COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

DANIEL CAMERON
ATTORNEY GENERAL

CAPITOL BUILDING, SUITE 118
700 CAPITOL AVENUE
FRANKFORT, KY 40601
(502) 696-5300
FAX: (502) 564-2894

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Summary: Fulton County Fiscal Court ("Fiscal Court") violated the Open Records Act ("the Act") in denying a request for all existing records "prepared by or otherwise in the possession of" the agency regarding tornado damage to the Fulton County Detention Center ("FCDC") that occurred in 2017 solely because the records pertain to civil litigation that is ongoing between the parties and the records may be discoverable in that proceeding. Although the Fiscal Court may withhold some or all of the records on the basis of KRE 503 or CR 26.02, the Fiscal Court has not satisfied its burden of justifying a denial based on either privilege.

Open Records Decision

The question presented in this appeal is whether the Fiscal Court violated the Act in denying R. Michael Sullivan's ("Appellant") October 8, 2019, request for certain records, which included:

- Any document submitted by Fulton County to the Kentucky Association of Counties ["KACO"] All Lines Fund Trust or [KACO] (collectively "KALF") that asserted or discussed a claim against KALF based on breach of contract, negligence, fraud, negligent misrepresentation, a violation of the Kentucky Unfair Claims Settlement Practices Act, or any other legal theory related to the handling of Fulton County's insurance claims for the Tornado Damage[;]

- Any documents related to any payments made by KALF to Fulton County related in any way to the Tornado Claim, including but not limited to the alleged failure to install smoke evacuation systems in a timely manner after March 9, 2017, and any advance payment, conditional payment, or any promise to pay in the future any agreed upon sum for present or future release of liability of KALF to Fulton County[;]

- Any documents related to settlement of any claim asserted by Fulton County against KALF involving the handling of Fulton County's claims for the Tornado Damage, including but not limited to tolling agreements, settlement agreements or releases between Fulton County and KALF.

By letter dated October 17, 2019, Fulton County Judge Executive Jim Martin responded to Appellant's request, which the Fiscal Court received on October 15, 2019. Quoting KRS 61.878(1), the Fiscal Court denied the request, stating that all existing responsive documents "are 'materials related to civil litigation.'" The Fiscal Court maintained that all of the records "are clearly related to the civil litigation in this case and are therefore patently inappropriate for an Open Records Request."

In supplemental correspondence directed to Judge Executive Martin on October 21, 2019, Appellant cited *Kentucky Lottery Corp. v. Stewart*, 41 S.W.3d 860 (Ky. App. 2001) and OAG 89-65 to support his position that a public agency's duties under the Act are not suspended during litigation. Noting that KRS 61.878(1) is "not a stand-alone exemption," and "no exemption applies to the records we requested," Appellant maintained the Fiscal Court should honor the request.

In responding to this appeal, the Fiscal Court first noted that Appellant is the attorney of record for Underwriters Safety and Claims, Inc., a defendant in Fulton Circuit Court Case No. 18-CI-00036. The Fiscal Court argued, "All of the information requested in the October 8, 2019, letter was previously served on counsel for Fulton County (Hon. Charles E. Moore) on August 27, 2019, in the

Defendant's first tendered written discovery." The Fiscal Court further explained that it received the discovery requests on September 3, 2019, and either provided answers or gave responses containing objections. In summary, the Fiscal Court argued that KRS 61.878(1) is controlling because Appellant first sought the information during the course of discovery. In reply, Appellant clarified that he simultaneously asked for the information and records via discovery requests that he served on Mr. Moore, counsel for the County in the aforementioned case, and Mr. Moore subsequently advised him via e-mail dated October 3, 2019, that he did not represent Fulton County regarding the request made under the Act. Following receipt of that e-mail, Appellant mailed his October 8, 2019, request letter to Judge Executive Martin. When viewed in light of the following, the sequence of the Appellant's requests in this case is irrelevant.

Consistent with existing legal authority construing KRS 61.878(1), this Office finds the Fiscal Court violated the Act in denying Appellant's request on the sole basis of pending litigation. In a line of decisions dating back to 1982, this Office has consistently recognized that litigation does not suspend the duties of a public agency under the Act. *See* OAG 82-169; 17-ORD-177. Although there is litigation in the background of a request, a "requester stands in relationship to the agency under the Open Records Law as any other person. The fact that he may have a special interest by reason of the litigation provides no reason to grant or deny his request to inspect the records." OAG 82-169, p. 2; 09-ORD-211; 16-ORD-149. Elaborating upon this view, the Attorney General subsequently observed, "No exceptions to the general rules regarding inspection are provided for denying inspection of public records on the ground that litigation is either contemplated or in progress." OAG 89-53, p. 4; 11-ORD-108. Shortly thereafter, the Attorney General reaffirmed the validity of this position, recognizing that requests under the Act "are founded upon a statutory basis independent of the rules of discovery." OAG 89-65, p. 4. This Office clarified that such observations were not intended "to suggest that Open Records provisions should be used by parties to litigation as a substitute for requests under discovery procedures associated with civil litigation. To do so tends to circumvent the orderly, balanced, process the rules of discovery attempt to provide." *Id.*, p. 3. In summary, the Attorney General has recognized "the potential pitfalls of using the Act in lieu of discovery; however, this office has *not* recognized the right of a public agency to deny access to public records on that basis." 09-ORD-211, p. 7; 11-ORD-108.

In *Kentucky Lottery Corp. v. Stewart*, 41 S.W.3d 860, 864 (Ky. App. 2001), the Kentucky Court of Appeals expressly agreed with prior decisions of this Office, holding that "an open records request should be evaluated independently of whether or not the requester is a party or potential party to litigation[.]" In so holding, the Court observed:

> [KRS 61.878(1)] does not exempt or exclude all records from the open records disclosure, in favor of discovery in litigation or anticipated litigation cases, but limits the release of records specifically listed in KRS 61.878(1) to those records which parties can obtain through a court order. The gist of this wording is not to terminate a person's right to use an open records request *on excluded records*, to those records that could be authorized through a court order on a request for discovery under the Rules of Civil Procedure governing pretrial discovery.

Id. at 863 (emphasis original). The General Assembly "clearly intended to grant any member of the public as much right to access to information as the next." *Id.* (quoting *Zink v. Commonwealth*, 902 S.W.2d 825, 828 (Ky. App. 1994)). Adopting and clarifying the *Stewart* court's holding, the Kentucky Supreme Court has stated:

> The civil litigation limitation is an explanation of a court's authority to order inspection of documents otherwise exempted from disclosure under KRS 61.878(1)(a)-(n). It is **not** an exception to an agency's duty to disclose nonexempted records. And it does not allow a court to prevent disclosure of records available to the general public simply because the requesting party is involved in litigation against a public agency.

Dept. of Revenue v. Wyrick, 323 S.W.3d 710, 714 (Ky. 2010)(emphasis original).

The Appellant's status as a litigant "does not alter his right of access to information save for that information he cannot obtain 'on a request for discovery *under the Rules of Civil Procedure* governing pretrial discovery' as opposed to a request for discovery submitted in defiance of a protective order." 10-ORD-142, p. 6. Nevertheless, *if* a court has deemed certain documents not

discoverable, the court's order is "the law of the case and ... 'this office is not empowered to facilitate [an] end-run around the normal discovery process.'" 17-ORD-177 (quoting 06-ORD-121). In cases where the court has ordered a stay of discovery, or a protective order, "attorneys acting on behalf of a litigant and persons with a substantiated shared interest in the litigation" may not circumvent the court's order by using the open records process to obtain records related to the litigation. 06-ORD-137.

The record on appeal does not contain any court order staying discovery or any order addressing whether any existing responsive documents are subject to a protective order. Rather, the Fiscal Court provided a copy of the Plaintiffs' Responses to First Request for Production of Documents Propounded by Defendant, and the Plaintiffs' Answers to First Interrogatories Propounded by Defendant. The Fiscal Court objected to Interrogatory No. 15 on the basis of relevance and objected to Interrogatory No. 16 "to the extent the information is privileged and/or work product, and the information sought does not appear reasonably calculated to lead to the discovery of admissible evidence." [1]

The courts and this Office have recognized that public records may be withheld from disclosure under the attorney-client privilege or work-product doctrine *if* all of the elements of the privileges are established. *See Hahn v. University of Louisville,* 80 S.W.3d 771 (Ky. App. 2001). The attorney-client privilege "does not apply to all communications between an attorney and a client. Indeed, to fall under the attorney-client privilege, a communication must be confidential, relate to the rendition of legal services, and not fall under certain exceptions." *Cabinet for Health and Family Services v. Scorsone,* 251 S.W.3d 328, 329 (Ky. 2008). See 01-ORD-246; 02-ORD-161; 10-ORD-177. There is no "litigation" or "residual" exception that can be invoked by a public agency solely because it is engaged in litigation, or threatened litigation; the attorney-client privilege and

[1] The record contains a supplemental response from the Fiscal Court to Appellant stating, "our county attorney [has] consulted with the KY AG office regarding the opinions you have cited. We were advised that these types of appeals are viewed on a case-by-case basis. It was noted however that if the requested information was already the subject of a court supervised discovery dispute, the AG office would generally defer to the court's decision." As an initial matter, this Office speaks only through its written decisions. While this Office will defer to a court during "supervised discovery disputes," the record is devoid of any evidence of a court order to which to defer. An objection in an interrogatory is insufficient.

work product doctrine cannot "be invoked absent a showing that each of the elements of KRE 503 or CR 26.02 [is present.]" 03-ORD-015, p. 6; *see also* 12-ORD-075; 13-ORD-052; 16-ORD-055 (no basis for withholding an e-mail simply because a copy was forwarded to counsel); 16-ORD-169. The Fiscal Court has not attempted to make any such showing here. Accordingly, its response was both procedurally and substantively deficient.

KRS 61.880(1) provides that a "response denying, in whole or in part, inspection of any record 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." The "language of [KRS 61.880(1)] directing agency action is exact. It requires the custodian of records to provide *particular and detailed information* in response to a request for documents. . . . [A] limited and perfunctory response [does not] even remotely compl[y] with the requirements of the Act-much less [amount] to substantial compliance." *Edmondson v. Alig*, 926 S.W.2d 856, 858 (Ky. App. 1996); *City of Ft. Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 852 (Ky. 2013) (noting that a public agency "should provide the requesting party and the court with sufficient information about the nature of the withheld record (or the categories of the withheld records) . . . to permit the requester to dispute the claim and the court to assess it"); 10-ORD-142; 17-ORD-177.

The Fiscal Court is authorized to withhold records that are privileged "only if it can articulate, in writing, the reasons for withholding a record, or group of records, with sufficient particularity and detail to enable the public to assess the propriety of its actions." 05-ORD-136, p. 8; 03-ORD-042; 06-ORD-166; 11-ORD-108. "In so holding, this [O]ffice is not implying that the [Fiscal Court] cannot successfully build a case for withholding some, if not all, of the [requested] materials on the basis of KRE 503 and/or CR 26.02, only that it has failed to provide sufficiently detailed information to substantiate its position thus far." 11-ORD-108, p. 9. To discharge its duty under KRS 61.880(1) and 61.880(2)(c), the Fiscal Court "must review all records responsive to his request and segregate those which qualify under one or more statutory exceptions, generally identifying the records withheld in a written response in which it cites the applicable exception and how it applies to the records withheld. KRS 61.880(1)." 10-ORD-142, p. 6.

Either party may appeal this decision by initiating action in the appropriate circuit court under 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 proceeding.

Daniel Cameron
Attorney General

Michelle D. Harrison
Assistant Attorney General

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Distributed to:

R. Michael Sullivan
Jim Martin
Richard L. Major, Jr.