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22-ORD-136

June 22, 2022

In re: Roger Allcock/Tourism, Arts and Heritage Cabinet

Summary: The Tourism, Arts and Heritage Cabinet ("the Cabinet") did not violate the Open Records Act ("the Act") when it denied a request for records protected by the attorney-client privilege, or when it was unable to locate records in addition to those provided to the requester in response to a previous request.

Open Records Decision

Roger Allcock ("the Appellant") submitted a request to the Cabinet seeking copies of any communications that requested the drafting of a legal memorandum titled, "Right of public navigation over lands submerged by flooded watercourses." The Appellant also sought copies of any legal authorities submitted to the Cabinet about the issue, the Cabinet's internal communications exchanged during the drafting process, and any communications between the Cabinet and the Office of Attorney General related to the Appellant's inquiries about the memorandum.[1] In a timely response, the Cabinet notified the Appellant that his request was a "duplicate" of one submitted to the Department of Fish and Wildlife ("the Department") in October 2021. Nevertheless, the Cabinet searched its records again and could not locate any records in addition to those that the Department had previously provided or that the Department previously withheld under the attorney-client privilege. This appeal followed.

In October 2021, the Appellant submitted a substantially similar request to the Department. *See*, 22-ORD-117. The Department had provided some responsive

[1] In response to the Appellant's request for communications exchanged with the Office of Attorney General, the Cabinet provided one responsive email that related to the Appellant's inquiry about the memorandum. The Office of Attorney General had no role in drafting the memorandum. *See, e.g.*, 22-ORD-078.

records, but withheld others under the attorney-client privilege. This Office lacked jurisdiction to determine whether the Department had properly invoked the attorney-client privilege because the Appellant had failed to submit the Department's response to his request, as required under KRS 61.880(2)(a). *Id*. Here, the Appellant claims that his request to the Cabinet is not a "duplicative request," because the Cabinet is public agency that is separate and distinct from the Department. He therefore claims that the Cabinet's response was inadequate.

The Appellant is correct that his request is not "duplicative" of his request to the Department at issue in 22-ORD-117. Although the Department was housed within the Cabinet for administrative purposes at the time of the Appellant's request the Department is now a separate and distinct public agency. *See* KRS 150.021(1).[2] Because the Department is a public agency that is distinct from the Cabinet, the Appellant's request to the Cabinet cannot be construed as "duplicative" of his request for the same records made to the Department. Upon receiving the Appellant's request, the Cabinet was required to notify the Appellant within five business days of whether it would comply with the request. KRS 61.880(1). If the Cabinet denied the request, it was required to cite the applicable exemption and explain how it applied to the records withheld. It did so here.

Although the Cabinet noted that the Appellant's request was "duplicative" of his request to the Department, the Cabinet also stated that it reviewed its records "once again and there are no additional documents to [the Appellant's] current request." The Cabinet stated that it would provide the Appellant with the same records the Department had previously provided, if the Appellant still wanted copies of those records. The Cabinet also stated that it was withholding the same records that the Department had previously withheld under KRE 503, the attorney-client privilege, because those records contained communications between Cabinet and Department staff in which legal advice and opinions were provided.

Once a public agency states affirmatively that it does not possess responsive records, the burden shifts to the requester to present a *prima facie* case that requested records do exist in the possession of the public agency. *See Bowling v. Lexington-Fayette Urb. Cnty. Gov.*, 172 S.W.3d 333, 341 (Ky. 2005). If the requester is able to make a *prima facie* case that the records do or should exist, then the public agency "may also be called upon to prove that its search was adequate." *City of Fort*

[2] During the 2022 Regular Session of the General Assembly, the legislature enacted SB 217, which further clarified the Department's independence from the Cabinet. SB 217 contained an emergency clause, and took effect on April 13, 2022, when the General Assembly overrode the Governor's veto. The Appellant's request to the Cabinet was submitted the same day, April 13, 2022. Regardless, the passage of SB 217 has no impact on this Office's decision that the Department and the Cabinet were, and remain, separate public agencies.

Thomas v. Cincinnati Enquirer, 406 S.W.3d 842, 848 n.3 (Ky. 2013) (citing *Bowling*, 172 S.W.3d at 341).

Here, a *prima facie* case has been made that the Cabinet possesses *some* responsive records. The Cabinet admits that responsive records exist in its possession, however, these records are duplicative of records that were previously provided to the Appellant by a different agency.[3] But the Cabinet did not specifically deny the Appellant's right to receive copies of those records. Instead, the Cabinet asked the Appellant to "advise" whether he still wanted copies of records that he had previously received. Implicit in the Cabinet's invitation is the fact that copying fees may be associated with providing the records, *see* KRS 61.874(2), which the Appellant may not want to incur if he will receive only records that he previously received. The Office does not find that the Cabinet's request for the Appellant to confirm whether he wanted duplicative copies of records constitutes a denial of the records under KRS 61.880(1). Moreover, the Appellant does not make a *prima facie* case that records in addition to those he has previously received exist in the Cabinet's possession. Thus, the Cabinet did not violate the Act when it was unable to provide copies of records that do not exist.

As for the responsive records that the Cabinet is withholding, it has properly relied on the attorney-client privilege to deny inspection of the records. The attorney-client privilege protects from disclosure "confidential communication[s] made for the purpose of facilitating the rendition of professional legal services to [a] client." KRE 503(b). "A communication is 'confidential' if 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 applies to communications between a client or representative of a client and the lawyer, KRE 503(b)(1), as well as between representatives of the client, KRE 503(b)(4). KRS 61.878(1)(l) operates in tandem with KRE 503 to exclude from public inspection public records protected by the attorney-client privilege. *Hahn v. Univ. of Louisville*, 80 S.W.3d 771 (Ky. App. 2001).

On appeal, the Cabinet explains that it had provided legal counsel to the Department at the time the memorandum was drafted, but that the Cabinet itself had no involvement in drafting the memorandum. Thus, the only records in the Cabinet's possession were those of the legal counsel assigned to the Department. Those communications were between legal counsel and Department staff in which legal advice and opinions were provided. This Office has found that communications between a public agency and its counsel, in which legal opinions are expressed, are

[3] The Appellant's request is not a duplicative request, because it was sent to two different public agencies. But the Appellant has sought communications between these two agencies, and thus, the responsive records are duplicative because they constitute each agency's copy of the communication.

exempt from inspection under KRE 503. *See, e.g.*, 22-ORD-140. Accordingly, the Cabinet did not violate the Act when it withheld emails protected by the attorney-client privilege.

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 within 30 days from the date of this decision. 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. The Attorney General will accept notice of the complaint e-mailed to OAGAppeals@ky.gov.

Daniel Cameron
Attorney General

s/Marc Manley
Marc Manley
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Distributed to:

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