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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001560-ME

LOUISVILLE/JEFFERSON COUNTY
METRO GOVERNMENT

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE
ACTION NO. 18-CI-001430

THE COURIER-JOURNAL, INC.

APPELLEE

OPINION AFFIRMING

** ** * * * * *

BEFORE: GOODWINE, LAMBERT, AND MAZE, JUDGES.

MAZE, JUDGE: Louisville/Jefferson County Metro Government (Louisville Metro) appeals from a summary judgment order by the Jefferson Circuit Court directing it to disclose an economic development proposal pursuant to an Open-Records request by the Courier-Journal, Inc. (the Courier-Journal). Louisville Metro argues the documents at issue were exempt from disclosure because they

were related to the prospective location of a business or industry and because they were merely a preliminary offer that was never adopted into a final action. We conclude that neither of these exceptions apply to the documents at issue in this case. Hence, we affirm.

The underlying facts of this case are not in dispute. On September 7, 2017, Amazon.com, Inc. (Amazon) announced its intention to construct a second headquarters somewhere in North America, referred to as “HQ2.” As part of that announcement, Amazon emphasized its anticipated \$5 billion investment in the construction of HQ2 and the creation of up to 50,000 jobs. Amazon also launched a competitive bidding initiative to identify potential locations for HQ2. The initiative included a request for proposals (RFP) setting out the criteria and specifications for bids.

Amazon encouraged communities to provide a variety of financial incentives for the project. Its suggestions included incentives for “land, site preparation, tax credit/exemptions, relocation grants, workforce grants, utility incentive/grants, permitting and fee reductions,” and noted that special incentive legislation may be required to achieve a competitive incentive proposal. All proposals were to include a summary of the incentive offered, total value of the incentives, timetable for Amazon to realize the benefits of the incentives, and details about conditions or recapture provisions associated with the incentives.

The RFP emphasized that the incentive packages would be “significant factors in the decision-making process” and the extent of which those incentives could “offset initial capital outlay and ongoing operational costs” by Amazon could be “critical decision drivers.”

In response to Amazon’s announcement, Louisville Metro prepared a proposal for the HQ2 project. Louisville Metro submitted its final HQ2 proposal on October 18, 2017 (the Proposal). The Proposal consisted of hundreds of pages of text, promotional videos and an interactive website. The Proposal cost an estimated \$170,000 to prepare, \$70,000 of which were paid by tax dollars.

Amazon received more than 238 proposals from cities across Canada, the United States and Mexico. On January 18, 2018, Amazon announced that it had narrowed the field of HQ2 proposals to 20 finalists, and Louisville Metro was no longer being considered for the HQ2 site.

After Amazon’s announcement of the finalists, Courier-Journal reporter, Phillip Bailey, submitted an Open Records Request to Louisville Metro, seeking “[a] copy of Louisville Forward’s¹ competitive bid proposal submitted to Amazon.com, Inc. for its headquarters including but not limited to correspondence, documents and associated partners.” On February 7, 2018, Louisville Metro

¹ Louisville Forward is the local economic development organization for Louisville Metro Government.

provided a heavily redacted version of a 118-page Proposal that omitted all information about the economic incentives and the prospective HQ2 site locations offered to Amazon. Louisville Metro asserted that the remaining portions of the Proposal were exempt from disclosure under the exceptions found in the Open Records Act (ORA). First, Louisville Metro argued that the Proposal was preliminary in nature under KRS² 61.878(1)(i) & (j). Second, Louisville Metro argued that KRS 61.878(1)(d) permits agencies to withhold records pertaining to the prospective locations of a business or industry where no previous disclosures have been made of the business' or industry's interest in locating within the Commonwealth.

On March 9, 2018, the Courier-Journal filed a complaint in the Jefferson Circuit Court in an effort to obtain full disclosure of the Proposal. Eventually, the matter proceeded to cross-motions for summary judgment. In a memorandum and order entered on September 24, 2018, the circuit court granted the motion by the Courier-Journal and denied the motion by Louisville Metro. The court found that the Proposal was no longer exempt as preliminary after Amazon announced that Louisville Metro was no longer in consideration. Likewise, the court found that KRS 61.878(1)(d) was not applicable because Amazon's interest

² Kentucky Revised Statutes.

in relocating was publicly disclosed and well-known. Consequently, the court ordered Louisville Metro to provide the full, unredacted Proposal to the Courier-Journal within ten days from entry of the order.

Thereafter, Louisville Metro filed a motion to alter, amend or vacate the order pursuant to CR³ 59.05. On October 8, 2018, the circuit court denied the motion, but stayed its order requiring production of the unredacted Proposal until final disposition of any appellate proceedings. This appeal followed.

When an agency denies a request under the ORA, the requester has two ways to challenge the denial. The requester may ask the Attorney General to review the matter under KRS 61.880. In the alternative, the requester may, as was done in this case, file an original action in circuit court pursuant to KRS 61.882 seeking injunctive or other appropriate relief. In either case, the circuit court's review is *de novo*. *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 848 (Ky. 2013). Furthermore, the agency bears the burden of proving that its decision to withhold the records was justified under the Act. *Id.* "We review the [circuit] court's factual findings for clear error, and issues concerning the construction of the ORA we review *de novo*." *Id.* at 849.

³ Kentucky Rules of Civil Procedure.

The basic policy of the ORA “is that free and open examination of public records is in the public interest . . . even though such examination may cause inconvenience or embarrassment to public officials or others.” KRS 61.871. Consequently, the Act requires that all exceptions to production, statutory or otherwise, must be strictly construed. As noted, the burden of establishing that an exception applies rests upon the agency resisting disclosure. KRS 61.882(3).

Louisville Metro first argues that the Proposal is exempt under KRS 61.878(1)(d), which provides:

Public records pertaining to a prospective location of a business or industry where no previous public disclosure has been made of the business’ or industry’s interest in locating in, relocating within or expanding within the Commonwealth.

Louisville Metro argues that Amazon has never formally disclosed an interest in a prospective location within the Commonwealth. Rather, Amazon’s RFP was only a pre-application request for proposals, which may later result in a formal application or expression of interest. As a result, Louisville Metro contends that Amazon has never directly indicated whether it was interested in developing the site locations set out in the Proposal, leaving it within the scope of KRS 61.878(1)(d). Louisville Metro further argues that the Proposal contains recommendations and options which could be broadly applicable to future attempts to recruit a variety of businesses or industries to the Commonwealth. Thus,

Louisville Metro contends that disclosure of those options could prejudice its competitive position in those recruiting efforts.

While Louisville Metro's latter argument has some appeal from a broad, policy standpoint, we are not at liberty to consider how disclosure of the Proposal may affect Louisville Metro's recruiting efforts with different businesses or industries. Rather, we may only consider whether disclosure of the Proposal to Amazon is exempt under KRS 61.878(1)(d). As the circuit court correctly noted, Amazon's interest in relocating was extensively publicized. We conclude that this publicity amounted to a public disclosure of Amazon's interest in relocating within the Commonwealth. Therefore, the exception to disclosure under KRS 61.878(1)(d) does not apply.

Louisville Metro primarily argues that Proposal was preliminary and therefore exempt from disclosure under KRS 61.878(1)(i) & (j), which exclude from disclosure:

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

Louisville Metro acknowledges that preliminary records may lose that status once they are adopted into final agency action. *Univ. of Kentucky v.*

Courier-Journal & Louisville Times Co., 830 S.W.2d 373, 378 (Ky. 1992).

However, Louisville Metro takes the position that no final action occurred.

Although Amazon did not include Louisville Metro in its list of finalists for the HQ2, Louisville Metro contends that it did not definitely reject the Proposal either.

Furthermore, Louisville Metro contends that the Proposal remains subject to reconsideration or amendment at any time that Amazon chooses to revisit it.

Consequently, Louisville Metro asserts that the Proposal remains preliminary because no final agreement was reached between it and Amazon.

In support of its interpretation, Louisville Metro cites an opinion by the Attorney General's Office on a separate request for the Proposal brought by Louisville Business First. 18-ORD-029. The Attorney General concluded that the submission of the Proposal to Amazon was not a final agency action because the incentive package was subject to negotiation until such time as a final agreement was reached. However, Louisville Business First's inquiry came prior to Amazon's announcement that it had narrowed the field of HQ2 proposals to 20 finalists. Consequently, the analysis in 18-ORD-029 is not applicable to the facts of the current appeal.

Louisville Metro also points to a number of other opinions by the Attorney General which take the position that proposed incentive packages remain preliminary even after the business or industry chooses a location in a different

state. Most notably, in 04-ORD-081, the Attorney General concluded that proposed incentives remained preliminary even after the business chose a location in a different state. Consequently, the Attorney General concluded that the proposals were merely preliminary memoranda which were not subject to disclosure. Several other opinions by the Attorney General have likewise reached similar conclusions.⁴

The gist of the interpretation given by the Attorneys General in these opinions is that “final agency action” means when a final agreement is reached with the prospective business or industry. Rejected bid proposals that do not result in a completed negotiation with an approved agreement never reach the level of a final agreement. 04-ORD-081. Similarly, information exchanged with a prospective employer relating to incentive packages, proposed site locations, utility costs, and possible incentives remain preliminary and inchoate when no final agreement is reached. *See* 93-ORD-29. Furthermore, the Attorney General noted that, in certain cases, proposals may include confidential or propriety information which would permit an unfair advantage to competitors of the entity that disclosed

⁴ *See also* 12-ORD-213 (Letters of intent to lease in city development project remain preliminary until formal lease is signed); 93-ORD-29 (Proposed incentive package offered to business remained preliminary after business rejected the package); OAG 91-21 (Letter of intent regarding an economic development incentive package is a preliminary document and does not constitute final agency action until the package is formally approved); and OAG 87-21 (Untimely bids to city development project are not part of the bidding and negotiation process and remain preliminary correspondence).

them if made public. See KRS 61.878(1)(c)1. *See also* 11-ORD-033. Therefore, in the absence of a final agreement, the Attorney General has often concluded that any unaccepted offers, proposals or supporting correspondence remain preliminary under KRS 61.878(1)(i) & (j).

As an initial matter, while Louisville Metro asserts that disclosure of the Proposal would reveal confidential information that would place it at a competitive disadvantage, it does not seek to avoid disclosure under KRS 61.878(1)(c)1. As noted above, the agency claiming the exemption has the burden of asserting it and establishing that it applies. *City of Fort Thomas*, 406 S.W.3d at 852.⁵ Therefore, the application of that exemption is not before this Court on appeal.

The more significant question is whether the Attorney General's longstanding interpretation of KRS 61.878(1)(i) and (j) is supported by the

⁵ While there are no Kentucky cases or Attorney General opinions which directly address this issue, we note that Pennsylvania has rejected claims that similar Proposals in response to Amazon's RFP were not confidential or proprietary under that state's open records. *See In the matter of Mark Belko and the Pittsburgh Post-Gazette v. Penn. Dep't of Cmty. & Econ. Dev.*, 2018 WL 3091293 (Pa. Off. Open Rec. June 13, 2018); *In the matter of Emily Opilo and the Morning Call v. Penn. Dep't of Cmty. & Econ. Dev.*, 2018 WL 1542109 (Pa. Off. Open Rec. March 26, 2018); and *In the matter of J. Dale Shoemaker and PublicSource v. Penn. Off. of the Governor*, 2018 WL 704197 (Pa. Off. Open Rec. Jan. 31, 2018). In each of these opinions, the Pennsylvania Office of Open Records found that the agency failed to meet its burden of proving that the proposals contained confidential or proprietary information that was exempt from disclosure. Similar to the requirements of the Pennsylvania open-records statute, an agency claiming an exemption under KRS 61.878(1)(c)1 must show that the document includes confidential or proprietary information.

statutory text and case law. While not binding on the courts, opinions by the Attorney General are highly persuasive. *York v. Commonwealth*, 815 S.W.2d 415, 417 (Ky. App. 1991). On the other hand, our review of questions of law and statutory interpretation is *de novo* and without deference to the conclusions reached by the Attorney General. *Medley v. Bd. of Educ. of Shelby Cty.*, 168 S.W.3d 398, 402 (Ky. App. 2004). Furthermore, the ORA demonstrates a general bias toward favoring disclosure. *Hardin Cty. Sch. v. Foster*, 40 S.W.3d 865, 868 (Ky. 2001). Finally, the General Assembly has directed that any exceptions to the ORA must be strictly construed. KRS 61.871.

For purposes of the ORA, “final action” is the point at which agency makes a final determination on the ultimate issue. *University of Louisville v. Sharp*, 416 S.W.3d 313, 315 (Ky. App. 2013). In *Sharp*, this Court held that notes and an agenda from a meeting discussing University Hospital merger did not constitute a final agency action, as the meeting was merely a step along the road to deciding the merger issue. *Id.* at 315-16. But in *Palmer v. Driggers*, 60 S.W.3d 591 (Ky. App. 2001), we held that a decision by a city commission to end disciplinary hearings against police officer upon resignation constituted “final action,” which terminated the application of the preliminary matters exemption. *Id.* at 597. Similarly, in *Kentucky State Bd. Med. Licensure v. Courier-Journal & Louisville Times Co.*, 663 S.W.2d 953 (Ky. App. 1983), this Court held that a

complaint filed with the medical licensure board remained preliminary until the final determination of the board regarding the license, at which point the initiating complaint was no longer exempt as preliminary. *Id.* at 956. And in *University of Kentucky v. Courier-Journal*, *supra*, our Supreme Court held that the University of Kentucky's response to an inquiry by NCAA became final action once submitted and no longer subject to modification. 830 S.W.2d at 378.

Contrary to the interpretations by various Attorneys General, final action occurs when the ultimate issue is definitely resolved, either by action or a decision not to take action. *Sharp*, 416 S.W.3d at 315. In the current case, Louisville Metro's Proposal was merely an offer submitted in response to Amazon's RFP. It remained subject to additional negotiation, modification and approval by other agencies or governmental bodies. But once Amazon excluded Louisville Metro from its list of finalists, the Proposal was no longer subject to change. Any possible re-opening of the bid process would require a new Proposal. Consequently, we must conclude that the final action occurred at that point. Therefore, the preliminary recommendations in the Proposal lost their exempt status once the final action occurred. Therefore, we agree with the circuit court that the Proposal lost its status as preliminary.

Accordingly, we affirm the summary judgment by the Jefferson Circuit Court. However, the circuit court's order requiring production of the unredacted Proposal shall remain stayed until this opinion becomes final.

ALL CONCUR.

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