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22-ORD-007

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In re: Joshua Wilkey/Lexington-Fayette Urban County Government

Summary: The Lexington-Fayette Urban County Government ("the City") violated the Open Records Act ("the Act") when it failed to respond to a request within five business days and when it denied a request for records without explaining how the cited exemptions applied to the records it withheld. On appeal, the City failed to carry its burden of proof that KRS 61.878(1)(i) or KRS 61.878(1)(j) applied to the withheld records.

Open Records Decision

On November 12, 2021, Joshua Wilkey ("Appellant") submitted a request to inspect records that contained nine subparts and which all related to premium pay for City employees under the American Rescue Plan Act ("ARPA"). On November 19, 2021, the City responded to one subpart of the Appellant's request by providing "all final documents" and stating that "[a]ll other responsive documents are preliminary drafts, notes, and recommendations and are exempt pursuant to KRS 61.878(1)(i) and (j)." With regard to the remaining eight subparts of the request, the City stated that it was "currently in the process of reviewing files to gather documents" and that the Appellant could "expect a follow-up response within five to seven business day[s]." On December 1, 2021, the City issued its response to the remaining subparts, in which it granted one subpart and stated that no responsive documents existed for two other subparts. As to the remaining five subparts of the request, the City provided "all final documents" and stated that all other responsive records were "preliminary drafts, notes and recommendations" that were exempt under KRS 61.878(1)(i) and (j). This appeal followed.

A public agency has five business days to fulfill a request for public records or deny such a request and explain why. KRS 61.880(1). This time may be extended if the records are "in active use, in storage or not otherwise available," but the agency must give "a detailed explanation of the cause . . . for further delay and the place, time, and earliest date on which the public record[s] will be available for inspection." KRS 61.872(5). Here, the City issued a letter within five business days, but it did not respond to eight out of nine requests, nor did it allege that any records were in active use, in storage, or not otherwise available. Instead, the City gave an expected response date of ten to twelve business days from the date of the request. The City did not give the Appellant a detailed explanation of the cause for delay, as required under KRS 61.872(5). Therefore, the City violated the Act.

Moreover, when a public agency denies a request under the Act, it must give "a brief explanation of how the exception applies to the record withheld." KRS 61.880(1). 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). This requires the agency to assign the withheld records to "meaningful categories" that describe the nature of the documents and how the claimed exemption applies to the documents in the category. *See, e.g.,* 19-ORD-120; 15-ORD-003. And, as this Office has recognized, KRS 61.878(1)(i) and (j) are two separate exemptions. *See*, *e.g.*, 21-ORD-168. Therefore, public agencies must explain how each of those separate exemptions applies to the withheld records if a public agency chooses to rely on both exemptions. But here, the City's response was "limited and perfunctory," because the City did not explain how either exemption applied to the records withheld. Therefore, the City violated the Act.

On appeal, the City provides no additional descriptive information about the individual records, or categories of records, it withheld. However, the City asserts that "the documents, memorandums, and communications that [the Appellant] requests were never adopted into the final action taken" by the City in determining which employees were eligible for premium pay. Thus, the City maintains that the withheld records remain preliminary and exempt.

"[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 Cnty.,* 873 S.W.2d

575, 578 (Ky. 1994). But after an agency takes final action, "the 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). Nonetheless, under KRS 61.880(2)(c), a public agency bears the burden of proof that a particular exemption applies to a public record. To determine whether the City has met its burden, it is necessary to examine the Appellant's requests individually.

First, the Appellant requested "[a]ny document, memoranda, internal communication, email or other record which shows the criteria used to determine non-sworn employee eligibility for premium pay" of employees in the City's Chief Administrative Office. The City has not identified the specific records it withheld, in terms of whether they are memoranda, e-mails, or other types of documents. Nor has the City alleged that the records contained proposed alternatives to a specific final action which were not accepted. Rather, the City merely states that the records constitute preliminary drafts and notes, under KRS 61.878(1)(i), or preliminary recommendations under KRS 61.878(1)(j), and that none of them were adopted as the basis of final action. This minimal information is insufficient to meet the City's burden of proof.

For example, the City does not explain what final action it took, if any, regarding premium pay. The City states only that it "does not dispute that a final action has been taken." Apparently, the City has taken final action to determine which employees qualify for premium pay. Thus, if a document recommends that a particular employee receive premium pay, and the City subsequently provided such payment, then the City would have adopted the recommendation in that record. Likewise, if a document recommended that an employee should not receive such payment, and the City does not provide the payment, then the City would have also adopted that recommendation.[1] Only if the City rejected a recommendation, *i.e.*, that a particular employee should receive premium payment yet the City declined the recommendation, or vice versa, would the record retain its preliminary status. But the City's "limited and perfunctory response," *Edmondson,* 926 S.W.2d at 858, was not "detailed enough to permit [a reviewing] court to assess its claim and the opposing party to challenge it," *Kentucky New Era,* 415 S.W.3d at 81. That is because the City has not identified the records it is withholding, or explained how the

[1] To the extent that any record contains multiple recommendations, in which some were adopted and others were not, the City has a duty to "separate the excepted [material] and make the nonexcepted material available for examination." KRS 61.878(2).

exemptions apply to the records it is withholding. KRS 61.880(1). Accordingly, the City has failed to carry its burden that the records have retained their preliminary status such that they may be exempted from inspection.

The Appellant also requested documents from the Computer Services Office, such as "[a]ny email between the General Services Commissioner and any of the following individuals regarding employees' eligibility and/or ineligibility for premium pay: Parks & Recreation director, deputy directors, and/or superintendents." Here, it is clear from the terms of the request that the records in question are e-mails. However, as with the previous request, the City has not provided sufficient information to meet its burden of proof that the e-mails are exempt from disclosure under KRS 61.878(1)(i) or (j). Also with regard to the Computer Services Office, the Appellant requested "[a]ny email sent by [the Deputy Director of Parks and Recreation] to any other employee relating to ARPA, premium pay, employee eligibility or ineligibility and/or criteria for determining eligibility." Again, for the reasons stated above, the City has not met its burden of proof that the withheld e-mails are exempt from disclosure under KRS 61.878(1)(i) or (j).

The Appellant made three requests related to the Parks and Recreation Department that are in dispute. First, the Appellant requested "[a]ny email, memoranda, internal communication, or other document between the General Services Commissioner and any of the following individuals regarding employees' eligibility and/or ineligibility for premium pay: Parks & Recreation director, deputy directors, and/or superintendents." Second, the Appellant requested "[a]ny email, memoranda, internal communication, and/or any other document sent by [the Deputy Director of Parks and Recreation] to any other employee relating to ARPA, premium pay, employee eligibility or ineligibility and/or criteria for determining eligibility." For the same reasons stated above, the City has not met its burden of proof that those records are exempt under KRS 61.878(1)(i) or (j).

Finally, the Appellant requested "[a]ny document, memoranda, internal communication, email or other record used to determine criteria for premium pay." As to these records, the Appellant specifically requested records "used to determine criteria" that were the basis for the City's final decision regarding premium pay. A document used in making a determination is not merely a preliminary draft, *i.e.,* "a tentative version, sketch, or outline," or a note, "created as an aid to memory or as a basis for a fuller statement." *See* 05-ORD-179. Rather, a document "used to determine criteria" has necessarily been adopted, because that is the standard the City is using to take final action.

However, it is unclear from this record whether the City possesses such a document. In its initial response to the Appellant, the City claimed that ARPA established the criteria for premium pay. Thus, to the extent that the City is only relying on a federal statute to determine the criteria, it was not required to provide the Appellant with a copy of the statute. *See, e.g.*, 00-ORD-130 (the Act does not require public agencies to perform legal research for a requester).

However, if the City does not possess a record describing the criteria, other than the federal statute, it should have affirmatively stated that no record responsive to the request exists. *See Univ. of Ky. v. Hatemi*, Case No. 2019-CA-0731, 2019-CA-0794, 2021 WL 5142666 at *20 (Ky. App. Nov. 2, 2021). Because the City has not carried its burden that the criteria are preliminary, or stated that no records containing the criteria exist, it violated 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 e-mailed to OAGAppeals@ky.gov.

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/s/ James M. Herrick

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