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21-ORD-202

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In re: Richard Maynard/Luther Luckett Correctional Complex

Summary: The Luther Luckett Correctional Complex ("the Complex") did not violate the Open Records Act ("the Act") when it denied an inmate's request for a disciplinary report that was not final. However, the Complex violated the Act when it failed to explain how exceptions to the Act applied to particular records, and when it denied the inmate's request for his written disciplinary appeal and the recording of his disciplinary hearing.

Open Records Decision

On September 8, 2021, inmate Richard Maynard ("Appellant") requested that the Complex provide "copies of all info from" his disciplinary proceeding, including "Part 1," "Part 2," "CD," and "appeal." In a timely response, the Complex denied the request under KRS 61.878(1)(i) and (j). However, the Complex did not specify whether the requested records were considered "drafts, notes, [or] correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency," under KRS 61.878(1)(i), or whether such records were "[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended," under KRS 61.878(1)(j). The Complex indicated that "for the above reason the request for the *statement letter* is being denied. This request is still in pending status and information will not be available until investigation is completed and disciplinary finalized" (emphasis added). This appeal followed.

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). The agency 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). Furthermore, 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 applies to the withheld records if an agency chooses to rely on both provisions. *See*, *e.g.*, 21-ORD-168; 21-ORD-169. Here, however, the Complex's response was "limited and perfunctory" because it did not explain how either of the two exemptions applied to the records withheld. The Complex therefore violated KRS 61.880(1).

On appeal, the Complex clarifies that the Appellant's request was denied in its entirety because the requested records were "preliminary drafts" under KRS 61.878(1)(i) and "preliminary memoranda in which opinions are expressed" under KRS 61.878(1)(j). The Complex explains that Part 1 of the disciplinary report consists of the "initial charge and investigation" and Part 2 consists of the "hearing and decision."

Under Corrections Policy and Procedure ("CPP") 15.6(II)(F), an inmate may appeal a disciplinary decision to the warden, who "has the authority at any time to order the disciplinary report to be vacated upon justification and may allow it to be re-investigated or reheard, or both."[1] The Complex indicates that the Appellant appealed the outcome of his disciplinary hearing and the warden ordered the matter to be re-investigated and reheard.

Under CPP 15.6(II)(E)(1), an inmate is to be given a copy of the finalized disciplinary report form "[a]t the end of the hearing."[2] The Complex states that the Appellant received the original Part 1 of his disciplinary report, but Part 1 was rewritten after the warden's action vacating the decision, and the new Part 1 is therefore still a "preliminary draft" under KRS 61.878(1)(i) until the new hearing is concluded. As for Part 2 of the disciplinary report, the Complex asserts that "the old Part [2] is still preliminary and will be rewritten with the new hearing." Thus, the Complex regards the initial hearing decision as a "preliminary recommendation" under KRS 61.878(1)(j) that has not been

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[1] *See* Dept. of Corrections Policy and Procedure 15.6, available at https://corrections.ky.gov/About/cpp/Documents/15/CPP%2015.6.pdf (last accessed Oct. 21, 2021).

[2] This provision apparently refers to Part 1 of the disciplinary report.

adopted as final agency action. This Office agrees that these records are properly treated as exempt, under KRS 61.878(1)(i) and (j) respectively, and the Complex did not violate the Act by withholding the disciplinary report.

However, the Appellant also requested a copy of his written appeal to the warden and a copy of the "CD" or other recording of his first hearing. The Complex has not explained how the appeal or the recording constitutes a preliminary draft or a preliminary recommendation. Moreover, under CPP 15.6(II)(G)(1), an inmate may arrange access to disciplinary hearing tapes through the open records request process. Also, under CPP 15.6(II)(G)(2), "[c]opies of that portion of the tape, pertaining to the particular hearing concerned, less the deliberation phase, shall be provided, if the audiotape is available." The Complex has not alleged that the hearing tape or CD is unavailable. Furthermore, under CPP 15.6(II)(B)(2), "[t]he institution shall preserve the audio tape recording of the hearing for a period of two (2) years from the date of the Warden's review."

Under KRS 61.880(2)(c), a public agency bears the burden of proof in an open records appeal. Here, the Complex has not met its burden that the Appellant's request for his written appeal and the recording of his initial disciplinary hearing is a request for an exempt preliminary draft or an exempt preliminary policy recommendation. Therefore, the Complex violated the Act when it denied those portions of the Appellant's request.

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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