RENDERED: NOVEMBER 8, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000842-MR

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES APPELLANT

APPEAL FROM FRANKLIN CIRCUIT COURT
v. HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 17-CI-01113

ANNE MARIE REGAN, ON
BEHALF OF THE KENTUCKY
EQUAL JUSTICE CENTER APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; ACREE AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Commonwealth of Kentucky, Cabinet for Health and Family Services, (Cabinet) brings this appeal from a May 14, 2018, Order of the Franklin Circuit Court granting summary judgment and concluding that the Cabinet violated the Open Records Act. We affirm.

The underlying facts were set forth by the circuit court as follows:

On August 24, 2016, Governor Bevin submitted a Section 1115 waiver application to the Department of Health and Human Services (HHS) to implement a new medical assistance program in the state, Kentucky HEALTH. The goal of the application was to transform Medicaid comprehensively by implementing work requirements, requiring the payment of premiums, instituting cost-sharing for non-emergency use of emergency rooms, locking coverage after failure to pay premiums or comply with reporting requirements, and eliminating retrospective coverage.

[Anne Marie Regan] is a senior staff attorney at the Kentucky Equal Justice Center (KEJC), a non-profit entity that provides legal assistance to low-income Kentuckians by improving health access and outcomes for many people who rely on Kentucky's Medicaid program. [Regan] submitted an open records request to the Cabinet on May 18, 2017, to obtain information regarding the Kentucky HEALTH waiver. Specifically, [Regan] requested:

(1) 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) and the Kentucky Cabinet for Health and Family Services that refer or relate to the Kentucky HEALTH § 1115 demonstration project;

(2) 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) and Governor Bevin that refer or relate to the Kentucky HEALTH § 1115 demonstration project.

Defendant requested the documents as an effort to contribute to public understanding of Kentucky Medicaid

program, and to allow beneficiaries to better understand the changes proposed in the waiver.

On May 23, 2017, the Cabinet informed [Regan] that it would need until May 30, 2017[,] to adequately prepare the documents for release. On May 31, 2017, the Cabinet sent [Regan] a letter denying her request stating that any relevant documentation in its possession was "preliminary and opinion" and "does not represent the final action of the Cabinet," which the Cabinet claimed was exempted pursuant to KRS 61.878(1)(j). [Regan] appealed this denial to the Attorney General. On August 11, 2017, the Attorney General requested additional documentation from the Cabinet to more completely present the issue in an *in camera* review. On August 30, 2017, the Cabinet responded to the Attorney General's request by stating that it was reluctant to prematurely release the documents of the draft policies. However, the Cabinet submitted a "sampling" of documents to the Attorney General, which consisted of five-pages of emails between state and federal officials regarding the scheduling of conference calls.

The Attorney General issued an Open Records Decision in [Regan's] favor on September 25, 2017. In the Decision, the Attorney General concluded that the Cabinet failed to satisfy its burden of proving that KRS 61.878(1)(j) warrants the withholding of documents for three reasons. First, the Attorney General found that the Cabinet violated the three-day notification provision contained in the Open Records Act. The Cabinet's denial of [Regan's] request came nine business days after the original request with no justification for the cause of the delay, as the statute requires. The Attorney General held that using boilerplate language to ambiguously delay the production of documents violates KRS 61.880(1). The Attorney General also found that the Cabinet's provision of a sampling of documents rather than the full onslaught of documents requested for *in camera* review caused the Cabinet to fail to meet its burden of proof in sustaining

> the denials of the records requests. Finally, none of the content provided in the sample emails is exempt under KRS 61.878(1)(j) except for a sentence recommending the cancellation of a call. The Cabinet appealed the Attorney General's decision to this Court.
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> On January 12, 2018, the federal Centers for Medicare and Medicaid Services approved the Kentucky HEALTH waiver application. No further agency action, either federal or state, remains pending in this matter, all negotiations are final, and no documentation generated in the course of the application process can alter the outcome of the application acceptance.

May 14, 2018, Order at 1-4 (footnote omitted).

The Cabinet then filed an action in the Franklin Circuit Court to appeal the Attorney General's decision. The Cabinet and Regan filed motions for summary judgment. The Cabinet argued that the records were preliminary in nature and were exempt from disclosure under Kentucky Revised Statutes (KRS) 61.878(1)(i) and (j). The Cabinet maintained that preliminary records only lose exempt status if such records were both adopted and made part of a final administrative agency's action. As neither occurred herein, the Cabinet asserted that the records were not subject to disclosure under the Open Records Act.

On the other hand, Regan contended that the records were subject to disclosure. Regan alleged that the HEALTH Waiver Application by the Cabinet constituted a final agency action under the Open Records Act. And, Regan

believed the preliminary records served as a basis for the HEALTH Waiver Application, lost its exempt status, and were subject to disclosure.

By Order entered May 14, 2018, the circuit court rendered summary judgment in favor of Regan. The court concluded that the agency's final action had taken place by submission of the HEALTH Waiver Application by the Cabinet. After an *in camera* review, the court believed that the preliminary records had formed the basis of the application and, thus, lost exempt status. As a consequence, the court determined that the preliminary records were subject to disclosure. The court also stated that the Cabinet violated the Open Records Act by failing to submit the preliminary records to the Attorney General for review per KRS 61.880(2)(c). This appeal follows.

To begin, summary judgment is proper where there exists no material issue of fact and movant is entitled to judgment as a matter of law. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). All facts and inferences therein are viewed in a light most favorable to the nonmoving party.

The Cabinet contends that the circuit court erred by concluding that the preliminary records lost exempt status and were subject to disclosure under the Open Records Act. The Cabinet argues that preliminary records only lose exempt status if the records were both adopted and specifically made part of a final agency action. The Cabinet asserts that the circuit court merely concluded that the

preliminary records were a basis of the final action (HEALTH Waiver Application) and were subject to disclosure. The Cabinet believes such conclusion constituted an error of law. We disagree.

On September 14, 2018, the Court of Appeals rendered an opinion in *University of Kentucky v. Lexington H-L Services, Inc.*, 579 S.W.3d 858 (Ky. App. 2018), *disc. review denied* August 21, 2019. In that case, the Court was squarely faced with the legal issue of whether preliminary records must be specifically referenced in or incorporated into the University's final action to lose exempt status under the Open Records Act. The Court concluded that preliminary records do not have to be referenced or incorporated; rather, preliminary records lose exempt status if such records formed the "basis" of the agency's final action:

> The University's position is novel, but we do not find any authority supporting it. Indeed, there is no dispute that the University took its final action based upon the information revealed during the audits. **Records which are of an internal, preliminary and investigatory nature lose their exempt status once they are adopted by the agency as part of its action.** *Courier-Journal*, 830 S.W.2d at 378. **The Act does not require that an agency reference or incorporate specific documents in order for those records to be adopted into the final agency action. Rather, we agree with the Attorney General that preliminary records which form the basis for the agency's final action are subject to disclosure.**

Lexington H-L Services, Inc., 579 S.W.3d at 863 (emphasis added).

Likewise, in this case, the preliminary records need not be referenced in or incorporated into the HEALTH Waiver Application to lose exempt status. The preliminary records need only form a basis for the HEALTH Waiver Application. Based upon its *in camera* review, the circuit court determined that the preliminary records constituted a basis for the HEALTH Waiver Application. We find nothing in the record to refute this finding. As the circuit court noted, the HEALTH Waiver Application was a final document and constituted a final agency action. Accordingly, we are of the opinion that the circuit court properly concluded that the preliminary records are no longer exempt and are subject to disclosure under the Open Records Act.

The Cabinet also asserts that the circuit court erred by determining that it violated the Open Records Act by denying "the Attorney General's request for *in camera* review of the withheld records." Cabinet's Brief at 11. The Cabinet believes that the circuit court misinterpreted KRS 61.880(2) and that the production of documents to the Attorney General is merely permissive.

The relevant provisions of the Open Records Act is found in KRS 61.880(2)(c); it reads:

> On the day that the Attorney General renders his decision, he shall mail a copy to the agency and a copy to the person who requested the record in question. 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.

It is well-established that words in a statute are to be afforded their plain and general meaning. *Wheeler & Clevenger Oil Co., Inc. v. Washburn*, 127 S.W.3d 609, 614 (Ky. 2004). And, when interpreting a statute, we must look to its language as a whole. *Cty. of Harlan v. Appalachian Reg'l Healthcare, Inc.*, 85 S.W.3d 607, 611 (Ky. 2002).

In its May 14, 2018, Order, the circuit court viewed the Attorney General's statutory authority to request additional documents as binding and compulsory upon the Cabinet:

> [T]he General Assembly expressly granted the Kentucky Attorney General with the authority to review appeals of a state agency's denial of an open records request. Ky. Rev. Stat. § 61.880(2)(a). Included in that grant of authority is the Attorney General's ability to request additional documentation to substantiate the agency's claim that the records are protected by an exception to the Open Records Act. Ky. Rev. Stat. § 61.880(2)(c). In this case, the Attorney General's request for the documents falls within his power under KRS 61.880 to conduct a review of substantiating documents to evaluate the agency's denial of an open records request. The Attorney General is not acting as another public entity seeking to reveal the substantiating records to public purview. Rather, the Attorney General's statutorily authorized *in camera* review of substantiating documents merely seeks to better determine if the Cabinet erred in denying [Regan's] request for documents.
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> . . . .

> The Court also recognizes the important role that the Attorney General's *in camera* review process plays in public transparency. The legislature tasked the Attorney General in the Open Records Act with the ability to review documents to substantiate an agency's denial of an open records request. The Attorney General then issues an opinion outlining the appropriateness, or lack thereof, of the denial of the citizen's open records inquiry. At no time are the confidential documents the Attorney General reviews disclosed to the public unless the Attorney General deems that the documents do not constitute excluded records from the public Open Records Act requests. An *in camera* review conducted by the Attorney General's Office, as ordained by the Kentucky General Assembly, is proper for review of the documents [Regan] requested from the Cabinet.
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> The Attorney General's role in the appeal process was intended to save the Court time and costs associated with adjudication and *in camera* review of substantiating documents relating to open records requests. And, as the Court previously stated in its *Order* allowing the Attorney General to intervene, agencies that thwart the Attorney General's ability to conduct such a review unduly burdens the power the General Assembly granted to the Attorney General. Any subversion of this authority inherently undermines the functioning of the Attorney General's Office, and it inhibits transparency in government operations. Therefore, disallowing the Attorney General to act in accordance with its statutory mandate of reviewing appeals of open records request by requesting substantiating documents for an *in camera* review could only thwart the public interest of transparency in government. . . .

Order at 9-10.

Considering the review procedure set forth in the Open Records Act and the language of KRS 61.880(2), we agree with the circuit court's analysis and

also interpret the Attorney General's statutory authority to request additional documents for substantiation as constituting a compulsory directive to the Cabinet. Therefore, the Cabinet violated KRS 61.880(2) by failing to produce the requested additional documentation necessary to substantiate its claim of privilege under the Open Records Act.

We view any remaining contentions of error as moot or without merit.

For the foregoing reasons, the Order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

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