



COMMONWEALTH OF KENTUCKY
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20-ORD-055

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In re: Tyler Murphy/Fayette County Public Schools

Summary: Fayette County Public Schools (“FCPS”) subverted the intent of the Open Records Act (“Act”), short of denial, when it declined to accept an open records request via e-mail. FCPS also violated the Act when it withheld responsive records as preliminary under KRS 61.878(1)(i) and (j) after those records had been adopted through final agency action.

Open Records Decision

On January 13, 2020, Tyler Murphy (“Appellant”) emailed his request for certain open records to FCPS seeking a copy of the following:

1. [T]he contract with Strothman & Company for auditing services commencing the 2019-2020 fiscal year, which was approved by the Fayette County Board of Education on December 19, 2019[;]
2. [T]he proposals submitted by Strothman & Company and Barnes Dennig in response to [FCPS’] RFP for external audit services commencing the 19-20 fiscal year[;]
3. [T]he specific criteria used in evaluating the proposals received in response to the above-referenced RFP, including criteria description and the weight assigned to each criterion[; and]

4. [A]ny and all RFP evaluation, ranking, and/or score sheets completed for each of the proposals listed in item 2 above[.]

In its initial response to the request, FCPS violated the Act. Although Appellant initially submitted his request via e-mail, FCPS promptly responded to state that requests made under the Act must be submitted to FCPS via fax, mail, or hand-delivery. Appellant subsequently hand-delivered his request for records to FCPS. But on appeal, FCPS acknowledged that at the time of Appellant's request its open records policy expressly included e-mail as an acceptable means of submitting an open records request.¹ It is that policy that explains the "procedures to be followed in requesting public records." KRS 61.876(1)(d); *see* 20-ORD-052 (explaining how a public agency may comply with KRS 61.872 and KRS 61.876). Although FCPS directed Appellant to follow its preferred procedure in requesting public records, that preference was not reflected in its own policy promulgated under KRS 61.876. Thus, FCPS "misdirected" Appellant and thereby subverted the intent of the Act "short of denial of inspection." KRS 61.880(4).

After Appellant's e-mail request was rejected, he hand-delivered it to FCPS. In a timely written response, FCPS addressed each of Appellant's requests. First, FCPS notified Appellant that the requested contract did not exist because it had not been fully executed, but would be "finalized in April 2020" and available for inspection at that time.

With regard to items 2 and 3 of the request, FCPS indicated that the proposals and criteria used to evaluate them were placed in two binders available for Appellant's inspection. On appeal, Appellant complains that he requested a "copy" of the subject proposals rather than asking to conduct onsite inspection of the records. According to FCPS, "the District prepared two, large binders containing the requested [records] for [Appellant] to pick up at a time of his choosing." FCPS further stated that a copy of the records has "been and will continue to be made available to him in whatever format he chooses." This appears to be a miscommunication and not a dispute ripe for this Office's review. Although Appellant stated he preferred electronic transmission, the Act does not require electronic transmission of responsive records if the records are not stored

¹ FCPS's argument that the inclusion of e-mail was a mistake is not persuasive. At the time of Appellant's request, e-mail was an accepted means of transmission.

electronically. See KRS 61.874(2)(a). Additionally, Appellant did not specifically request the records by mail and there is no indication Appellant paid “all fees and the cost of mailing,” which is required before the official custodian mails the records. KRS 61.872(3)(b).

Finally, in item 4 of his request, Appellant also sought “any and all RFP evaluation, ranking, and/or score sheets completed for each of the proposals listed in item 2 above[.]” FCPS provided the final scores that were awarded to each firm, but denied item 4 of the request to the extent it sought “individual score sheets” from members of the evaluation committee convened to evaluate the proposals. Relying on KRS 61.878(1)(j), however, FCPS claimed that individual score sheets “are not final and are exempt from review.”

KRS 61.878(1)(i) exempts “[p]reliminary drafts, notes, 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 “[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended[.]” According to the Kentucky Supreme Court, “materials that were once preliminary in nature lose their exempt status once they are adopted by the agency as part of its action.” *University of Kentucky v. Courier-Journal & Louisville Times Co.*, 830 S.W.2d 373, 378 (Ky. 1992) (citing *City of Louisville v. Courier Journal and Louisville Times*, 637 S.W.2d 658 (Ky. App. 1982)). And under that test, this Office must determine whether FCPS “adopted” the individual score sheets “as part of its action.” *Id.* This Office finds that it did.

“Final agency action” is understood as “when the ultimate issue to be decided [is] resolved.” *Univ. of Louisville v. Sharp*, 416 S.W.3d 313, 315 (Ky. App. 2013). Here, final action was taken when FCPS decided which audit firm would be awarded the contract under the request for proposal it had issued. FCPS made this decision first by causing members of an evaluation committee to assign their individual scores to each bidder. Then, the evaluation committee used each individual score to create three composite scores by averaging those individual scores together. Based on those composite scores, the committee recommended one proposal over the others and presented all of the composite scores to FCPS. In choosing the audit firm based on the composite scores presented, FCPS necessarily “adopted” the work of the evaluation committee, including the individual scores of each member of that committee. Thus, the individual score sheets lost their

preliminary status under the rule announced in *University of Kentucky*, 830 S.W.2d at 378 and FCPS violated the Act in withholding them.

In an attempt to withhold the individual score sheets, FCPS relies on this Office's analysis in 10-ORD-164 and attempts to analogize the score sheets to the "work papers" found exempt under the preliminary exception. However, this is not an accurate comparison and the documents are not sufficiently analogous. The "work papers" at issue in 10-ORD-164 were the "work papers" of an auditor, which are made confidential under KRS 325.420 and KRS 325.440. Because those "work papers" were deemed confidential by enactment of the General Assembly, they were exempt under KRS 61.878(1)(l) and not the preliminary records exemptions upon which FCPS relies here. And FCPS has not pointed to any statute making the score sheets confidential. Thus, neither KRS 61.878(1)(l) or the analysis in 10-ORD-164 are relevant here.

Either party may appeal this decision by initiating action in the appropriate circuit court pursuant to KRS 61.846(4)(a). 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.

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s/Marc Manley

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Distributed to:

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