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21-ORD-169

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In re: Courtney Graham/Board of Nursing

Summary: The Board of Nursing ("Board") violated the Open Records Act ("the Act") when it denied a request for records without citing the applicable exceptions to the Act or explaining how the cited exceptions applied to the records it withheld. On appeal, however, the Board provided the necessary explanation to justify its reliance on KRS 61.878(1)(i) and (j).

Open Records Decision

On June 18, 2021, attorney Courtney Graham ("Appellant") requested various records relating to a licensure proceeding against her client in which the Board, pursuant to KRS 13B.120, issued a final order on June 17, 2021. In response, the Board denied five of the Appellant's six requests, citing KRS 61.878(h), (i), and (j), and claimed that the request constituted an "unreasonable burden" under KRS 61.872(6). This appeal followed.

In her first request, the Appellant sought the Board's "complete investigative file" relating to her client's case. In response, the Board stated that it had already produced part of its investigative file in response to previous requests, "but subject to the withholding of exempt documents." However, the Board did not identify the records it was withholding, nor did it cite any exception to the Act.

When a public agency denies inspection of public records, it must "include a statement of the specific exception authorizing the withholding of the record and a brief explanation of how the exception applies to the record withheld." KRS 61.880(1). This requirement applies regardless of whether the records have been requested before. Therefore, the Board violated the Act when

it failed to state an exception to the Act and explain how it applied to deny inspection of records that were responsive to the Appellant's first request.

The Board's response to the Appellant's other requests was similarly deficient. Unlike its response to the Appellant's first request, the Board did cite KRS 61.878(1)(i) and (j) as grounds for denying the Appellant's other requests. However, the Board did not explain how those exceptions applied to the records withheld, as required under KRS 61.880(1). Nor did the Board specify whether the requested records were "drafts, notes, [or] correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency," or whether such records were "[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended." The agency's explanation must "provide particular and detailed information," not merely a "limited and perfunctory response." *Edmondson v. Alig,* 926 S.W.2d 856, 858 (Ky. 1996). "The agency's explanation must be detailed enough to permit [a reviewing] court to assess its claim and the opposing party to challenge it." *Kentucky New Era, Inc. v. City of Hopkinsville,* 415 S.W.3d 76, 81 (Ky. 2013). And as this Office has recognized, KRS 61.878(1)(i) and (j) are two separate exemptions, and public agencies must explain how each of those separate exemptions apply to the withheld records if a public agency chooses to rely on both exemptions. *See*, *e.g.*, 21-ORD-168. But here, the Board's response was "limited and perfunctory," and it therefore violated KRS 61.880(1).[1]

After this appeal was initiated, the Board provided some additional investigative documents to the Appellant, but withheld "drafts, notes, internal correspondence, and preliminary correspondence" under KRS 61.878(1)(i) and (j). The Board additionally identified several e-mails with witnesses as "preliminary correspondence with private individuals" under KRS 61.878(1)(i). The Board also identified "over three hundred" e-mails between staff members that it withheld as "[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended," under KRS 61.878(1)(j).

"[T]he General Assembly has determined that the public's right to know is subservient to . . . the need for governmental confidentiality" under KRS 61.878(1)(i) and (j). *Beckham v. Bd. of Education of Jefferson County,* 873 S.W.2d 575, 578 (Ky. 1994). But after an agency takes final action, "the

[1] On appeal, however, the Board provided the required explanations for this request and the Appellant's other requests.

preliminary characterization is lost" as to any records or recommendations that the agency adopts as part of its final action. *City of Louisville v. Courier-Journal & Louisville Times Co.,* 637 S.W.2d 658, 659 (Ky. App. 1982).

The Board, however, argues that it has not yet taken final action because the Appellant's client may seek judicial review of the Board's final order under KRS 314.091(6) and KRS 13B.140, and, under certain circumstances, the reviewing court may choose to "remand the case for further proceedings." KRS 13B.150(2). This Office disagrees. The fact that parties may avail themselves of judicial review of an agency's final order does not render that order any less final for purposes of KRS 61.878(1)(i) or (j). *See Univ. of Kentucky v. Courier Journal & Louisville Times Co.,* 830 S.W.2d 373, 378 (Ky. 1992) (holding that any subsequent action by another entity is irrelevant to the finality of a public agency's action under the Act).

Therefore, the only question is whether the withheld records have been adopted as the basis of the Board's final action. On this issue, the Board argues that none of the withheld records were adopted because the final decision was made pursuant to KRS Chapter 13B and the records in question were not entered into the administrative record. This Office agrees. In fact, the "adoption" rule was born in the context of requests for records related to investigations leading to administrative proceedings, like those conducted under KRS Chapter 13B. *See City of Louisville v. Courier-Journal*, 637 S.W.2d at 659 (notes of police officer internal affairs investigation were not adopted when the Chief took final action); *see also Ky. Bd. of Medical Licensure v. Courier-Journal and Louisville Times Co.*, 663 S.W.2d 953, 956 (Ky. App. 1983) (adopting the trial court's finding that "[u]nless so adopted and made a part of the Board's final action, such [investigative] documents shall remain excluded under" KRS 61.878(1)(i) and (j)).

"In an administrative hearing, findings of fact shall be based exclusively on the evidence on the record." KRS 13B.090(1). Furthermore, "[i]n making the final order," an agency must base its decision on "the record including the recommended order and any exceptions duly filed to a recommended order." KRS 13B.120(1). These statutes establish a presumption that the Board, in making its final decision, considered nothing outside the administrative record. And the Board could not "adopt" any records to form the basis of its final action other than those records which were admitted into the official administrative record. So although the Board failed to specify whether these records are exempt under KRS 61.878(1)(i) or whether they are exempt under KRS 61.878(1)(j), there is no evidence to overcome the presumption that the

Board did not consider any drafts, notes, internal correspondence, or correspondence with private individuals extraneous to the record when it took final action. Therefore, this Office finds that the Board did not violate the Act when it withheld those documents.

In her second request, the Appellant sought all "pre-complaint review forms concerning" the licensure proceeding. The Board denied inspection of these forms under KRS 61.878(1)(i) and (j), but it is not clear whether the Board characterizes these documents as "notes" under KRS 61.878(1)(i) or as "[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended," under KRS 61.878(1)(j). In either case, however, the Board correctly argues that the records retain their preliminary status because the Board's final decision was solely "based upon the testimony given at the hearing, and the exhibits entered into evidence in the hearing." Thus, the Board did not violate the Act when it withheld the pre-complaint review forms.

In her third request, the Appellant sought all e-mails from August 1, 2020, through June 22, 2021, between Board staff members and three named witnesses. The Board denied the request under KRS 61.878(1)(i) because the e-mails were "correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency." The Appellant argues that the witnesses are no longer "private individuals" because they testified on behalf of the Board in an administrative hearing. However, the Appellant offers no authority for the proposition that private individuals who appear as witnesses cease to be private individuals. The Board states that none of the requested e-mails were part of the record in the administrative proceeding. Accordingly, they retained their exempt status and were properly withheld.[2]

In her fourth request, the Appellant sought "[e]ach writeup, summary, narrative, memoranda [*sic*], and report . . . and all other documents and records" submitted by Board staff to the Credentials Review Panel in her client's case. The Board withheld these records as "preliminary drafts" and

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[2] Under KRS 13B.090(3), a party to an administrative proceeding has a right, independent of the Act, to inspect "the available documentary or tangible evidence relating to an administrative hearing." Because this Office's only concern here is the resolution of this appeal under the Open Records Act, this Office takes no position on whether the requested records should be or may be discoverable under the rules governing discovery in administrative hearings or whether such documents should be or may be discoverable on an appeal of an administrative order to circuit court.

"notes" under KRS 61.878(1)(i) and as "preliminary recommendations" and "preliminary memoranda in which opinions are expressed or policies formulated or recommended" under KRS 61.878(1)(j).

Under 201 KAR 20:161, after the executive director of the Board determines that a complaint against a licensee alleges a violation of the provisions of KRS Chapter 314, the complaint may be referred to the Credentials Review Panel for disposition in lieu of an administrative hearing. 201 KAR 20:161 § 2(1)(b)1. In this case, the Appellant alleges that the Credentials Review Panel directed Board staff to make a settlement offer, which the Appellant's client rejected. But records and discussions pertaining to unsuccessful settlement negotiations are, by their very nature, not adopted as the basis of final agency action. *See* 14-ORD-014. Furthermore, the Board's final action was based only on the administrative record and testimony at the hearing. Therefore, the Board did not violate the Act when it withheld records submitted to the Credentials Review Panel.

In her fifth request, the Appellant sought the Credentials Review Panel's "agendas, notes, minutes, review material, and reports" for the meetings that concerned the case involving the Appellant's client. Initially, the Board denied this request in its entirety on the basis of KRS 61.878(1)(i) and (j). On appeal, however, the Board provided four documents which it determined were not exempt from the Act, but the Board has not stated what those documents are. The Board indicates that the remaining records are preliminary drafts and notes under KRS 61.878(1)(i) and "preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended."

Two categories of records that are clearly not exempt from inspection are the agendas and minutes of the Credentials Review Panel. Under KRS 61.835, minutes of a public agency "shall be open to public inspection." Furthermore, under KRS 61.823, the agenda for a special meeting of a public agency must be publicly posted. Although it is unclear whether the relevant meetings of the Credentials Review Panel were regular or special meetings, it is clear that the final agenda for a regular or special meeting would not be a draft, a note, or a preliminary recommendation under KRS 61.878(1)(i) or (j). Therefore, this Office assumes that the Board has provided the relevant minutes and agendas to the Appellant.

The remaining records consist of notes, "review material," and reports of the Credentials Review Panel. Because these records, like those within the

scope of the Appellant's fourth request, are records pertaining to an unsuccessful settlement negotiation, they likewise retain their preliminary status under KRS 61.878(1)(i) and KRS 61.878(1)(j) respectively. Furthermore, because they are not part of the administrative record on which the Board decided the case, they were not adopted as the basis of final agency action. Therefore, the Board did not violate the Act when it withheld those records.

In sum, the Board violated the Act when it denied access to public records without citing the applicable exceptions to the Act or without explaining how the exceptions applied to the records withheld. However, the Board did not violate the Act when it withheld records that were exempt from disclosure under KRS 61.878(1)(i) or (j).[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.

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/s/ James M. Herrick

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[3] Because KRS 61.878(1)(i) and (j) are dispositive of the issues on appeal, it is not necessary to address the Board's arguments under KRS 61.878(1)(h) or KRS 61.872(6).