



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

RUSSELL COLEMAN
ATTORNEY GENERAL

1024 CAPITAL CENTER DRIVE
SUITE 200
FRANKFORT, KY 40601
(502) 696-5300

24-ORD-193

September 11, 2024

In re: Kristin Turner/Fayette County Public Schools

Summary: The Fayette County Public Schools (“FCPS”) did not violate the Open Records Act (“the Act”) when it denied a request for notes under KRS 61.878(1)(i).

Open Records Decision

Kristin Turner (“Appellant”) submitted a request to FCPS for “talking points and remarks for protect our school’s events”; “email communication[s] regarding . . . Protect our Public Schools” events or events related to opposition to “Amendment 2”; email communications between five FCPS employees; and email communications that were an invitation or announcement related a “Protect our Schools” event on FCPS property. In response, FCPS provided records related to the request for talking points with portions redacted pursuant to KRS 61.878(1)(i) and (j). This appeal followed.¹

On appeal, FCPS maintains the redacted records are exempt under KRS 61.878(1)(i) and (j). KRS 61.878(1)(j) exempts from inspection “[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended.” This exception is distinct from KRS 61.878(1)(i), which exempts from inspection “[p]reliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency.” The distinction is important because Kentucky courts have held that “investigative materials that were once preliminary in nature lose their exempt status once they are adopted by the agency as part of its action.” *Univ. of Ky. v. Courier-Journal & Louisville Times Co.*, 830

¹ FCPS also stated that it had no records responsive to the Appellant’s request for email communications that were an invitation to, or an announcement of, any event held on FCPS property. FCPS also stated that the request for email communications between five FCPS employees was not specific enough to be completed. The Appellant has not challenged these portions of FCPS’s response.

S.W.2d 373, 378 (Ky. 1992). But neither KRS 61.878(1)(i) nor (j) discusses preliminary “investigative materials.” Rather, KRS 61.878(1)(i) relates to preliminary drafts and notes, which by their very nature are rejected when a final report is approved. In other words, a first draft is not “adopted” when a second draft is written, and the first draft is always exempt under KRS 61.878(1)(i). *See, e.g.*, 21-ORD-089 (agency properly relied on KRS 61.878(1)(i) to deny inspection of the “first draft” of a report that was later adopted).

Here, FCPS states that the redacted pages contained proposed “talking points” for speeches by two FCPS employees. FCPS explains that the talking points “combined district information and language from previous op-eds written” by the employee. FCPS further claims that, although one employee “may have reviewed the talking points before the event, he did not refer to them during the event or use them during his statement.” The Office has previously held that the notes used to give a speech remain exempt under KRS 61.878(1)(i) even after the speech is given. *See* 21-ORD-168. FCPS has explained that the talking points were a “general guide and loose outline for oral presentations” and were not intended to give notice of final action. Thus, the talking points are “notes” within the meaning of KRS 61.878(1)(i). Accordingly, FCPS did not violate the Act when it withheld the talking points under KRS 61.878(1)(i).²

A party aggrieved by this decision may appeal it by initiating an action in the appropriate circuit court under KRS 61.880(5) and KRS 61.882 within 30 days from the date of this decision. Under 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.

Russell Coleman
Attorney General

/s/ Zachary M. Zimmerer
Zachary M. Zimmerer
Assistant Attorney General

² Because KRS 61.878(1)(i) is dispositive of the issues on appeal, it is unnecessary to address the Cabinet's alternative argument relating to KRS 61.878(1)(j).

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Distributed to:

Kristin Turner

Andria Jackson

Demetrus Liggins

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Carmine G. Iaccarino