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22-ORD-180

September 6, 2022

In re: Teri Erchak/Marion County School Board

Summary: The Marion County School Board (the "Board") did not violate the Open Records Act ("the Act") when it withheld records that are exempt under the attorney-client privilege, and when it provided all responsive records that exist within its possession. All issues related to records the Board has already provided to the Appellant have been rendered moot under 40 KAR 1:030 § 6.

Open Records Decision

Teri Erchak ("Appellant") submitted a request to the Board that contained twelve subparts related to various records and information that she believed the Board possessed. In a timely response, the Board responded to each subpart and withheld some records as exempt under the attorney-client privilege, provided 90 pages of records responsive to other subparts, and claimed that no records existed that were responsive to other subparts of the request. This appeal followed.[1]

On appeal, the Board claims it has provided answers to the information requested or all responsive records to subparts 3, 4, 6, 7, 8, and 9. Under 40 KAR 1:030§ 6, "[i]f the requested documents are made available to the complaining party after a complaint is made, the Attorney General shall decline to issue a decision in the matter." Here, the Appellant did not dispute the Board's claims that it provided

[1] The Appellant initiated this appeal by providing a copy of her original request and the agency's response thereto. Under KRS 61.880(2)(a), these are the only documents the Appellant is required to provide to initiate her appeal. However, the Appellant did not explain the basis of her appeal or specify which of the Board's responses she believes are objectionable.

all records responsive to subparts 3, 4, 6, 7, 8, and 9. Thus, all issues related to these subparts are now moot under 40 KAR 1:030 § 6.

As for subparts 2, 5, 10, 11, and 12, the Board provided some responsive records or otherwise claimed that no responsive records existed. Specifically, in subpart 2, the Appellant asked for "[d]etailed financial statements including supporting documentation for the past 5 years" and the Board provided a link to its website in response to that subpart. In subpart 5, the Appellant asked for "[t]he redacted contract of [a Board employee], her title and position in regards to [the Board] and the cost of services rendered for preparing Covid paperwork." The Board provided the employment letter for the employee, stated she was a part time "Budget Coordinator" whose salary was "[g]rant funded," and that "[n]o separate documentation exists to track the time spent on specific paperwork."[2]

In subpart 10, the Appellant asked for a copy of "[y]our license to practice medicine" to which the Board's responded "N/A."[3] In subpart 11, the Appellant asked for "[a] copy of [the Board's] By-Laws and school council policies." The Board explained that it does not have by-laws, but it provided a link to its policy and procedure manual. In subpart 12, the Appellant asked for "[a] list of the power of attorney of each insurance policy and whether each is an individual or blanket policy." In response, the Board claimed no such record existed within its possession.

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

Here, the Appellant did not attempt to make a *prima facie* case that the Board possesses any additional responsive records, or that she did not receive records

[2] On appeal, the Board explains that part time employees are "as-needed" employees and do not have employment contracts so no other documentation exists related to the information requested in subpart 5.

[3] The Board's explains on appeal "that that the individual to whom she sent her initial request did not have a license to practice medicine." The Appellant did not dispute the Board's claim.

responsive to these subparts of her request. Thus, the Board did not violate the Act when it provided all responsive records that exist within its possession.

Finally, in subpart 1, the Appellant asked for "[a]ll communications between the school board and legal council [*sic*] between" January 2020 and the present. In response, the Board invoked KRS 61.872(5) and notified the Appellant that the "records are in storage and will require time to retrieve and individually review by our attorney to determine which are attorney-client privileged" and that the records would be provided on or before June 13, 2022.[4]

On appeal, the Board explains that "some records were provided to [the Appellant] along with a privilege log and explanation of records which were withheld based on attorney-client privilege" 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).

KRE 503(b)(4) is incorporated into the Act through KRS 61.878(1)(l) which exempts from inspection "[p]ublic records or information the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly[.]" *Hahn v. Univ. of Louisville*, 80 S.W.3d 771 (Ky. App. 2001).

The agency carries the burden of proof on appeal to sustain its actions. KRS 61.880(2)(c). When a party invokes the attorney-client privilege to shield documents in litigation, the party carries the burden of proof and "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,

[4] The Appellant did not claim that the Board failed to properly invoke KRS 61.872(5), or that its delay in providing responsive records was unreasonable. In fact, the Appellant did not initiate this appeal until August 6, and did not claim that the Board failed to provide records or to explain why responsive records were being withheld by its stated deadline of June 13.

then the public agency will have discharged its duty. *See City of Fort Thomas*, 406 S.W.3d at 848-49 (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.").

On appeal, the Board states it invoked the attorney-client privilege to withhold responsive records, but explains that it provided a "privilege log" to the Appellant and an explanation for the records it withheld. The Appellant did not dispute the Board's assertions, or claim that any records were wrongfully withheld based on attorney-client privilege. Thus, the Board did not violate the Act when it withheld records that are exempt from inspection because they are privileged attorney-client communications.

In sum, the Board did not violate the Act when it provided all responsive records that exist within its possession and the Appellant did not attempt to make a *prima facie* case that any additional records were withheld from her. Nor did the Board violate the Act when it withheld records exempt under the attorney-client privilege. Moreover, all issues related to records the Board has already provided to the Appellant have been rendered moot under 40 KAR 1:030 § 6.

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court under KRS 61.880(5) and KRS 61.882 within 30 days from the date of this decision. Under 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 emailed to OAGAppeals@ky.gov.

Daniel Cameron
Attorney General

s/Matthew Ray
Matthew Ray
Assistant Attorney General

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Distributed to:

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