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21-ORD-150

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In re: *The Courier-Journal*/Louisville Metro Government

Summary: Louisville Metro Government ("Metro") did not violate the Open Records Act ("the Act") when it did not provide records that do not exist or when it denied inspection of notes taken by an investigator under KRS 61.878(1)(i).

Open Records Decision

On June 8, 2021, *The Courier-Journal* ("Appellant") requested "[a]ny completed Human Resources investigation into [a named Louisville Metro Police officer] using 'offensive, derogatory language,' including but not limited to any interview notes, conclusions and recommendations." In response, Metro produced a letter in which the Chief of the Louisville Metro Police Department ("Department") informed the officer of his demotion from Major to Lieutenant and his transfer to a temporary assignment "based on disciplinary action and for the operational efficiency of the [Department]." However, Metro withheld the notes of a Human Resources department ("Human Resources") employee under KRS 61.878(1)(i), "as they are simply the work notes taken by the employee conducting [a Human Resources] inquiry into the allegations as a memory aid during the inquiry."[1]

Metro further explained that "Metro [Human Resources] conducted a factual inquiry into the veracity and context surrounding the information [Department] command received about alleged comments [and] orally shared with [the Department] the information obtained during the factual inquiry; no

[1] Metro also withheld an attorney-client privileged communication and redacted the officer's home address from the letter provided. The Appellant does not question these actions on appeal.

final report or memorandum detailing the inquiry was written nor any recommendations made." Thus, Metro stated, "no additional records responsive to [the] request exist." This appeal followed.

Once a public agency states affirmatively that it does not possess any further responsive records, the burden shifts to the requester to present a *prima facie* case that additional records do exist in the agency's possession. *Bowling v. Lexington-Fayette Urban Cnty. Gov't,* 172 S.W.3d 333, 341 (Ky. 2005). Here, the Appellant argues that an investigative file containing certain records should exist under certain statutory, contractual, and policy provisions.

First, the Appellant asserts that KRS 67C.326 requires disciplinary charges against a Department officer to be served on the officer in writing. Therefore, according to the Appellant, written charges against the officer should exist. Metro, however, states that the rank of Major is a "non-merit" rank, which is not subject to the disciplinary procedures that apply to officers in the merit system. The term "officer," includes "police officers, corporals, sergeants, lieutenants, and captains." KRS 67C.301(5).[2] However, under KRS 67C.315(1), "any officers above the rank of captain . . . shall be appointed by the mayor and shall not be considered covered under the employment protections of the merit board[.]" Accordingly, Metro asserts that a Major serves as an "at will" member of the Department's command staff and may be returned to his merit system rank at any time. Thus, the officer in question did not have the right to be presented with formal written charges, and was summarily "restored to the same classification and rank [in the merit system that he] held prior to the appointment" as provided in KRS 67C.315(2). Metro has therefore provided sufficient information to demonstrate that KRS 67.326 does not apply to this particular personnel action, and has thus rebutted the Appellant's *prima facie* case that written charges should exist for this personnel action.

Next, the Appellant argues that other statutes apply that would require the Department to present disciplinary charges in writing to the Department's officers. Specifically, the Appellant claims that the Department is subject to a collective bargaining agreement that incorporates the provisions of KRS 15.520, known as the Police Bill of Rights. Under KRS 15.520(6), charges against an officer must be presented in writing. Furthermore, under the

[2] Because Metro is a consolidated government, KRS Chapter 67C applies to its police force merit system.

collective bargaining agreement, the investigating agency must obtain an affidavit from the complainant or a written inquiry form from the investigator, setting forth the specifics of the complaint, and take recorded statements from all witnesses. In response, Metro states that officers above the rank of captain are not subject to the collective bargaining agreement or the Police Bill of Rights if the discipline taken against them merely restores the higher ranking officers to their former classification and rank in the merit system under KRS 67C.315(2). Additionally, Metro notes that KRS 15.520 "shall not apply to officers employed by a consolidated local government that receives funds under KRS 15.410 to 15.510, who shall instead be governed by the provisions of KRS 67C.326." KRS 15.520(11). Accordingly, the Department was not required to follow the procedures cited by the Appellant. Thus, Metro has presented sufficient information to rebut a *prima facie* case that written charges, an affidavit, a written inquiry form, or recorded witness statements should exist for this personnel action.

The Appellant further argues that the Department's standard operating procedures require the Professional Standards Unit to conduct administrative investigations of complaints against officers, which must include specific written information about each investigation. In response, Metro states that "[t]he mandatory investigative due process procedures afforded [Department] officers simply do not apply to those who rise above the rank of Major [*sic*] when no property interest is at stake." Because the officer in this case was a Major, Metro asserts that he was an "at will" command staff member and the Department was not required to follow the formal procedure of a Professional Standards Unit investigation. It is for this reason, according to Metro, that an informal Human Resources investigation was the only investigation conducted. This information is sufficient to explain why no additional records exist, thus rebutting any *prima facie* case to the contrary.

Finally, the Appellant argues that the notes taken by the Human Resources employee as part of the investigation are not exempt from disclosure under KRS 61.878(1)(i), which exempts from the Act "[p]reliminary drafts, notes, [and] correspondence with private individuals, other than correspondence which is intended to give notice of final action[.]" This Office has previously described "notes" as records "*created as an aid to memory* or as a basis for a fuller statement, as are, for examples, written or shorthand notes taken at a meeting." *See* 05-ORD-179 (emphasis added). Here, Metro has characterized the notes in this case "as a memory aid during the inquiry." At the close of its inquiry, Human Resources did not transmit those notes to others within the Department, but "orally shared" with the Department the

information Human Resources had gathered. Thus, the records were clearly "notes" under KRS 61.878(1)(i), not an investigative report or any other type of record.

The Appellant argues that the notes are no longer exempt because preliminary records lose their protected status "once they are adopted by the agency as part of its action." *See University of Kentucky v. Courier-Journal & Louisville Times Co.,* 830 S.W.2d 373, 378 (Ky. 1992). In particular, the Appellant cites the Court of Appeals' dictum that "if the [Police] Chief adopts [the Internal Affairs Unit's] notes or recommendations as part of his final action, clearly the preliminary characterization is lost to that extent." *City of Louisville v. Courier-Journal & Louisville Times Co.,* 637 S.W.2d 658, 659 (Ky. App. 1982). Here, the Appellant argues that the investigator's notes "must necessarily have [been] utilized . . . to communicate the results of [the] inquiry" to the Department and that the Department thereby adopted the notes. This Office disagrees.

Certainly, the investigator "utilized" the notes as an aid to memory during the inquiry. But that fact alone does not mean that the Chief "adopted" the investigator's notes as part of her final action. There is no evidence that the Chief or any other Department personnel saw the employee's notes, or even that Human Resources used the notes in making its oral report to the Department. The notes were simply a memory aid used during the inquiry. To accept the Appellant's argument in this case would vitiate the exemption for notes under KRS 61.878(1)(i). In construing this exemption, this Office has observed:

> Not every paper in the office of a public agency is a public record subject to public inspection. Many papers are simply work papers which are exempted because they are preliminary drafts and notes. KRS 61.878(1)[(i)]. Yellow pads can be filled with outlines, notes, drafts and doodlings which are unceremoniously thrown in the wastebasket or which may in certain cases be kept in a desk drawer for future reference. Such preliminary drafts and notes and preliminary memoranda are part of the tools which a public employee or officer uses in hammering out official action within the function of his office. They are expressly exempted by the Open Records Law and may be destroyed or kept at will and are not subject to public inspection.

OAG 78-626; *see also Courier-Journal v. Jones*, 895 S.W.2d 6, 8 (Ky. App. 1995) (applying OAG 78-626 to affirm the withholding of the Governor's appointments calendar). The records in this case fall squarely within the category of "notes" that are exempt under KRS 61.878(1)(i).

The Appellant, however, contends that the Department must have relied on some written record in support of its final action, and that by default it must have been the investigator's notes. But the premise on which the Appellant's conclusion rests is incorrect. In 10-ORD-034, for example, this Office found that the final action taken by the Department in response to a citizen's complaint against an officer had been based solely upon the Chief's oral interviews of the parties involved, not on the investigative report and recommendation of the Professional Standards Unit. As such, this Office found that those records retained their preliminary status under the Act. It is not necessarily true, then, that every final action of a public agency must adopt some written record as the basis of its decision. Here, the Department's action in restoring a command staff member to his former rank in the classified service was based solely on an oral discussion with Human Resources. Therefore, Metro did not violate the Act when it denied access to the Human Resources employee's notes.

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.

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/s/ James M. Herrick

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