



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

DANIEL CAMERON
ATTORNEY GENERAL

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

22-ORD-264

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In re: Sebastian Kitchen/Office of Attorney General

Summary: The Office of Attorney General (“the Office”) did not violate the Open Records Act (“the Act”) when its response to a request to inspect records complied with KRS 61.880(1).

Open Records Decision

Sebastian Kitchen (“the Appellant”) submitted a request to the Office seeking a copy of all emails or communications exchanged between the Office’s Executive Staff and the Offices of Attorneys General for the States of Texas, Ohio, Alaska, Indiana, Kansas, Florida, and Arkansas from December 17, 2019 to the present. In a timely response, the Office provided 92 nonexempt responsive records and withheld 1,035 responsive records.¹ As grounds for withholding the responsive records, the Office relied on KRS 61.878(1)(i) and (j), as well as KRE 503 and the attorney-client privileged/work product doctrines.

In explaining how the stated exemptions applied, the Office stated the “e-mail records consist of communication between this Office and other State Attorneys General Offices regarding: joining, requests to join, and drafts of amicus briefs and multi-state comment letters; ongoing communication and preliminary drafts and notes, and attorney work product regarding multi-state consumer protection tolling agreements and common interest agreements; preliminary drafts and notes, and attorney work product regarding ongoing multi-state lawsuits and investigations; and communication regarding ongoing multi-state human trafficking investigations.”

¹ The Office initially responded within five business days and invoked KRS 61.872(5) because the requested records were “otherwise unavailable.” The Office explained the cause of the delay and provided the Appellant the earliest date on which records would be available. The Appellant does not challenge the Office’s initial response, which properly invoked KRS 61.872(5).

The Office then gave three detailed reasons why the cited exemptions applied to the records withheld. This appeal followed.

The Appellant argues the Office's response was inadequate under KRS 61.880(1) because it gave, according to the Appellant "four blanket justifications" to withhold responsive records. Of course, among the Office's cited exemptions for denying inspection of its correspondence with the other State Attorneys General offices were the attorney-client and work product privileges.² But in terms of the adequacy of the response, because the Office denied the request its written response must "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." KRS 61.880(1). Although KRS 61.880(1) requires the explanation in support of denial to be "brief," the response cannot be "limited and perfunctory." *Edmondson v. Alig*, 926 S.W.2d 856, 858 (Ky. App. 1996). In *Edmondson*, the agency's response to a request stated only that "the information you seek is exempt under KRS 61.878(1)(a)(k)(l) [sic]." *Id.* The agency failed to explain how any of the three exemptions applied to the records withheld, and for that reason, the court held, it violated KRS 61.880(1). *Id.*

Kentucky courts have refined the level of detail a "brief explanation" in support of a denial KRS 61.880(1) requires. As stated by the Supreme Court of Kentucky, an agency is *not* "obliged in all cases to justify non-disclosure on a line-by-line or document-by-document basis." *City of Ft. Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 851 (Ky. 2013). Rather, "with respect to voluminous [open records] requests . . . it is enough if the agency identifies the particular kinds of records it holds and explains how [an exemption applies to] the release of each assertedly [sic] exempt category." *Id.* (discussing the "law enforcement exception" under KRS 61.878(1)(h)). Of course, "if the agency adopts this generic approach it must itself identify and review its responsive records, release any that are not exempt, and assign the remainder to meaningful categories. A category is meaningful if it allows the court to trace a rational link between the nature of the document and the alleged" exemption. *Id.* (quotation omitted). The Court also has acknowledged the Act must be "workable." *Ky. New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76, 89 (Ky. 2013). As a result, when certain types of information that are routinely kept in public records are routinely exempt, an agency "need not undertake an ad hoc analysis of the exemption's application to such information in each instance, but may apply a categorical rule." *Id.*

The takeaway from these decisions is that—at least with respect to voluminous requests—an agency must break up responsive records into meaningful categories

² Because the Office properly relied on the common-interest provision of the attorney-client privilege doctrine, KRE 503(b)(3), and the work product doctrine, this decision need not address the Office's alternative reliance on KRS 61.878(1)(i) and (j).

and explain how the exemptions cited for each category of records applies. Here, the Office categorized the types of privileged communications by the type of “professional legal services” that were provided. Specifically, the Office described the types of privileged communications as “content in which opinions are expressed as to amicus briefs and multi-state comment letters”; “draft multi-state consumer protection tolling agreements and cost share agreements pertaining to two entities being investigated by this Office and other State Attorneys General Offices regarding potential anticompetitive conduct”; and “preliminary content in which opinions are expressed as to multi-state lawsuits and investigations regarding for which this Office’s Civil and Consumer Protection Divisions joined.”

As for whether the claimed exemption applies to the described categories of “professional legal services,” 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). One aspect of the privilege that is key here is the common-interest privilege, which applies to communications between the “client’s lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein.” KRE 503(b)(3).

The attorney work product doctrine, on the other hand, “affords a qualified privilege from discovery for documents ‘prepared in anticipation of litigation or for trial’ by that party’s representative, which includes an attorney.” *Univ. of Ky. v. Lexington H-L Servs.*, 579 S.W.3d 858, 864 (Ky. App. 2018). “[D]ocuments which are primarily factual, non-opinion work product are subject to lesser protection than ‘core’ work product, which includes the mental impressions, conclusions, opinions, or legal theories of an attorney.” *Id.*

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). Records protected by the work product doctrine may likewise be withheld from public inspection under KRS 61.878(1)(l) and CR 26.02(3). See *Lexington H-L Servs.*, 579 S.W.3d at 864–65.

It should come as no surprise that emails between multiple State Attorneys General involved in multi-state federal litigation and multi-state investigations would involve the common-interest privilege under KRE 503(b)(3). Nor should it come as a surprise that such communications could involve the work product of those States’ Attorneys General. The Office’s descriptions of the professional legal services

being provided in each category of withheld records is sufficient to allow the Appellant to assess the legitimacy of the claimed privilege.³ The Office's response was not "limited and perfunctory." *Edmondson*, 926 S.W.2d at 858. The Office did not violate the Act in withholding records exempt under KRS 61.878(1)(l); KRE 503(b)(3); and CR 26.02(3).

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. The Attorney General will accept notice of the complaint e-mailed to OAGAppeals@ky.gov.

Daniel Cameron
Attorney General

s/ Marc Manley
Marc Manley
Assistant Attorney General

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Distributed to:

Sebastian Kitchen
Jacob Ford

³ Moreover, on appeal, the Office categorizes the emails even further by the specific attorneys or their representatives who sent or received the communications regarding the professional legal services rendered.