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**22-ORD-144**

June 29, 2022

In re: David Webster/Christian County Board of Education

***Summary:*** The Christian County Board of Education ("the Board") did not violate the Open Records Act ("the Act") when it withheld communications between staff and Board members that were exempt from disclosure under KRS 61.878(1)(a), (i), (j), (l), or (r).

## *Open Records Decision*

On April 9, 2022, David Webster ("Appellant") submitted a four-part request to the Board for inspection of records. At issue in this appeal is the fourth part, in which the Appellant requested "[t]ext messages, emails and any other communications between" Board members and the superintendent, assistant superintendent, and secretary to the superintendent from May 2021 through February 2022. In its response to the request, the Board withheld several groups of records as exempt under KRS 61.878(1)(a), (i), (j), (k), (l), and (r). This appeal followed.

The Board withheld some records as privileged attorney-client communications. 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 inspection public records protected by the attorney-client privilege. *Hahn v. Univ. of Louisville,*

80 S.W.3d 771 (Ky. App. 2001). However, when a party invokes the attorney-client privilege to shield documents in litigation, that party carries the burden of proof. That is because "broad claims of 'privilege' are disfavored when balanced against the need for litigants to have access to relevant or material evidence." *Haney v. Yates*, 40 S.W.3d 352, 355 (Ky. 2000) (quoting *Meenach v. General Motors Corp.*, 891 S.W.2d 398, 402 (Ky. 1995). So long as the public agency provides a sufficient description of the records it has withheld under the privilege in a manner that allows the requester to assess the propriety of the agency's claims, then the public agency will have discharged its duty. *See City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 848–49 (Ky. 2013) (providing that the agency's "proof may and often will include an outline, catalogue, or index of responsive records and an affidavit by a qualified person describing the contents of withheld records and explaining why they were withheld.").

Here, the Board asserts that the withheld communications were "[c]ommunications of confidential legal advice and opinions provided with respect to particular matters" involving employees or students and "opinions and recommendations of [Board] counsel primarily with regard to the interpretation of federal and state Covid regulations and the possibility of liability." This description, while brief, suffices to establish that the Board's attorney, in the withheld communications, was acting in the capacity of rendering professional legal services to the Board. Accordingly, the Board did not violate the Act when it withheld these records under KRE 503 and KRS 61.878(1)(l).

The Board also withheld certain text messages and e-mails from Board members and staff "regarding their personal lives and families that do not relate in any way to their duties." KRS 61.878(1)(r) exempts from disclosure "[c]ommunications of a purely personal nature unrelated to any governmental function." Accordingly, the Board did not violate the Act by withholding these records.

KRS 61.878(1)(a) exempts from disclosure "[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." In reviewing an agency's denial of an open records request based on the personal privacy exemption, the courts and this Office balance the public's right to know what is happening within government against the personal privacy interest at stake in the record. *See Zink v. Commonwealth, Dept. of Workers' Claims,* 902 S.W.2d 825, 828 (Ky. App. 1994). Here, the Board has identified some of the withheld communications as "[i]ntra-office discussions as to the health of hospitalized, sick, and injured students, family members, and employees" and as "[i]ntra-office discussions of the process of specific individuals applying for individual positions in the district." This Office has long recognized that "medical information is information in which a person has a privacy interest and the disclosure of records containing such information would constitute

an unwarranted invasion of privacy." *See* 06-ORD-209. Likewise, this Office has recognized that "in general, the privacy interests of applicants for public employment in records relating to their application outweigh the public interest in disclosure." *See* 11-ORD-046. Here, the Appellant has not suggested any heightened public interest in the disclosure of such records. Accordingly, the Board did not violate the Act when it withheld such communications.

The Board withheld other records under KRS 61.878(1)(i), which exempts from disclosure "[p]reliminary drafts, notes, [and] correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency." The Board asserts that the documents in question consist of preliminary drafts, notes, and certain communications with private individuals not intended to give notice of final action, including "communications about the consolidated school [and] Covid protocols and policies, and communications from parents to school Board members or officials regarding their children." Additionally, the Board states that none of these records were adopted as the basis of final agency action. According to the plain text of KRS 61.878(1)(i), these categories of records are exempt. *See* 20-ORD-095. Thus, the Board did not violate the Act when it withheld these communications.

Lastly,[1] the Board withheld numerous records under KRS 61.878(1)(j), which exempts from disclosure "[preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended." If a public agency adopts such opinions or recommendations as the basis of final action, the exempt status of the record is lost. *See Univ. of Ky. v. Courier-Journal & Louisville Times Co.,* 830 S.W.2d 373, 378 (Ky. 1992); *Univ. of Ky. v. Lexington H-L Services, Inc.,* 579 S.W.3d 858, 863 (Ky. App. 2018). Here, the Board describes multiple subjects to which the withheld statements of opinion and recommendations pertain, including the consolidation of high schools, Covid-19 protocols, staffing, curriculum, legislative initiatives, scheduling of meetings, weather events, investigations, insurance coverage, spoof e-mails, and student discipline. In all cases, however, the Board states that the communications at issue were not adopted as the basis of final agency action. Accordingly, those records retain their preliminary characterization. Thus, the Board did not violate the Act when it partially denied the Appellant's request.

[1] Although the Board has cited KRS 61.878(1)(k), which exempts from disclosure "public records or information the disclosure of which is prohibited by federal law or regulation or state law," it has not identified the specific provision of federal or state law that applies to any of the disputed records. The Board has identified certain records relating to students as "education records," which suggests that the Board means to invoke the Federal Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g. However, because the records at issue are protected by other exceptions to the Act, it is not necessary to address them under KRS 61.878(1)(k).

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**
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s/James M. Herrick
James M. Herrick
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Distributed to:

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