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21-ORD-125

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In re: Randy Strause/Kentucky Board of Nursing

Summary: The Kentucky Board of Nursing (the "Board") violated the Open Records Act ("the Act") when it did not invoke KRS 61.872(5) or provide any explanation to delay access to requested records. The Board also violated the Act when it did not adequately explain how the exceptions under KRS 61.878(1)(i) and (j) applied to records it withheld.

Open Records Decision

On May 19, 2021, Randy Strause ("Appellant") sent the Board four requests to obtain copies of public records related to an administrative proceeding brought by the Board against the Appellant's client. On May 24, 2021 the Board responded and provided records responsive to one request and explained that it found no records that were responsive to a second request. For the remaining two requests, the Board stated that it needed "at least ten additional business days to respond." Having received no response by June 9, 2021, the Appellant initiated this appeal.

Normally, a public agency must issue within three business days a written response that notifies a requester whether the agency will approve or deny a request under the Act. KRS 61.880(1).[1] In response to the public health emergency caused by the Coronavirus, however, the General Assembly modified that requirement when it enacted SB 150, which became law on March 30, 2020. SB 150 provides, notwithstanding the provisions of the Act,

[1] Effective June 29, 2021, KRS 61.880 is modified to require an agency to respond within five business days.

that "a public agency shall respond to the request to inspect or receive copies of public records within 10 days of its receipt." SB 150 § 1(8)(a). Under KRS 446.030, when the period prescribed by statute is seven days or less, weekends and legal holidays are excluded from the computations of time. Therefore, because SB 150 provides ten days to respond, weekends or holidays are not excluded from the computation of time and a response is due within ten calendar days of receipt.

If, however, the records are "in active use, in storage or not otherwise available," a public agency may delay inspection of the requested records. KRS 61.872(5). To delay inspection under KRS 61.872(5), a public agency must issue a timely written response that explains the reason for the delay, and provide the "earliest date" on which the records will be available for inspection. KRS 61.872(5). The statute places the burden on the agency to give a "detailed explanation of the cause" for delay. *Id.*.

Here, the Board received four requests on May 19, 2021. The Act as modified by SB 150 required the Board to issue a written response approving or denying the four requests, or otherwise notify the Appellant that records are in "active use, storage, or [are] not otherwise available" by May 29, 2021. *See* KRS 61.872(5). The Board issued timely responses to two of the Appellant's four requests in which it notified him that it was complying with his request. *See* KRS 61.800(1). But when it sought to delay inspection of records responsive to his other two requests, the Board did not invoke KRS 61.872(5), it did not state that responsive records were in "active use, storage, or [were] not otherwise available," and it did not explain the reason for why an additional ten business days were necessary to process those two requests. Therefore, the Board violated the Act.

After the Appellant initiated this appeal, the Board issued its final response to the Appellant's two outstanding requests. In doing so, it provided hundreds of pages of documents. But it withheld from inspection 37 emails that were responsive to the Appellant's request for "each email, including attachments" sent to or received by the Board's hearing officer in which the name of the Appellant's client appeared in the email. In support of its decision to withhold these emails, the Board claims that such emails "constitute deliberations as described in 201 KAR 20:162 Section 5 and internal preliminary communications between Board staff members" under KRS 61.878(1)(i) and (j).

An agency's denial to inspect records must "provide particular and detailed information," not merely a "limited and perfunctory response." *Edmondson v. Alig*, 926 S.W.2d 856, 858 (Ky. App. 1996). A public agency that denies a request to inspect records carries the burden of proving that the claimed exemption applies to withhold the requested record. KRS 61.880(2)(c). The Act allows public agencies to deny a request to inspect records that are "preliminary 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), an exemption that is separate and distinct from KRS 61.878(1)(i), records that are "preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies are formulated or recommended" are also exempt from inspection. However, Kentucky courts have held that such preliminary recommendations lose their exempt status if the recommendations are adopted by the agency as part of its final action. *See Univ. of Ky. v. Courier-Journal & Louisville Times Co.*, 830 S.W.2d 373, 378 (Ky. 1992).

Here, the records withheld are *internal* preliminary communications *between Board staff*. The Appellant argues that the Board cannot rely on KRS 61.878(1)(i) to deny inspection of such communications because these are internal agency communications that were not exchanged with private individuals. He is correct. The plain language of KRS 61.878(1)(i) states the exception applies to "correspondence with *private individuals*." And the Board does not explain how these emails could be considered "preliminary drafts" or "notes." Thus, KRS 61.878(1)(i) does not apply to deny inspection of these emails.

Moreover, the Board does not explain how these emails can still be considered preliminary. According to the Appellant, the Board has taken final action against his client. Thus, according to the Appellant, all 37 emails must be produced. He is partially correct. Only those policy recommendations that are adopted as part of the agency's final action lose their exempt status. *Univ. of Ky.*, 830 S.W. 2d at 378. The Board does not assert that all of the recommendations discussed within these emails were rejected (and therefore not adopted) by the Board. Those emails containing recommendations or opinions which were not adopted by the Board continue to be exempt under KRS 61.878(1)(j). But any emails containing recommendations that were adopted by the Board have now lost their preliminary status and are no longer exempt. *Univ. of Ky.*, 830 S.W. 2d at 378. The Board's "limited and perfunctory response," *Edmondson*, 926 S.W.2d at 858, did not explain how it concluded

that these emails were exempt under KRS 61.878(1)(j) in light of the final action taken by the Board.[2] Therefore, it violated the Act.[3]

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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[2] Of the 37 emails that the Board has withheld, it identifies four which it considers to be "deliberations" under 201 KAR 20:162 § 5. But that regulation permits the hearing officer and the Board's hearing panel to "retire into closed session for purpose of deliberations." "Closed session" is a term more closely related to procedures subject to the Open Meetings Act. *See, e.g.*, KRS 61.815. The regulation says nothing about whether records created during those closed session deliberations are exempt from inspection under the Open Records Act.

[3] The Appellant claims that these emails represent ex parte communications between the hearing officer and the Board, which he claims are prohibited under KRS 13A.100(1). Whether such communications were prohibited under KRS 13A.100 is beyond the scope of an open records appeal.