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20-ORD-133

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In re: Patricia Abell/Louisville Regional Airport Authority

Summary: Louisville Regional Airport Authority ("the Authority") did not violate the Open Records Act ("the Act") by withholding two e-mails that were exempt from public inspection due to the attorney-client privilege.

Open Records Decision

Michael A. Drew requested from the Authority "full and complete copies" of his personnel file. Specifically, he requested "the full and complete investigation" by the Authority that culminated in his termination, including any e-mails containing the "date, source, and contact information of any person(s), organization or entity, who provided to or made [the Authority] aware that [he] had a claim against Louisville Metropolitan Sewer District, the names of the person(s) investigation the report, a copy [of] any report, notes, or records relating to the investigation."[1] Citing KRE 503 and KRS 61.878(1)(l), the Authority notified Mr. Drew that it was not disclosing two records that "constitute confidential communication[s] made by the Authority's counsel, Brenda Allen, in the course of her representation of and advising her client." Thereafter, Patricia A. Abell ("Appellant"), counsel for Mr. Drew, initiated this appeal.

[1] Appellant also requested a copy of responsive documents that the Authority initially withheld under KRS 61.878(1)(i) and (j). On appeal, the Authority provided those documents to Appellant. Accordingly, this appeal is moot as to those records. 40 KAR 1:030 § 6.

The attorney-client privilege applies to communications between a client and a lawyer "made for the purpose of facilitating the rendition of professional legal services to the client[.]" KRE 503(b). The privilege also exempts from public disclosure communications between lawyers and representatives of their clients. KRE 503(b)(1). For the privilege to apply, the communication must be confidential, *i.e.* "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." KRE 503(a)(5). The privilege is incorporated into the Act by KRS 61.878(1)(l). *Hahn v. Univ. of Louisville*, 80 S.W.3d 771, 774 (Ky. App. 2001).

Appellant challenged the Authority's reliance on the privilege because Ms. Allen serves in a dual capacity — she is the Authority's Vice President of Legal Affairs *and* Corporate Culture. Appellant claimed that many of Ms. Allen's duties pertaining to her role in "Corporate Culture" are in the nature of human resources. Appellant claims that the Authority must present evidence that Ms. Allen was acting in the capacity of the Authority's legal counsel when she sent the two e-mails and not as a human resources officer.

However, the Authority explained initially that both of the e-mails "at issue constitute confidential communication[s] made by the Authority's counsel, Brenda Allen in the course of her representation of and advising her client." Moreover, Ms. Allen explained on appeal that her role as a human resources officer is "rooted in the legal functions inherent in each of these departments and their need for significant legal advice and guidance."[2] Ms. Allen further explained that she "does not take the position that all of [her] communications with staff in these departments or others are attorney-client privileged communications such that the Authority would withhold all documents to or from [her] related to Mr. Drew." Rather, the Authority produced some communications in which Ms. Allen was a party and withheld only two e-mails (of the hundreds of responsive documents provided) as privileged communications. Accordingly, the Authority claimed that it did not use a blanket approach to withhold its communications

[2] In relevant part, Appellant's job description provides that she "[d]irects a professional staff in areas with a significant legal component, including Director of Human Resources, Director of Purchasing and Procurement and Director of Public Safety."

with its legal counsel and only withheld e-mails in which Ms. Allen actually gave legal advice to the Authority.

The Authority has explained that the disputed emails were confidential and contained legal advice. Moreover, the record does not contain any evidence to refute Ms. Allen's claim that the privilege applies to both of the e-mails withheld.[3] Based upon the foregoing, this Office affirms the Authority's disposition of the request.

A party aggrieved by this decision may appeal it 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 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

/s/ Michelle D. Harrison

Michelle D. Harrison
Assistant Attorney General

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[3] Appellant further claimed that KRS 61.878(3) should apply to permit Mr. Drew's inspection because he is a former public employee and he requested records pertaining to him. Under KRS 61.878(3), "[n]o exemption in this section shall be construed" to deny a public employee access to records pertaining to him. However, KRS 61.878(1)(l) exempts from public inspection records that have been made confidential by an enactment of the General Assembly. Thus, it is not "this section" — *i.e.* KRS 61.878 — that makes these e-mails confidential. KRE 503 is the enactment that permits the Authority to withhold these records and KRS 61.878(1)(l) incorporates the privilege into the Act. Courts have held that legislatures do not "alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—[they do] not, one might say, hide elephants in mouseholes." *Whitman v. American Trucking Ass'n*, 531 U.S. 457, 468 (2001). There is no reason to conclude that the General Assembly waived every statute requiring confidentiality (including federal law, KRS 61.878(1)(k)) by enacting KRS 61.878(3).

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Distributed to:

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Brenda Allen