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21-ORD-213

November 9, 2021

In re: Mark Graham/Hopkinsville Electrical System

Summary: The Hopkinsville Electrical System[1] (the "System") did not violate the Open Records Act ("the Act") when it denied inspection of preliminary recommendations that were rejected by a public agency.

Open Records Decision

Mark Graham ("Appellant") submitted a request to the System for "live view access" as well as an "electronic copy" of records related to a utility pole relocation project in Hopkinsville (the "City"). In a timely response, the System responded and provided the Appellant with nine pages of responsive records, but withheld six pages of responsive records because it claimed the documents were exempt from disclosure under KRS 61.878(1)(i) and (j). This appeal followed.

Although this Office did not ask the System to provide the records it withheld, the System has nevertheless provided them on appeal for this Office's confidential review. Under KRS 61.880(2)(c), this Office cannot disclose the contents of these records except as necessary to determine whether a claimed exemption applies. Under KRS 61.878(1)(j), "[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended" may be exempt from inspection. In *University of Kentucky v. Courier-Journal & Louisville Times*

[1] The Hopkinsville Electric System "is a municipal not-for-profit corporation established by Kentucky statute and city ordinance." The Hopkinsville Electric System, *About Us* https://hop-electric.com/about-us/hopkinsville-electric-system/ (last viewed November 2, 2021).

Co., 830 S.W.2d 373, 378 (Ky. 1992), the Kentucky Supreme Court held that "materials that were once preliminary in nature lose their exempt status once they are adopted by the agency as part of its action." This Office has recognized that "[e]mails containing strategies, opinions, or recommendations that have not been adopted as the basis of final agency action fall within the coverage of KRS 61.878(1)(j)." 19-ORD-011 (citing 17-ORD-004).

After careful review of the withheld records, it is this Office's opinion that these records are of preliminary recommendations or memoranda within the scope of KRS 61.878(1)(j). Here, the withheld records consist of several emails between the System and a City representative discussing three options for relocating a utility pole and the cost of each option. The System claims that the City rejected all three options discussed in these records, and decided at a later time to pursue a different option. On review, none of the recommendations in the withheld records correspond to the option eventually selected by the System. Therefore, the System's claim that the City rejected all options in the withheld correspondence appears to be corroborated by the invoices that the City ultimately paid. Accordingly, the recommendations made in these records were never adopted, and they retain their preliminary status and are exempt from inspection pursuant to KRS 61.878(1)(j).[2]

Finally, the Appellant also claims that the System failed to provide all responsive correspondence in its possession. The System, however, claims to have provided all responsive correspondence, other than the emails it has withheld under KRS 61.878(1)(j).

Once a public agency states affirmatively that it does not possess responsive records, the burden shifts to the requester to present a *prima facie* case that requested records do exist in the possession of the public agency. *See Bowling v. Lexington-Fayette Urb. Cnty. Gov.*, 172 S.W.3d 333, 341 (Ky. 2005). If the requester is able to make a *prima facie* case that the records do or should exist, then the public agency "may also be called upon to prove that its search was adequate." *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 848 n.3 (Ky. 2013) (citing *Bowling*, 172 S.W.3d at 341).

To establish his *prima facie* case, the Appellant states only that he believes it to be unlikely that the System did not send additional written

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[2] Because the System properly relied on KRS 61.878(1)(j) to deny inspection of these records, it is unnecessary to determine whether KRS 61.878(1)(i) would also apply to deny inspection of the records.

correspondence to the City about "a project of this size." However, a mere belief that additional records should exist is not sufficient to establish a *prima facie* case that additional records exist. *See, e.g.*, 20-ORD-056. This Office has historically found that it is unable to resolve competing factual claims about the existence of additional records. *See, e.g.*, 19-ORD-083; 03-ORD-061; OAG 89-91. Accordingly, this Office cannot find that the System has withheld additional records in violation of the Act.

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 within 30 days from the date of this decision. 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. The Attorney General will accept notice of the complaint emailed to OAGAppeals@ky.gov.

Daniel Cameron
Attorney General

/s/Matthew Ray
Matthew Ray
Assistant Attorney General

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Distributed to:

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Jack N. Lackey Jr.