



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-210

September 26, 2024

In re: Laura O'Brien/Oldham County School District

Summary: The Oldham County School District (“the District”) did not violate the Open Records Act (“the Act”) when, under KRS 61.878(1)(j), it withheld written survey responses consisting of preliminary recommendations and expressions of opinion that were not adopted as the basis of final agency action.

Open Records Decision

Laura O'Brien (“Appellant”), submitted a three-part request to the District for: (1) “survey forms given to teachers of [District] students in 2022”; (2) “All the responses, including written,” to the 2022 survey; and (3) “The overall results from the teacher surveys that were presented at the Board Meeting in January 2023.” The District granted subparts one and three but denied subpart two’s request for written survey responses, citing KRS 61.878(1)(i) and (j). This appeal followed.

KRS 61.878(1)(j) exempts from disclosure “[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended.” If a public agency adopts such opinions or recommendations as the basis of a final action, the exempt status of the record is lost. *See Univ. of Ky. v. Courier–Journal & Louisville Times Co.*, 830 S.W.2d 373, 378 (Ky. 1992); *Univ. of Ky. v. Lexington H-L Services, Inc.*, 579 S.W.3d 858, 863 (Ky. App. 2018). Here, the District explains that the written responses to the survey were one of several factors it has used to evaluate its year-over-year performance. Further, the District states that the written responses to the 2022 survey were not adopted as the basis of any final agency action. For her part, the Appellant provides slides from a presentation given to the District by the private entity that conducts District surveys. That presentation, in a slide describing accomplishments from the 2023–24 school year, states that a new strategic plan had been “finalized and launched.” Thus, the Appellant argues that final agency action has occurred and the written responses to the 2022 survey are no longer exempt.

A record is adopted as the basis of final agency action insofar as the action “necessarily stem[s] from” that document. *Palmer v. Driggers*, 60 S.W.3d 591, 595 (Ky. App. 2001). The Appellant has not explained how the District’s strategic plan “necessarily stem[s] from” the written responses to the 2022 survey. The District maintains that “no final action was taken by [it] that specifically incorporated those results.” The Office has previously held that school faculty survey responses that have not been adopted as the basis of final agency action retain their preliminary status. *See, e.g.*, 15-ORD-202. Accordingly, the written responses to the 2022 survey remain preliminary, and the District did not violate the Act when it withheld the responses under KRS 61.878(1)(j).¹

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

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Distributed to:

Laura O’Brien
Suzanne Hundley
Jason Radford
Eric G. Farris

¹ The District also claims the written survey responses are exempt under KRS 61.878(1)(i) because they contain preliminary drafts and notes. It is unnecessary to address this argument because KRS 61.878(1)(j) is dispositive of the exempt status of the written survey responses.