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25-ORD-029

January 30, 2025

In re: John Cheves/Cabinet for Health and Family Services

Summary: The Cabinet for Health and Family Services ("the Cabinet") did not violate the Open Records Act ("the Act") when it could not provide records that do not exist. The Cabinet also did not violate the Act when it withheld several emails under KRS 61.878(1)(i) and (j).

Open Records Decision

John Cheves ("Appellant") submitted a request to the Cabinet seeking "records from the weekly discussion of central office and branch management staff concerning surveys, complaint and facility reported incidents." The Appellant specified that responsive records included, but were not limited to, "agendas, meeting minutes, data, priorities, staff assignments and other documents distributed at the meetings." The appellant also requested "correspondence to or from" a named Cabinet employee that includes the words "backlog" or "overdue." Both requests were limited to records from April 1 to October 4, 2024. In response, the Cabinet stated it did not possess any records responsive to the first portion of the request, but it was withholding 616 emails in response to the second portion of the request. To justify its denial, the Cabinet cited and quoted KRS 61.878(1)(i) and (j), explaining that the responsive records "are interoffice emails not intended to give notice of final agency action where Cabinet employees provide opinions and recommendations on how to proceed with surveys." This appeal followed.

On appeal, the Cabinet states that "no documents or notes are made or distributed during" the meetings identified by the Appellant. Once a public agency states affirmatively that a record does not exist, the burden shifts to the requester to present a *prima facie* case that the requested record does exist. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov't*, 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

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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).

Here, the Appellant asserts that a "corrective action plan" submitted to the Centers for Medicare and Medicaid Services ("CMS") stated, "Central Office and branch management staff discuss weekly. Complaints/FRI's are reviewed and prioritized based on available staff. Staff assignments are made weekly."[1] That statement supports the Appellant's belief that the identified meetings took place, but it does not establish a *prima facie* case that records were created in those meetings. The Appellant further asserts that it is "impossible to believe that" the functions he requests records about occur "without leaving any paper trail." But a requester's bare assertion that an agency must possess the requested records is insufficient to establish a *prima facie* case that the agency actually possesses such records. *See, e.g.*, 22-ORD-040. Rather, to present a *prima facie* case that the agency possesses or should possess the requested records, the requester must provide some statute, regulation, or factual support for that contention. *See, e.g.*, 21-ORD-177; 11-ORD-074. The Appellant has not presented a *prima facie* case that the request records exist. Accordingly, the Cabinet did not violate the Act when it could not provide the requested records.

Upon receiving a request to inspect public records, a public agency must determine within five business days whether to grant the request or deny it. KRS 61.880(1). If the agency chooses to deny the request, it "shall include a statement of the specific exception authorizing the withholding of the record and a brief explanation of how the exception applies to the record withheld." *Id*. An agency response denying a request for records must explain the denial by "provid[ing] 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." *Ky. New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76, 81 (Ky. 2013). In the event a request implicates a great many records, an agency discharges its duty under KRS 61.880(1) by assigning the withheld records to meaningful categories, describing the nature of the documents in each category, and explaining how the claimed exception applies to the documents in each category. *See, e.g.*, 22-ORD-007 (holding an agency violated the Act when it merely stated the withheld records were exempt under KRS 61.878(1)(i) and (j) as not having been

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[1] A copy of the "corrective action plan" was not provided to the Office.

adopted as final agency action, because the agency did not describe the records withheld or the potential final action that was being contemplated).

Here, the Cabinet's original response quoted the text of KRS 61.878(1)(i) and (j) and asserted that it was withholding "interoffice emails not intended to give notice of final action of final agency action" and which contained discussions in which "Cabinet employees provide opinions and recommendations on how to proceed with surveys." That response explained that the cabinet possesses and was withholding 616 interoffice emails, described the general content of those records, and explained how they are exempt under KRS 61.878(1)(i) and (j). That description, while minimal, was not "limited and perfunctory" and did not violate the Act.

On appeal, the Cabinet supplemented its response explaining the emails contain "communications" with the Office of the Inspector General ("OIG"), "survey staff," CMS, or an investigator employed by another agency "discussing how to proceed with surveys, preliminary findings, recommendations for review, tentative schedule documents, and/or discussions on how to proceed with an active, ongoing investigation into residential abuse at a health care facility not intended to give notice of final action on behalf of the Cabinet." Also on appeal, the Cabinet created a privilege log separating the emails into five categories of records.

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 "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 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).

The same is true of "notes," which include most interoffice emails and chat messages. *See, e.g.*, 22-ORD-176 n.6; OAG 78-626. To the extent specific thoughts or

beliefs contained within drafts and notes are "adopted," they are adopted in whatever final document the agency produces from those drafts and notes. That final document represents the agency's official action and is therefore subject to inspection. But the initial and preliminary thoughts on what the final product should contain, which are expressed during the drafting process in emails, do not lose their preliminary status once the final end-product is produced. To do so would destroy the "full and frank discussion[s] between and among public employees and officials" as they "hammer[ ] out official action," which is the very purpose of KRS 61.878(1)(i). 14-ORD-014.

To determine whether the Cabinet properly invoked the claimed exemptions, the Office asked the Cabinet to provide copies of the withheld records. *See* KRS 61.880(2)(c). The Cabinet provided 605 emails.[2] Of course, the Office cannot disclose the contents of these records. *Id.* But having reviewed the records, it is clear they all are exempt under KRS 61.878(1)(i) and (j).

The first category of emails withheld by the Cabinet were "Communications between OIG and survey staff regarding entering/inspecting facilities and preliminary findings/recommendations." Upon review, the Office confirms that the withheld emails are notes, exempt under KRS 61.878(1)(i), or preliminary recommendations, exempt under KRS 61.878(1)(j). This category of emails includes internal communications describing the status of surveys, recommendations regarding the number of surveyors needed, and recommendations regarding action required following the survey. As such, they are exempt.

The next category of emails identified by the Cabinet are "communications between OIG staff discussing how to proceed with surveys." These emails include internal communications among OIG staff providing updates regarding ongoing surveys and discussions of how those surveys should be conducted and resolved. This includes discussions of which surveys should take priority, which surveyors should handle certain surveys, and dates on which surveys should occur. These emails are notes under KRS 61.878(1)(i) and are therefore exempt.

The next category of emails identified by the Cabinet are "communications between OIG and CMS regarding guidance on how to proceed with surveys and recommended findings." These emails, like the previous category, include internal communications among OIG staff providing updates regarding ongoing surveys and discussions of how those surveys should be conducted and resolved. This includes

[2] On appeal, the Cabinet explained that its original response erroneously stated an additional 11 emails were responsive despite those emails being encrypted and unable to be accessed by the Cabinet.

discussions of which surveys should take priority, which surveyors should handle certain surveys, and dates on which surveys should occur. The Cabinet classified this category differently because of the inclusion of CMS personnel in those communications. On appeal, the Cabinet explains the relationship between it and CMS as it relates to the surveys implicated by this request. The Cabinet explains that it is a "state survey agency" and acts as an employee of CMS when conducting "investigations into health care facilities." *See* 45 C.F.R. § 2.2 (defining "Employee of the Department"[3] to include "Employees of a . . . state agency performing survey, certification, or enforcement functions. . .") The Office has previously agreed that the Cabinet, through OIG, possesses such a relationship with CMS. *See, e.g.*, 09-ORD-022. Accordingly, although this category of emails included non-OIG personnel, the Office concludes that these emails are notes under KRS 61.878(1)(i) and are therefore exempt.

The next category of emails identified by the Cabinet are communications between the "OIG, survey staff, and CMS regarding survey schedules and tentative schedule documents." The Court of Appeals has held that emails related to meetings and calendar invitations and entries are preliminary drafts and notes exempt from inspection under KRS 61.878(1)(i). *See Courier–Journal & Louisville Times Co. v. Jones*, 895 S.W.2d 6, 10 (Ky. App. 1995) (describing a "schedule as nothing more than a draft of what may or may never take place"). Here, the emails withheld by the Cabinet include discussions of scheduling requirements and possibilities related to ongoing and future surveys. These emails are therefore exempt under KRS 61.878(1)(i).

The last category of emails identified by the Cabinet are communications among OIG staff, and between OIG and an outside investigator[4] regarding his investigation of abuse at a particular facility. The emails provided by the Appellant includes interoffice emails between OIG staff regarding how the agency should respond to the outside investigator's inquiry. The Cabinet is correct that those emails discussing the investigator's inquiry are notes under KRS 61.878(1)(i) and are therefore exempt.[5]

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[3] The Department of Health and Family Services.

[4] That investigator is employed by the Office of Medicaid Fraud and Abuse Control within the Kentucky Office of the Attorney General.

[5] The original email from the investigator to OIG must be analyzed differently. An email inquiry from another agency's investigator is not a preliminary draft, note, or correspondence with a private individual exempt under KRS 61.878(1)(i). However, that email was not sent to the individual identified in the Appellant's request nor did it include the keywords identified by the Appellant. Thus,

In sum, the Cabinet did not violate the Act when it did not provide records it does not possess. Further, the Cabinet has demonstrated that the emails it withheld are exempt under KRS 61.878(1)(i) and (j) because they contain preliminary recommendations regarding how to proceed with surveys, ongoing interoffice communications regarding how to conduct surveys, and scheduling details related to potential surveys.

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
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Distributed to:

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it was not responsive to the Appellant's request and the Cabinet did not violate the Act when it did not provide it.