



## 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-201

September 18, 2024

In re: John Reynolds/Department of Education

**Summary:** The Department of Education (“the Department”) did not violate the Open Records Act (“the Act”) when it withheld records created in the course of an ongoing investigation under KRS 61.878(1)(i) and (j).

### *Open Records Decision*

On June 21, 2024, attorney John Reynolds (“the Appellant”) submitted a request to the Department for “[a]ny and all reports, notes, or documents regarding disciplinary actions, reprimands, suspensions, revocations, probationary or supervisory conditions, or complaints for” a specific teacher “for the last twenty (20) years.” In a timely response, the Department stated it was “not producing” the records in its possession “pursuant to exemptions set forth in KRS 61.878(1)(i) and (j).” The Department explained that the records consisted of a complaint or report of educator misconduct filed with the Education Professional Standards Board (“the Board”) and the Department’s subsequent investigation, which was still ongoing.<sup>1</sup> Thus, the Department asserted “the records pertaining to that case are exempt from disclosure” until the Board takes final action on the complaint. This appeal followed.

The Appellant, who represents the mother of a former student of the teacher in question, states that the Cabinet for Health and Family Services issued a substantiation letter in January 2024 relating to an allegation of abuse against the teacher that occurred in August 2023. The Department acknowledges its staff received a report to the Board pertaining to that matter. According to the Department, the Board’s procedures dictate that “[t]he report is reviewed and if found to contain sufficient credible evidence that a violation of KRS 161.120 occurred, then a case file is opened.” The teacher is notified of the complaint and given an

---

<sup>1</sup> The Commissioner of Education acts as head and executive Secretary of the Board. See KRS 161.017(1); KRS 161.028(2)(g). The Board is empowered to take disciplinary action against the certificate of any teacher for the reasons listed in KRS 161.120(1).

opportunity to submit a rebuttal. The complaint and rebuttal are then submitted to the Board for review at its next meeting. The Board may then refer the matter for review and investigation by its attorney, who determines whether more evidence is needed and submits a recommendation to the Board regarding whether a hearing should be held, an agreed order should be approved, or the case should “be dismissed for lack of evidence or insufficiency of evidence.” Regardless of the determination, the Board adopts a Final Order, which “is considered final agency action.” The Board has not yet issued a Final Order in the case at issue.

KRS 61.878(1)(i) exempts from disclosure “[p]reliminary drafts, notes, [and] correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency.” KRS 61.878(1)(j) exempts from disclosure “[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended.” Records that are part of an ongoing administrative investigation, including the initiating complaint, are exempt from public inspection under KRS 61.878(1)(i) and (j) until final action is taken on the matter.<sup>2</sup> See, e.g., *Ky. State Bd. of Medical Licensure v. Courier–Journal & Louisville Times Co.*, 663 S.W.2d 953, 956 (Ky. App. 1983); 20-ORD-121; 17-ORD-189; 10-ORD-065; 05-ORD-147; 02-ORD-101. A public agency is not required to release records prior to final disposition of a disciplinary action because “piecemeal disclosure along the path of the decision-making process is not mandatory.” *Univ. of Louisville v. Sharp*, 416 S.W.3d 313, 315 (Ky. App. 2013).

In his appeal letter, the Appellant repeatedly refers to a denial of his request by the Jessamine County Board of Education. However, the record on appeal reflects that the Appellant made his request to the Department, not to the local board of education.<sup>3</sup> While it is possible that the local board of education could possess records relevant to the Appellant’s request, the only question germane to this appeal is whether *the Department* violated the Act when it denied the Appellant’s request for records in its custody or control.<sup>4</sup> Because the responsive records in the Department’s custody or control are part of an ongoing administrative investigation, upon which the Board has not yet taken final action, the Department did not violate the Act.

A party aggrieved by this decision may appeal it by initiating an action in the appropriate circuit court pursuant to KRS 61.880(5) and KRS 61.882 within 30 days

---

<sup>2</sup> However, specifically identified records of the public agency generated in its ordinary course of business, rather than in the course of an investigation, may not be withheld merely because the agency may later use them as evidence in an investigation. See 20-ORD-148. Here, the Department claims its only responsive records are those generated in the course of its investigation.

<sup>3</sup> Further, the local board of education asserts it never received a request from the Appellant.

<sup>4</sup> Under KRS 61.880(2)(a), a person wishing to appeal a denial of a request for records must provide a copy of the request and the denial. The Appellant provided no copy of a request to, or a denial from, Jessamine County.

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.

**Russell Coleman**  
**Attorney General**

/s/ James M. Herrick  
James M. Herrick  
Assistant Attorney General

#351

Distributed to:

John E. Reynolds, Esq.  
Haley Williams, Esq.  
Todd Allen, Esq.  
Howard Downing, Esq.