

18-ORD-028

February 5, 2018

In re: Ellen Suetholz/Office of State Budget Director

Summary: Office of State Budget Director violated the Kentucky Open Records Act by failing to meet its burden to establish exemption under KRS 61.878(1)(i) or (j) for a private firm's final actuarial analysis of a public pension reform proposal previously released to the public by the Office of the Governor.

Open Records Decision

The question presented in this appeal is whether the Office of State Budget Director ("OSBD") violated the Open Records Act in its disposition of Ellen Suetholz's November 14, 2017, request for "a copy of the actuarial analysis conducted in support of the draft pension bill that was recently publicly disclosed." For the reasons that follow, we find a violation of the Act.

On October 27, 2017, the Office of the Governor published a proposal for a bill to reform Kentucky's public retirement systems.¹ At the request of Kentucky Retirement Systems ("KRS"), the consulting firm Gabriel Roeder Smith & Company ("GRS") performed an actuarial analysis on the published bill proposal. Ms. Suetholz addressed her November 14, 2017, request for a copy of the actuarial analysis to State Budget Director John E. Chilton, who serves on the

¹ The proposal remains publicly available at <https://pensions.ky.gov/Documents/2017%2010%2027%20-%20Pension%20Reform%20Draft.pdf>.

KRS Board as well as “serv[ing], under direction of the Governor, as state budget director and secretary of the state planning committee.” KRS 11.068(2)(a).²

On November 17, 2017, Matthew F. Kuhn, Deputy General Counsel, Office of the Governor, responded to Ms. Suetholz’s request on behalf of State Budget Director John Chilton:

All records that are responsive to your request are preliminary/drafts and therefore need not be disclosed under KRS 61.878(1)(i) and (j). These two provisions of the Open Records Act exempt from disclosure “[p]reliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency” and “[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended.” *Id.* These exceptions have been consistently interpreted to mean that “[p]reliminary drafts notes, correspondence, recommendations, and memoranda in which opinions are expressed or policies formulated retain their preliminary characterization [*i.e.*, they need not be disclosed], even after final agency action is taken, unless they are adopted as part of that final action.” 14-ORD-014; *see also* 05-ORD-048 (finding that “preliminary data” that may or may not make it into a final product is preliminary under the Open Records Act). The records that you have requested fall squarely within these exceptions to the Open Records Act.

Ms. Suetholz initiated an appeal to this office on November 20, 2017, arguing:

This claim [that the document is “preliminary”] is erroneous in that the analysis is based on the bill draft as written and therefore cannot be preliminary. Should the bill draft be amended a new analysis will be required, but as the bill drafts [*sic*] stands any analysis is final and complete.

She further indicates that “[t]his actuarial analysis was disclosed in an open meeting of the Kentucky Retirement Systems Board on November 13, 2017.”

²The OSBD is attached for administrative purposes to the Office of the Governor. KRS 11.068(1).

Responding to this appeal on behalf of OSBD on December 1, 2017, Mr. Kuhn argues as follows:

A pension bill has not yet been filed in the General Assembly and, as we understand it, does not yet have a House or Senate sponsor. Once the bill is filed, GRS will update its analysis to reflect any changes to the draft bill, and a final report will be publicly released. Consequently, at this time, GRS's actuarial analysis is of a draft bill that has not been formally submitted to the General Assembly for consideration. Moreover, there is always a possibility that the pension bill that will be filed will differ in significant respects from the draft bill that GRS reviewed. For these reasons, GRS's actuarial analysis is preliminary *as to the bill that ultimately will be submitted to the legislature* and therefore is exempt from disclosure under KRS 61.878(1)(i) and (j).

These two provisions of the Open Records Act, which exempt pre-decisional records from disclosure, are essential to Commonwealth's [*sic*] effective functioning. Individuals advising the Commonwealth must be able to offer frank input before a *final decision* is made without fear of their advice being immediately disclosed to the public. ...

.... For an issue this consequential, frank and uninhibited discussions about the draft pension bill, including GRS's review of it, are imperative. Budget Director Chilton must be able to review and respond to GRS's actuarial analysis – which may or may not be relevant to the bill filed with the General Assembly – without having to disclose GRS's preliminary findings.

(Emphasis added.) OSBD characterizes the GRS analysis as “pre-decisional,” pointing out that “GRS ... is not the ultimate decision maker on pension reform, *nor is Budget Director Chilton.*” (Emphasis added.)

In a January 12, 2018, response to an inquiry from this office as to what would constitute “final agency action” by the State Budget Director with respect to a bill affecting public pensions, Mr. Kuhn states as follows:

Budget Director Chilton merely has an advisory role with respect to the draft pension bill, offering input as needed. *See generally* KRS 11.068(2). Budget Director Chilton, in all likelihood, will not take any “final agency action” by offering advice about the draft bill. *See University of Louisville v. Sharp*, 416 S.W.3d 313, 315 (Ky. App. 2013) (labeling “final agency action” as action that “resolve[s] the ultimate issue”). Any advice from Budget Director Chilton will remain preliminary unless it is specifically incorporated into the filed pension bill.

Our analysis necessarily begins with the statutory provisions relied upon by OSBD. In so doing, we are mindful that “the basic policy of KRS 61.870 to 61.884 is 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, even though such examination may cause inconvenience or embarrassment to public officials or others.” KRS 61.871.

KRS 61.878(1)(i) and (j) create exceptions to the Open Records Act in the cases of, respectively:

- (i) Preliminary drafts, notes, correspondence with private individuals other than correspondence which is intended to give notice of final action of a public agency; [and]
- (j) Preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended[.]

While not specifying which type of record listed in these subsections the GRS actuarial analysis is supposed to be, OSBD maintains that the analysis “is, by its nature preliminary. Once the pension bill is filed, GRS’s analysis will be updated as needed and that revised analysis will become a public record. GRS’s initial analysis, however, will remain preliminary unless the filed pension bill mirrors the draft bill [made public on October 27, 2017].”

The actuarial analysis cannot be characterized as a “preliminary draft” under KRS 61.878(1)(i) because it does not “represent a tentative version, sketch, or outline of a formal and final written product,” but rather the formal and final

written product itself. 05-ORD-179. It is not a “note” because it was not “created as an aid to memory or as a basis for a fuller statement, as are, for example, written or shorthand notes taken at a meeting.” *Id.* As for “correspondence with private individuals,” that category of records “is generally reserved for that narrow category of public records that reflects ‘letters exchanged by private citizens and public agencies or officials under conditions in which the candor of the correspondents depends on assurances of confidentiality.’” *Id.* (quoting 00-ORD-168). There is nothing in the record to suggest that GRS relied on any assurances of confidentiality; nor would such assurances be necessary for a professional consulting firm conducting a type of analysis that is routinely conducted for public pension bills pursuant to KRS 6.350.³ Accordingly, we find KRS 61.878(1)(i) inapplicable.

This leaves the applicability of KRS 61.878(1)(j), which OSBD invokes no more specifically than did the public agency in 05-ORD-179, which did “little more than recite the language of [the] exception and assert that no final action is taken on the materials.” This office has described the purpose underlying KRS 61.878(1)(j) as follows: “To preserve the integrity of a *public agency’s internal decision making process* by promoting full and frank discussion between and among public employees and officials and by equipping them with the tools needed in hammering out official action, ‘the General Assembly has determined that the public’s right to know is subservient to ... the need for governmental confidentiality’ in pre-decisional records not adopted in that official action.” 14-ORD-014 (emphasis added) (quoting *Beckham v. Board of Educ. of Jefferson Cnty.*, 873 S.W.2d 575, 578 (Ky. 1994)).

In *University of Kentucky v. Courier-Journal & Louisville Times Co.*, 830 S.W.2d 373, 378 (Ky. 1992), the Kentucky Supreme Court made clear that “materials that were once preliminary in nature lose their exempt status once they are adopted by the agency as part of its action.” In 01-ORD-47, we summarized the manner in which “preliminary” records under KRS 61.878(1)(i) and (j) may retain or lose their exemption after final agency action is taken:

³ “A bill which would increase or decrease the benefits or increase or decrease participation in the benefits or change the actuarial accrued liability of any state-administered retirement system shall not be reported from a legislative committee of either house of the General Assembly for consideration by the full membership of that house unless the bill is accompanied by an actuarial analysis.” KRS 6.350(1).

Until final administrative action is taken, or a decision is made to take no action, the requested records are protected by KRS 61.878(1)(i) and (j). If the records are adopted as part of that final action, they will forfeit their preliminary characterization. If not adopted, they will retain their preliminary character.

It is not necessary that the record be explicitly adopted or incorporated by reference, so long as it constitutes a basis for the final agency action. “In our view, the courts purposefully employed the broader concept of ‘adoption’ rather than ‘incorporation,’ relative to preliminary investigative reports and records, to avoid a narrow, legalistic interpretation.” 01-ORD-83 (citing *City of Louisville, supra*). The present appeal, however, involves questions as to whether the GRS analysis is in fact preliminary to any final agency action.

OSBD cites 17-ORD-141, n.5, in which we referenced several earlier appeals where KRS 61.878(1)(i) and (j) were applied to “reports and analyses prepared by outside agencies, as well as consultants, on behalf of a public agency.”

[The reports and analyses include] a report prepared, and recommendations submitted by, a private attorney retained by the City of Louisville for the purpose of evaluating the Louisville Policemen’s Retirement Fund (96-ORD-38); a study prepared by an outside consultant hired by the Hardin County Schools to examine the organizational structure and compensation system of administrators, classified staff, and teachers (96-ORD-121; 96-ORD-122); an analysis prepared by a private corporation under contract with the Transportation Cabinet evaluating alternatives for the design of a connector road (98-ORD-70); and a draft report relating proposed rate increases by Sanitation District No. 1 prepared by Burton & Associates (00-ORD-139).

17-ORD-141. OSBD argues that “[t]his collection of authorities confirms that pre-decisional reports submitted to a public agency ... are preliminary at least until a final decision is reached.” We agree with this statement, as far as it goes.

The distinguishing fact presented by this appeal, however, is that GRS's analysis is not "pre-decisional." In each of the decisions referenced by OSBD in its citation to 17-ORD-141, there was no question that the public agency possessing the record had some remaining "final agency action" within its statutory competence to take. By contrast, OSBD admits that the State Budget Director *has no "final agency action" to take* with regard to a pension bill, beyond merely "offering advice," and "in all likelihood" will not even do that.

Therefore, it is not a question of "preserv[ing] the integrity of a public agency's internal decision making process." 14-ORD-014. The GRS analysis, presumably prepared with state funds, was provided to KRS *after* the public release of the bill proposal by the Office of the Governor. We have not been informed that OSBD has any intention of formulating a revised bill proposal of its own, but merely that a pension bill has yet to be filed *in the General Assembly*. Nor is there any suggestion in the record that either KRS or OSBD intends to request any revisions by GRS to its analysis of the October 27, 2017, bill proposal. A "decision ... to take no action" is equivalent to final agency action. 01-ORD-47. The finalized actuarial analysis is thus "not in the nature of pre-decisional expression of opinion or formulation of policy," 02-ORD-097, and to any extent that it might once have been pre-decisional, it is no longer so.

We recently noted that "the fact that [a person's or entity's] recommendations made, or memoranda prepared, are final as to the person making or preparing them is irrelevant" to whether the *public agency* has taken final action so as to deprive a document of its former preliminary character. 17-ORD-141 (emphasis omitted). Here, by contrast, where a public agency has no subsequent final action to take, the *finalized* GRS document does not possess a preliminary character. The agency action to which the document pertains is none other than KRS's request for the analysis from GRS on the already-published bill proposal. Since no subsequent agency action remains to be taken by KRS or OSBD, that matter is now final because the analysis is in its final form.

The only "final action" that remains, according to OSBD, is the filing by a legislator of a pension bill in the General Assembly. This, however, represents not the end of an executive process, but the beginning of a legislative process. "[T]he separation of powers doctrine is fundamental to Kentucky's tripartite system of government and must be 'strictly construed.'" *Legislative Research*

Comm'n v. Brown, 664 S.W.2d 907, 912 (Ky. 1984) (quoting *Arnett v. Meredith*, 275 Ky. 223, 121 S.W.2d 36, 38 (1938)). “One branch, therefore, is not empowered to exercise power properly belonging to another branch simply because the other branch is ‘along for the ride.’” *Elk Horn Coal Corp. v. Cheyenne Resources, Inc.*, 163 S.W.3d 408, 422 (Ky. 2005) (quoting *Prater v. Com.*, 82 S.W.3d 898, 907 (Ky. 2002)). In accordance with this principle, we cannot construe the filing of a bill by a member of the General Assembly as in any legally significant way the “final agency action” of OSBD.⁴

The finalized GRS actuarial analysis obtained by KRS on the pension bill proposal published on October 27, 2017, is therefore not “preliminary” to any final agency action by the Office of State Budget Director or Kentucky Retirement Systems. Accordingly, as OSBD has not met its burden of proof under KRS 61.880(2)(c), we find that this public record was improperly withheld under KRS 61.878(1)(i) and (j).

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

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#478

⁴ Furthermore, “final agency action” is to be understood as “when the ultimate issue to be decided [is] resolved.” *University of Louisville v. Sharp*, 416 S.W.3d 313, 315 (Ky. App. 2013). A filed bill resolves no ultimate issue, but merely constitutes a public proposal subject to further legislative action. Thus, the actuarial analysis completed on the bill proposal published on October 27, 2017, is no more “preliminary” than one completed on a filed bill pursuant to KRS 6.350 would be.

18-ORD-028

Page 9

Distributed to:

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