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17-ORD-192

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In re: Kentucky Equal Justice Center/Cabinet for Health and Family Services

Summary: In declining to provide this office with all of the records in dispute for *in camera* inspection pursuant to KRS 61.880(2)(c) and 40 KAR 1:030 Section 3, Cabinet for Health and Family Services failed to satisfy its burden of proving that all of the records were properly withheld under KRS 61.878(1)(j); the sampling provided was largely nonexempt.

Open Records Decision

The question presented in this appeal is whether the Cabinet for Health and Family Services ("CHFS") violated the Kentucky Open Records Act in denying the May 18, 2017, request of Anne Marie Regan, Senior Staff Attorney for the Kentucky Equal Justice Center, "for public records from [CHFS] and its divisions, including but not limited to the Department for Community Based Services (DCBS)." Ms. Regan asked for the following:

> All records, dated on or after January 1, 2016, sent between the U.S. Department of Health and Human Services (including the Centers for Medicare and Medicaid Services) ["HHS"] and the Kentucky Cabinet for Health and Family Services that refer or relate to the Kentucky HEALTH § 1115 demonstration project[, "which authorizes approval of demonstration projects that are likely to promote the objectives of the Medicaid Act."]

> All records, dated on or after January 1, 2016, sent between [HHS] and Governor Bevin that refer or relate to the Kentucky HEALTH § 1115 demonstration project.

By letter directed to Ms. Regan on May 23, 2017, CHFS advised, "the files you have requested are not readily available." Citing KRS 61.872(5), CHFS further advised that the Department of Medicaid Services ("DMS") "is working to compile the records to fulfill the request. [DMS] will search through [its] database and pull the responsive records. Once compiled, the Office of Legal Services will review documentation responsive to the request for compliance with" the Open Records Act "and make a definitive statement on redactions.[1] In order to adequately prepare the documents for release [CHFS] will need until May 30, 2017."

In relevant part, KRS 61.880(1) provides that upon receipt of a request, a public agency "shall determine within three (3) days, excepting Saturdays, Sundays, and legal holidays . . . whether to comply with the request and shall notify in writing the person making the request, within the three (3) day period of its decision." "The value of information is partly a function of time." *Fiduccia v. U.S. Department of Justice*, 185 F.3d, 1035, 1041 (9th Cir. 1999); 01-ORD-140. For this reason, the Act "contemplates records production on the third business day after receipt of the request, and not simply notification that the agency will comply." 01-ORD-140, pp. 3-4; 16-ORD-206. The only provision that authorizes postponement of access beyond three business days, KSR 61.872(5), expressly provides that if public records are "in active use, in storage or not otherwise available," the official custodian of the public agency "shall immediately notify the applicant and shall designate a place, time, and date for inspection of the public records not to exceed three (3) days from receipt of the application, unless a detailed explanation of the cause is given for further delay and the place, time, and earliest date on which the public record will be available for inspection."

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[1] There is "nothing wrong with [CHFS's apparent] policy of processing open records requests through its legal department. . . . This policy ensures uniformity and adherence to the law. . . . However, care must be taken that such a policy does not interfere with the timely processing of an open records request." 00-ORD-166, p. 4; 11-ORD-029 (unavailability of attorney to "'review the final record release'" was "legally unsupportable"); 10-ORD-151; 12-ORD-128; 15-ORD-174.

CHFS issued a written response within three business days per KRS 61.880(1), and expressly invoked KRS 61.872(5); CHFS also provided a date by which records would be made available (though its final response was delayed for one additional day), but failed to provide a sufficiently "detailed explanation," as required to successfully invoke KRS 61.872(5). See 02-ORD-217 (agency response that complying with request "will be a very time-consuming task" was not sufficiently detailed as it set forth "neither the volume of records involved nor explain[ed], in detail, the problems associated with retrieving the records implicated by the request"); 12-ORD-043; 13-ORD-168. Merely stating that records are "in use," or "in storage," or "not otherwise available," (here, not "readily" available), does not constitute a "detailed explanation of the cause ... for further delay." 15-ORD-029, p. 2; 16-ORD-206. "If merely reciting these phrases were sufficient, the statute's requirement of a 'detailed explanation' would be meaningless. 'Under the rules of statutory construction, no part should be construed as meaningless or ineffectual.' *Lexington-Fayette Urban County Gov't v. Johnson,* 280 S.W.3d 31, 34 (Ky. 2009)." 15-ORD-029, pp. 2-3.

"Whether *any* delay beyond the statutory deadline was warranted turned on the adequacy of the [agency's] explanation." 14-ORD-226, p. 4; 16-ORD-153. The only additional information that CHFS provided was that DMS would conduct a search of its database, retrieve any responsive documents, and then review the documents for necessary redactions, a process that is required upon receipt of any request. However, "[t]he need to review and redact records pursuant to KRS 61.878(4) is an ordinary part of fulfilling an open records request. It does not, in and of itself, constitute a reason for additional delay." 15-ORD-029, p. 3; 16-ORD-206 (explanation that agency was "in the process of retrieving and reviewing potentially responsive public records" was not sufficiently detailed); see also 10-ORD-138; 14-ORD-047; 17-ORD-082. On appeal, CHFS reiterated its original response and indicated that it "followed its normal open records process and then issued a second letter" stating that any responsive documents "are preliminary and opinion." CHFS issued a response that appears "to contain boilerplate language that was in no way correlated to [Ms. Regan's] particular request. This is an unacceptable practice that violates the express requirements of the Act and, in particular, the requirement of timely production of public records codified at KRS 61.880(1)." 11-ORD-135, p. 2; 15-ORD-143; see also, 05-ORD-134, 07-ORD-123, 10-ORD-080, 12-ORD-043 (involving DMS in particular), and 16-ORD-056, all involving CHFS.

By letter dated August 31, 2017, CHFS advised that it conducted a "search through all of its databases . . . and the search revealed no releasable documentation. It does not represent the final action of [CHFS]. As a result, [CFS] withholds any documentation pursuant to KRS 61.878(1)(j), which exempts from inspection preliminary recommendations and opinions on policy developments."[2] On appeal, Ms. Regan asserts that "CHFS's reliance on KRS 61.878(1)(j) is misplaced and overbroad. First, KRS 61.878(1)(j) should not apply to communications between CHFS and [HHS] because exempting them would not serve to protect frank discussions between agencies."[3] Second, Ms. Regan continued, "we believe that at least some of the records requested were adopted into CHFS's waiver request as submitted to HHS. The waiver request, in turn, constitutes a final agency action. Case law and [the Office of the Attorney General's prior decisions establish that records falling under this category cannot be exempted under KRS 61.878(1)(j)." Ms. Regan argued that recent decisions, including 16-ORD-167 and 16-ORD-256, are distinguishable as in those cases, the requesters asked for communications between the Kentucky Energy and Environment Cabinet ("EEC") and the United States Environmental Protection Agency ("EPA") "pursuant to joint investigations of third-party entities." Accordingly, the EEC and the EPA "had a shared interest in free and open communication as they collaborated on their joint investigations." Here, "CHFS and HHS's interests are not similarly aligned . . . . [T]he decision to grant a waiver rests entirely with HHS and its assessment of CHFS's application."

Upon receiving notification of Ms. Regan's appeal from this office, CHFS disagreed "with the assumptions put forth by [Ms. Regan] as to [its] communications with HHS." Even if CHFS accepted Ms. Regan's argument, which it does not, KRS 61.878(1)(j) "does not include the sentence about the underlying policy" and CHFS therefore is not required "to prove that its communications with HHS were free, open, or otherwise. [CHFS] *has to prove*

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[2] KRS 61.878(1)(j) excludes from disclosure "[p]reliminary recommendations and preliminary memoranda in which opinions are expressed or policies formulated or recommended." KRS 61.878(1)(j). See, generally, 15-ORD-067 and 17-ORD-156.

[3] This office has recognized that "KRS 61.878(1)[(i) and (j)] have been interpreted to authorize the nondisclosure of both interagency and intra-agency drafts and memoranda, and are designed to encourage frank discussion of matters of concern to the public agency or agencies." 93-ORD-125, p. 4. That rationale is deemed "equally compelling regardless of whether the communications are within an agency or between agencies." Id.; 14-ORD-230.

that the records it has withheld are preliminary with opinions expressed or policy formulated. KRS 61.878(1)(j)." (Emphasis added.) According to CHFS, the records contain "opinions and formulate policy. The records have not reached finality, because HHS has not approved or denied Kentucky 1115 demonstration waiver." If HHS approves the waiver, CHFS concluded, "then those communications that become part of the final agency action will then become releasable." Based upon the following, this office is unable to affirm the denial by CHFS on the basis of KRS 61.878(1)(j). See 15-ORD-189.

In order to facilitate a correct resolution of the question presented, this office asked CHFS to provide us with hard copies of all existing responsive documents for *in camera* review per KRS 61.880(2)(c) and 40 KAR 1:030 Section 3. Additionally, this office requested that CHFS elaborate upon its assertion "that CHFS 'has proposed changes to the state's Medicaid plan. These changes may or may not take effect based on decisions by HHS, and are subject to further change themselves. Any insight or additional context you can provide regarding the 'process of the Kentucky 1115 demonstration waiver,' the role of CHFS in that process, and what, in your view, constitutes the final action will be helpful." In response, CHFS advised that it was "reluctant to release the documents withheld pursuant to KRS 61.878(1)(j). . . even solely for *in camera* review." Rather than comply with our KRS 61.880(2)(c) request, CHFS provided a "sampling of documents." The only additional information provided regarding the "process of the Kentucky 1115 demonstration waiver" was that upon receipt of the waiver, HHS "sought clarifications and suggested changes on certain items in the submitted waiver. This essentially began a negotiation process to develop the waiver more fully in accordance with the guidance provided by HHS." Relying upon policy implications, *i.e.*, that "premature release of the draft policies" would "potentially disrupt the negotiation process," and "could also create confusion among individual consumers" in addition to program staff, CHFS asserted the waiver is a "draft" (implicating KRS 61.878(1)(i)). Our *in camera* review of the 5 pages that CHFS provided, which are purportedly representative of the remaining e-mails withheld, refutes the agency's position that any recommendations or opinions are contained therein with a single exception; accordingly, its reliance on KRS 61.878(1)(j) was misplaced regardless of whether final action has been taken. See 15-ORD-189 (with exception of a sentence, none of the information summarized in either document could be properly characterized as recommendations nor were any opinions expressed or policies

formulated therein, and KRS 61.878(1)(j) was therefore "facially inapplicable and the final action inquiry was "'moot rather than determinative'"); 99-ORD-220; 06-ORD-135; 11-ORD-108.

Pursuant to KRS 61.880(2)(c), "the burden of proof in sustaining the action shall rest with the agency, and the Attorney General may request additional documentation from the agency for substantiation. The Attorney General may also request a copy of the records involved but they shall not be disclosed." Similarly, 40 KAR 1:030(3) provides, "KRS 61.880(2) authorizes the Attorney General to request additional documentation from the agency against which a complaint is made. If documents thus obtained are copies of documents claimed by the agency to be exempt from the Open Records Law, *the Attorney General shall not disclose them and shall destroy the copies at the time the decision is rendered.*" (Emphasis added.) Referring to KRS 61.880(2)(c) and 40 KAR 1:030 § 3, this office has consistently recognized that "the General Assembly has twice vested the Attorney General with the authority to require production of public records, for which a claim of exemption has been made, for *in camera* review[.]" 10-ORD-079, p. 5. In light of KRS 61.871, declaring that "free and open examination of public records is in the public interest and the exceptions provided for by KRS 61.878 or otherwise provided by law shall be strictly construed," and KRS 61.880(2)(c), this office is "not prepared to accept, without independent confirmation, that all of the responsive documents are shielded from public inspection by KRS [61.878(1)(j)] or any other exception." 10-ORD-079, p. 6 (citation omitted).

When, as here, a public agency declines to produce documents that it claims are protected for *in camera* inspection, the Attorney General's Office has repeatedly found that "the agencies whose denials were challenged had not met their burden of proof in sustaining those denials under KRS 61.880(2)(c)." *Id;* see 05-ORD-169 (Attorney General's ability to render a decision is "severely impaired" without exercising his authority under KRS 61.880(2)(c) and 40 KAR 1:030 Section 3); 95-ORD-61; 96-ORD-206; 04-ORD-031; 05-ORD-185; 16-ORD-113; 16-ORD-133; 16-ORD-193; 17-ORD-011; 17-ORD-014. The Kentucky Court of Appeals unequivocally endorsed this approach in *Cabinet for Health and Family Services v. Todd County Standard, Inc.*, 488 S.W.3d 1 (Ky. App. 2016). In admonishing CHFS for "blatantly refusing to respond to the Attorney General's specific questions" per KRS 61.880(2)(c), the Court observed that CHFS "certainly frustrated the Attorney General's statutory review under KRS 61.880 . . . " *Id.* at

8. In sum, the Court declared that a public agency "cannot benefit from intentionally frustrating the Attorney General's review of an open records request; such result would subvert the General Assembly's intent behind providing review under KRS 61.880(5)." *Todd County Standard*, 488 S.W.3d 1 at 8; see 16-ORD-161 (noting the "juxtaposition of the assignment of the burden of proof to the agency and the Attorney General's authority to request additional documentation 'for substantiation' establishes" that requests made under KRS 61.880(2)(c) are neither "adversarial [n]or a form of 'advoca[cy] for the requester,'"); 16-ORD-191. As in 16-ORD-161, "the Attorney General's duty to conduct a meaningful review and issue an informed and reasoned decision, guided by the statutorily assigned agency burden of proof" must not yield to a noncompliant agency. That is particularly true in this case given that none of the content in the sampling of e-mails provided under KRS 61.880(2)(c) is exempt under KRS 61.878(1)(j) except for a single sentence recommending the canceling of a call. See 17-ORD-011; compare 17-ORD-141 (*in camera* review of e-mails confirmed that records contained recommendations and opinions).

Either party may appeal this decision by initiating action in the appropriate circuit court per KRS 61.880(5) and KRS 61.882. Pursuant to KRS 61.880(3), the Attorney General must be notified of any action in circuit court, but should not be named as a party in that action or in any subsequent proceeding.

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