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**21-ORD-089**

May 13, 2021

In re: Michael P. Abate/Louisville Metro Government

**Summary:** Louisville Metro Government (“Metro”) did not violate the Open Records Act (“the Act”) when it denied a request to inspect the first draft of a report related to an internal agency review.

***Open Records Decision***

Michael P. Abate (“Appellant”) asked Metro to provide a copy of “the first draft” of a report that Hillard Heintze presented to Mayor Greg Fischer regarding Metro’s review of the Louisville Metro Police Department (“Department”). The Appellant also sought all edits and changes made to the first draft of the report, including documentation, notes, and written correspondence, between certain dates. In a timely written response, Metro denied the request and claimed that the records are drafts of the final report and are exempt under KRS 61.878(1)(i). This appeal followed.

The Act exempts from inspection records that are “[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)(i). Under KRS 61.878(1)(j), a separate and distinct exemption, records that are “[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended” are exempt from inspection. Although these two exceptions are

routinely invoked simultaneously, they relate to separate and distinct types of records.<sup>1</sup>

Kentucky courts have held that records in which preliminary recommendations or opinions are expressed lose their exempt status once those records are adopted by the public agency as part of the agency's final action. *Univ. of Kentucky v. Courier-Journal & Louisville Times Co.*, 830 S.W.2d 373, 378 (Ky. 1992). In *University of Kentucky*, the Supreme Court held that the University's final response to an investigation conducted by the NCAA, which was "signed by the University's president and submitted to the NCAA," could no longer be considered a preliminary record. *Id.* The *Courier-Journal* did not ask for the University's "first draft." Instead, it sought the University's final response to the investigation.

Likewise, in *University of Kentucky v. Lexington H-L Services., Inc.*, 579 S.W.3d 858, 862-63 (Ky. App. 2018), the Court of Appeals found that an auditor's final report that was submitted to the University had lost its preliminary status and was no longer exempt once the University took action based on the auditor's report. Again, the requester did not seek the auditor's first draft of the audit, but rather, the final audit report.

Here, the Appellant does not seek the final draft of the Hillard Heintze report. Instead, he specifically seeks the first draft of the report. As this Office explained in 20-ORD-095, "the records described in KRS 61.878(1)(i) are themselves 'preliminary' to the records described in KRS 61.878(1)(j). That is, preliminary drafts, notes, and correspondence with private individuals are all types of records that may become a part of '[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended[.]' KRS 61.878(1)(j)."

Although the Appellant claims that Hillard Heintze's submission of the first draft in December 2020 constituted final action by Hillard Heintze, that assertion is directly refuted by Metro. On appeal, Metro explains that Hillard Heintze contracted with Metro to conduct an independent review of the Department's policies and procedures. As part of the process, Hillard Heintze produced a draft report, which it asked Metro to review so that it could confirm factual statements, to ensure that the "nomenclature" that it used was

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<sup>1</sup> Metro did not assert that KRS 61.878(1)(j) applied to these records in its original response denying the request. However, Metro now asserts on appeal that KRS 61.878(1)(j) applies to the records withheld.

appropriate, and to check for other errors. Metro performed this review, and exchanged drafts and emails in which it suggested revisions. Metro denies having edited any policy recommendations suggested by Hillard Heintze, and limited its review to ensure the accuracy of the factual findings of the report. According to Metro, Hillard Heintze both requested this review and retained “the sole discretion” to make any changes to the report. Hillard Heintze considered Metro’s suggestions and provided a second draft of the report. Thereafter, the review process was repeated. Finally on January 27, 2021, Metro adopted the final version of the Hillard Heintze report and made it publicly available.

When Hillard Heintze submitted its first draft to Metro, it did so with the understanding that revisions were likely and that the draft would not be its final product. That is because Hillard Heintze specifically sought input by Metro to ensure the accuracy of the report that would be final. Under the plain language of KRS 61.878(1)(i), “preliminary drafts” are exempt from inspection. Final drafts of policy recommendations, however, may be subject to inspection if the final draft is adopted as part of final action taken by the agency. *See Univ. of Kentucky*, 830 S.W.2d at 378. Metro has adopted the final version of the report, and has made it publicly available. Accordingly, it did not violate the Act when it denied a request for the “first draft” of the report under KRS 61.878(1)(i).

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court pursuant to KRS 61.880(5) and KRS 61.882. 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.

**Daniel Cameron**  
**Attorney General**

/s/Matthew Ray  
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Distributed to:

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