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23-ORD-056

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In re: Sean Southard/Office of the Governor

Summary: The Office of the Governor (the "Governor's Office") did not violate the Open Records Act ("the Act") when it denied a request for records because some portions are exempt under KRS 61.878(1)(i) and (j) and the other portions are exempt under KRE 503 and the attorney work-product doctrine.

Open Records Decision

On December 16, 2022, Sean Southard ("Appellant") submitted a request to the Governor's Office for "[w]eekly Cabinet reports from the Cabinet and Heath and Family Services and the Justice and Public Safety Cabinet submitted to the [Governor's Office] from December 10, 2019 to present." In a timely response, the Governor's Office cited KRS 61.878 (1) (i), (j), (l), and KRE 503 to deny the request because the requested records were "preliminary" and "protected by the attorney client privilege." This appeal followed.[1]

When an agency denies a request under the Act, 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). Its response cannot be merely "limited and perfunctory." *Edmondson*

[1] On appeal, the Governor's Office argues the Attorney General must recuse himself from this appeal because the Attorney General has filed to run as a candidate in the 2023 gubernatorial election. Although the Attorney General himself has recused from this decision, the Office must nevertheless carry out its mandate to adjudicate disputes under the Act. *See* KRS 61.880(2). Moreover, the Office has previously rendered decisions pursuant to its mandate under KRS 61.880(2) in similar situations. *See, e.g.,* 19-ORD-178; 19-ORD-185; 19-ORD-202.

v. Alig, 926 S.W.2d 856, 858 (Ky. 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 cited exemptions applied to the records withheld, and for that reason, the court held, it violated KRS 61.880(1). *Id.*

The level of detail a "brief explanation" in support of a denial requires has been refined by the Kentucky courts. "The agency's explanation must be detailed enough to permit [a reviewing] court to assess its claim and the opposing party to challenge it." *Ky. New Era, Inc. v. City of Hopkinsville,* 415 S.W.3d 76, 81 (Ky. 2013). The Supreme Court of Kentucky has stated that 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). Instead, "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.* "[I]f 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). Moreover, Kentucky courts have acknowledged the Act must be "workable." *Ky. New Era, Inc.,* 415 S.W.3d at 89. 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.*

Here, the Governor's Office's response separated the responsive records into meaningful categories according to the exemptions on which it relied, *i.e.,* "preliminary records and records protected by the attorney[-]client privilege." The Governor's Office also provided brief explanations of the contents of each category of records. First, it explained "the weekly cabinet reports solely exist for the purpose of providing the Governor with policy recommendations as well as privileged and confidential legal advice." For the portions of the reports it withheld under KRS 61.878(1)(i) and (j), it described those portions as containing descriptions of "actions the Cabinets propose to take in response to certain incidents, media requests, legislative requests, and personnel decisions." For those portions it withheld under the attorney-client privilege, it described the records as containing "summaries of legal issues facing the Cabinet and proposed responses prepared by Cabinet attorneys for their clients" and "legal strategies."

This Office has found that when a public agency invokes an exception to withhold records in its initial response, it must include a description of the records with adequate specificity so that the requester can assess the propriety of the agency's claims. *See, e.g.,* 21-ORD-180 (agency's initial response was inadequate when it only paraphrased the text of KRS 61.878(1)(i) and (j) without describing the contents of the records for which it claimed the exemptions). This Office has also found that an agency must explain how the statutory exceptions it relies on apply to the records it withheld. *See, e.g.,* 21-ORD-035 (agency's response was inadequate when it merely stated "some records" were exempt under KRS 61.878(1)(i) and (j)). Here, the Governor's Office's response sufficiently described the contents of the records and explained how the claimed exemptions applied to them. Its response therefore complied with KRS 61.880(1).

Turning to the merits of the Governor's Office's denial, this Office has stated that the purpose of the preliminary exceptions under KRS 61.878(1)(i) and (j) are "[t]o preserve the integrity of a public agency's internal decision making process by promoting full and frank discussion between and among public employees and officials and by equipping them with the tools needed in hammering out official action." 14-ORD-014. Here, the Governor's Office response described the portions of the records it withheld under KRS 61.878(1)(i) and (j) as preliminary reports related to "actions the Cabinets propose to take in response to certain incidents, media requests, legislative requests, and personnel decisions." It further explained that the reports contained "proposals" for various actions not yet taken, and consist only of "opinions on policy recommendations for the Governor to consider before approving a final action." Because these types of reports express opinions and recommendations about potential future actions, they are exempt from inspection. *See, e.g.*, 23-ORD-024. Accordingly, the Governor's Office did not violate the Act by withholding them.[2]

The Governor's Office also withheld the reports because portions of them are protected by the attorney-client privilege. The Governor's Office's response stated these portions of the reports contained "summaries of legal issues facing the Cabinet," "proposed responses by Cabinet attorneys for their clients," and "legal strategies." The Governor's Office further explains on appeal that the reports contain "sections"

[2] The Appellant questions whether the reports remain preliminary because final action on the matters addressed in the reports may have been taken since the reports were authored. However, he does not specify what action he believes has been taken, and there is no indication that these reports have been "adopted" as part of any such final action. *See Univ. of Ky. v. Courier-Journal & Louisville Times Co.*, 830 S.W.2d 373, 378 (Ky. 1992) (holding that "investigative reports" lose their preliminary status when they are "adopted" as part of the agency's final action).

in which attorneys have provided legal advice or legal strategies, and it has only withheld those sections under the attorney-client privilege. It withheld the remaining portions of the reports under KRS 61.878(1)(i) and (j), which as previously explained, was proper.

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 a lawyer and representatives of the lawyer, KRE 503(b)(2).

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*, 406 S.W.3d at 848–49.

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.* Records protected by the work-product doctrine may be withheld from public inspection under KRS 61.878(1)(l) and CR 26.02(3). *See id.* at 864–65.

Here, the Governor's Office has explained that "sections" of the report contain legal strategies and proposed responses made by attorneys on behalf of their Cabinet

clients. Although this description is minimal, it is sufficient to demonstrate that portions of the reports contain communications between attorneys and representatives of the attorneys which were exchanged for the purpose of providing legal services to their Cabinet clients. As such, those communications are exempt under the attorney-client privilege. KRE 503(b)(2). Additionally, those portions of the reports containing "legal strategies" are exempt attorney work product because they contain the mental impressions of an attorney. Accordingly, the Governor's Office has met its burden to show that the public records it withheld contain information that is protected by the attorney-client privilege or the attorney work product doctrine, and therefore should be excluded from inspection. Thus, it did not violate the Act when it withheld from inspection these sections of the reports.

Finally, the Appellant argues that, even if portions of the reports are exempt, the Governor's Office must redact those portions and provide the remainder of the reports. Under KRS 61.878(4), "[i]f any public record contains material which is not excepted under this section, the public agency shall separate the excepted and make the nonexcepted material available for examination." To support his claim, the Appellant argues, "Attorneys do not prepare the entire reports." However, the Governor's Office did not withhold the reports in their entirety under the attorney-client privilege or attorney work product doctrine. Rather, it withheld only the portions not protected by the attorney-client privilege or work product doctrine under KRS 61.878(1)(i) and (j). Thus, no parts of the reports contain "nonexcepted material" that is required to be separated. Therefore, the Governor's Office did not violate the Act by withholding the reports in their entirety.

In sum, the Governor's Office's response denying the request complied with KRS 61.880(1) because it separated responsive records into categories based on the exemptions that applied, described the contents of the records within those categories, and explained how the claimed exemptions applied to those respective portions of the reports. The Governor's Office also properly relied on KRS 61.878(1)(i) and (j), as well as the attorney-client privilege and attorney work product doctrine, to deny the Appellant's request. Finally, the Governor's Office did not violate KRS 61.878(4) because no portions of the reports contain "nonexcepted material."

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
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s/ Matthew Ray
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Distributed to:

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