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21-ORD-168

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In re: Glenn Hayden/Graves County School Board

Summary: The Graves County School Board (the "Board") violated the Open Records Act ("the Act") when its response to a request to inspect records failed to explain how KRS 61.878(1)(i) or (j) authorized it to deny inspection of the requested records. However, the Board did not violate the Act when it did not provide for inspection notes that no longer exist in the Board's possession.

Open Records Decision

Glenn Hayden ("Appellant") asked the Board to provide electronic copies of the records on which it relied when it voted to decline funds from the Elementary and Secondary School Emergency Relief II Fund ("ESSER II fund").[1] In a timely response, the Board provided a copy of a Kentucky Department of Education presentation which contained some information about ESSER II funds.[2] The Board further stated that "[p]reliminary drafts,

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[1] Although Congress had already enacted the Coronavirus Aid Relief and Economic Security Act ("CARES Act"), and established the "ESSER I" fund to provide federal funding to schools impacted by the coronavirus pandemic, Congress then passed additional relief for schools when it enacted the Coronavirus Response and Relief Supplemental Appropriations Act of 2021 ("CRRSA"). CRRSA allocated an additional $54.3 billion to the "ESSER II" fund. *See* "Elementary and Secondary School Emergency Relief Fund." Office of Elementary and Secondary Education, available at https://oese.ed.gov/offices/education-stabilization-fund/elementary-secondary-school-emergency-relief-fund/ (last visited Sept. 1, 2021).

[2] The presentation contains thirty-seven slides, six of which are relevant to ESSER II. The slides state that Kentucky was allocated $928 million of ESSER II funds, and explains that school boards may use ESSER II funds to pay for activities allowed under the Individuals with Disabilities Education Act ("IDEA"). As part of the presentation, the Department of Education

notes, correspondence, recommendations, and preliminary memoranda in which opinions are expressed or policies are formulated or recorded are exempt from the" Act. The Board did not identify any particular records it was withholding, nor did the Board identify which of the two "preliminary" exceptions it was relying on to withhold the records. This appeal followed.

Upon receiving a request to inspect records, and within five business days, a public agency must determine whether it will comply with or deny a request, and the public agency must communicate its decision in writing. KRS 61.880(1). If the public agency chooses to deny the request, it must cite the applicable exception and briefly explain how the exception applies to the records withheld. *Id.* That means two things. First, the public agency must actually identify the records being withheld. *See, e.g.*, 06-ORD-171 ("[T]he Board must identify any records withheld[.]"). Second, the public agency must explain how a cited exception applies to the very records that were identified as being withheld. *See Edmondson v. Alig*, 926 S.W.2d 856, 858 (Ky. App. 1996). A "limited and perfunctory response" does not "remotely" comply with the Act. *Id.*

Here, the Board simply conflated the language of two separate exceptions, KRS 61.878(1)(i) and (j), and implied that they somehow applied to exempt certain documents from inspection. The Board did not, however, explain *how* the exceptions applied or to what records it was applying the exceptions. The Board's "limited and perfunctory response" violated the Act. *See Edmondson*, 926 S.W.2d at 858.

On appeal, the Appellant specifies that the record he seeks is a document from which the Board's financial officer read when she spoke at the Board's meeting. The financial officer's presentation, and ultimately her recommendation, was that the Board take certain action with respect to the ESSER II funds. The Appellant seeks to inspect the document from which the financial officer read, but on appeal, the Board explains that that document, which is commonly kept in electronic form as an Excel spreadsheet, is a "working document subject to ongoing revisions." The physical form of that spreadsheet, from which the financial officer read at the meeting, contained handwritten notes in anticipation of potential questions the financial officer may be asked about her recommendation. Upon finishing her presentation, the

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recommended that school boards use ESSER I funds, which were created as a result of CARES Act funding, before using ESSER II funds.

financial officer discarded the spreadsheet containing her notes, and the electronic version of that spreadsheet has since been updated with new financial information.[3] In other words, the documents the Appellant seeks were notes used to give a speech, or presentation, to the Board, and those notes no longer exist.

As an initial matter, this Office has found on numerous occasions that a public agency cannot provide records that do not exist. *See, e.g.*, 19-ORD-206; 07-ORD-190; 06-ORD-040. The Board cannot provide the Appellant with the financial officer's notes because they have been destroyed. And for the reasons that follow, even if the Board *could* produce the notes, the Act would not *require* their production.

There are two separate and distinct exceptions to the Act that are both generally referred to as the "preliminary" exceptions. Under KRS 61.878(1)(i), "[p]reliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency" are exempt from inspection. Under KRS 61.878(1)(j), "[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended" are exempt from inspection. Although they are routinely combined by public agencies, and even the courts, given that they are separate subsections of KRS 61.878(1), these exceptions are separate and distinct. This distinction matters because Kentucky courts have held that "preliminary" records may lose their exempt status once they are "adopted" by a public agency upon taking final action. *See Univ. of Ky. v. Courier-Journal & Louisville Times Co.*, 830 S.W.2d 373, 378 (Ky. 1992). What is typically overlooked (or is irrelevant to the particular facts of such cases) is that "drafts" and "notes" are words with entirely different meanings. This case perfectly illustrates the important and meaningful distinction between the "notes" and "drafts" exception and the "preliminary recommendations" and "preliminary memoranda" exception.

Notes are not ordinarily "adopted," and are instead routinely "thrown in the wastebasket or which may in certain cases be kept in a desk drawer for future reference"—as was done here. OAG 78-626; *see also* 97-ORD-191. Notes "are expressly exempted by the Open Records [Act] and may be destroyed or kept at will and are not subject to public inspection." *Id.* Although a "preliminary policy memoranda" may form the basis of a public agency's final

[3] The Board explains that the spreadsheet had been "updated" long before the Appellant submitted his request, which was approximately one month after the meeting in question.

action, and such memoranda may thereby be "adopted" once final action is taken, the "notes" a public employee uses to give an oral presentation of that policy recommendation are not ordinarily "adopted."[4]

Here, the financial officer gave a recommendation to the Board, at an open meeting, in the form of a speech. She used notes to give that speech, and as the Board explains on appeal, she then discarded those notes after she finished her speech. The Act did not require her, or the Board, to do anything different. And based on the evidence in this record, the Board never saw the notes on which the financial officer relied when giving her presentation. If the Board adopted any recommendation from the financial officer, it was her oral recommendation given at the publicly attended open meeting, not the notes of her speech. Therefore, the notes upon which the financial officer relied to give her speech are exempt from inspection under KRS 61.878(1)(i) regardless of the fact that the Board ultimately adopted her verbal recommendation. Thus, the Board did not violate the Act when it denied the Appellant's request for this particular record.

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
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/s/Marc Manley
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[4] For a different example, there may be "preliminary drafts" ***of*** "preliminary memoranda." That is why a "first draft" of a document would typically be exempt from inspection. *See, e.g.*, 21-ORD-089 (affirming an agency's denial of a request to inspect a "first draft" of a report that was subsequently altered, and the altered version constituted the adopted report and was made available for inspection).

Distributed to:

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