classification, job key 20001531, was consider for a locality premium”; (3) “records showing how locality premium percentages for IT classification were calculated, selected, recommended, or approved”; (4) “records identifying the IT classifications selected for locality premium consideration or approval”; (5) records maintain by the Cabinet “relating to KPPA locality premium requests for” eight different IT job classifications; (6) “Business Request records, tickets, submissions, attachments, comments routing history, approval history, status history, [or] related correspondence” involving the Network Engineer classification; (7) “[a]ll locality premium requests or review records, whether approved, denied, withdrawn, pending, draft, incomplete or not submitted” involving the Network Engineer classification; (8) the “procedure document titled ‘instructions for Processing an Approved Locality Premium’”; (9) “records showing any adjustment, recission, discontinuation, renewal, continuation, expansion, or modification of locality premiums for IT classifications, between July 1, 2019, and the date of the request; and (10) correspondence “between the [Cabinet] and KPPA, Finance and Administration Cabinet, or Commonwealth Office of Technology concerning locality premiums for IT classifications, Network Engineer,” or the “Information Management Systems job group.”

To start, the Cabinet explains the process it undertakes when performing an “IT job classification locality premium review,” to explain why the types of records sought by the Appellant do not exist. According to the Cabinet, once a review begins, its staff “utilize both free and subscription based online resources to compare salaries of state job classifications to salaries in the public sector. The requesting agency may also provide data to support the request if they have such data available. No document is created, printed, saved, or captured by screen shot during this process.”² Cabinet staff then “report possible preliminary locality premium options through direct conversation or email with the initiator of the request for consideration to address recruitment and retention issues.” Finally, the Cabinet explains that the “only record maintained by [it] of any formal request or final action to grant or otherwise act on a locality premium request is the fully completed Request for Locality Premium form.” As to that form, the Cabinet states that it has provided the Appellant with all such forms from July 1, 2019, to the date of the request.

On appeal, the Cabinet maintains that it does not possess any records beyond what it has provided to the Appellant. Once a public agency states affirmatively that a record does not exist, the burden shifts to the requester to make a *prima facie* case that the requested record does or should exist. See *Bowling v. Lexington–Fayette Urb. Cnty. Gov’t*, 172 S.W.3d 333, 341 (Ky. 2005). If the requester makes a *prima facie* case that the record does or should exist, then the public agency “may also be called upon to prove that its search was adequate.” *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 848 (Ky. 2013) (citing *Bowling*, 172 S.W.3d at 341). A requester’s bare assertion that a public agency must or should possess the requested records is inadequate to make a *prima facie* case that the agency does, in fact, possess the records. See, e.g., 22-ORD-040. Rather, to make a *prima facie* case that the agency possesses or should possess the requested records, the requester must provide a statute, regulation, or factual support for that contention. See, e.g., 26-ORD-168; 21-ORD-177; 11-ORD-074.

Regarding part 1 of the request, the Appellant asserts that it “is not plausible that no documentation exists . . . of that review.” However, this is merely a “bare assertion” that additional records should exist. That assertion does not make a *prima facie* case, and the Office cannot find that the Cabinet violated the Act when it did not provide records it does not possess.

Regarding part 2 of the request, the Appellant has not made a *prima facie* case that responsive records exist. Rather, he simply asks that Office to require the Cabinet to explain why no responsive records exist and to explain the locality

² The Cabinet further explains that “some subscription-based resources prohibit printing or capturing of any salary reports absent an upgrade to a more premium subscription.”

premium review process.³ Because the Appellant has not made a *prima facie* case that responsive records exist, the Office cannot find that the Cabinet violated the Act when it did not provide records it does not possess.

Regarding part 3 of the request, the Appellant has not made a *prima facie* case that responsive records exist. Instead, he asks the Office to “direct [the Cabinet] to search for and produce any existing records reflecting the methodology used to set IT locality premium percentages.” This, the Office cannot do. *See* KRS 61.880(2)(a) (authorizing the Office to issue a decision stating whether an agency violated the Act). Because the Appellant has not made a *prima facie* case that responsive records exist, the Office cannot find that the Cabinet violated the Act when it did not provide records it does not possess.

Regarding part 6 of the request, the Cabinet maintains that it does not possess any responsive records. The Appellant only expresses his opposition to the Cabinet’s statement that such records, if they did exist, would be exempt under the Act.⁴ But the Appellant has not made a *prima facie* case that responsive records exist. Thus, the Office cannot find that the Cabinet violated the Act when it did not provide records it does not possess.

Regarding part 8 of the request, the Appellant only expresses his opposition to the Cabinet’s statement that such records, if they did exist, would be exempt under the Act. However, on appeal, the Cabinet confirms it has no records that bear the title stated by the Appellant in part 8 of this request. The Appellant has not made a *prima facie* case that such a document exists, and so the Office cannot find that the Cabinet violated the Act when it did not provide records it does not possess.

Regarding parts 5, 7, and 9 of the request, the Appellant does not take issue with the Cabinet’s refusal to provide new copies of records it has previously provided to him. Rather, he asserts that more records must exist, and so he asks the Office to direct the Cabinet to describe its search, confirm whether more records exist, or produce non-exempt records. But the Appellant has not made a *prima facie* case that additional records exist. Thus, the Office cannot find that the Cabinet violated the Act when it did not provide records it does not possess.⁵

³ As discussed above, the Cabinet has explained the locality premium review process in its response on appeal.

⁴ On appeal, the Cabinet explains that it possesses an internal guidance document that could be considered “marginally related” to part 6 of the request but that the record is not responsive because it does not specifically apply to locality premium requests. The Cabinet alternative states that the record would be properly withheld under KRS 61.878(1)(i) and (j). The Office agrees that the records is nonresponsive and will not address alternative exemption argument.

⁵ After the Cabinet submitted its response on appeal, the Appellant submitted additional materials he states make a *prima facie* case that the Cabinet possesses additional records responsive to parts 1, 2, and 8 of the request. But the Cabinet has clearly explained that it has either produced

Now, the Office turns to the Cabinet's denials of records responsive to parts 4 and 10 of the request. 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. 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 "notes," which constitute 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 into whatever final document the agency produces from those drafts and notes. That final document represents the agency's official action and is subject to inspection. But the initial and preliminary thoughts on what the final product should contain, which are expressed during the drafting process through 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.

The Cabinet explains that the correspondence that is responsive to parts 4 and 10 of the request are "staff notes" compiled in the course of the locality premium review, which contain preliminary options that an agency might choose to act on following the Cabinet's review. The Cabinet further explains that the communications containing those notes are preliminary and exist at a stage in which public agencies are only "exploring the use of a locality premium." Finally, the Cabinet has explained that its final action takes the form of a completed "Request for Locality Premium" form, which it has provided to the Appellant. As such, all the

all requested records or withheld records that are exempt under KRS 61.878(1)(i). Ultimately, the Office cannot resolve the between the parties regarding whether more responsive records exist. *See, e.g.*, 23-ORD-038; *see also Univ. of Ky. v. Hatemi*, 636 S.W.3d 857, 879 (Ky. App. 2021) (stating the Office "[l]ack[s] the authority to adjudicate factual disputes").

correspondence withheld by the Cabinet is exempt under KRS 61.878(1)(i) because none constitute the Cabinet's final action. Therefore, the Cabinet did not violate the Act when it withheld those records.

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/ Zachary M. Zimmerer
Zachary M. Zimmerer
Assistant Attorney General

#384

Distributed to:

Jimmy Shaw, Appellant
Mary Bailey, Kentucky Personnel Cabinet, Secretary
Robert Long, Kentucky Personnel Cabinet, Deputy Secretary
Rosemary Holbrook, Office of Legal Services, General Counsel