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**23-ORD-317**

December 4, 2023

In re: Lindzey Lewis/Morgan County Fiscal Court

**Summary:** The Morgan County Fiscal Court (“Fiscal Court”) violated the Open Records Act (“the Act”) when it redacted portions of records without citing any exception authorizing the redactions or explaining how any such exception applied. The Office cannot resolve the factual dispute between the parties about whether all responsive records have been provided.

***Open Records Decision***

In May 2023, Lindzey Lewis (“the Appellant”) submitted a request to the Fiscal Court seeking copies of 27 categories of records.<sup>1</sup> In general, she sought email correspondence to and from various individuals, several types of financial records and contracts, and other policy documents. The Fiscal Court responded by providing 27 electronic files corresponding to each category of the request, including in total nearly 4,000 pages of records. Some of the electronic files contained redactions, but the Fiscal Court did not state what material was being redacted or why. One response denied a request for correspondence between an individual and the County Attorney because it “is privileged and is not included herein.”

On July 20, 2023, the Appellant submitted a second request to “follow up” on her previous request. She claimed the Fiscal Court had failed to provide certain records she had requested. These included certain vendor contracts, purchase orders, and receipts involving two companies; copies of “all flex and discretionary claims made to the state from 2016 to present”; copies of one employee’s “timecards”; and a copy of a contract between the Commonwealth and the “Morgan County Fiscal Court Coal Severance Obligation.” The Appellant also disputed the Fiscal Court’s previous

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<sup>1</sup> Neither the Appellant’s first request nor the Fiscal Court’s response are dated. The Appellant has not alleged that the Fiscal Court’s response to her first request was untimely.

withholding of certain emails between the County Attorney and the named individual because the correspondence allegedly “pertains to public documentation.” On August 30, 2023, the Fiscal Court responded by stating only that it was “providing the enclosed documents,” amounting to 146 pages, in response to the Appellant’s second request.

On September 12, 2023, the Appellant submitted a third request to the Fiscal Court. This time, she asked to exercise her right of in-person inspection because the Fiscal Court allegedly had failed to provide all the documents she previously had requested. However, she did not identify which documents she thought should have been provided but were not. The Fiscal Court asked the Appellant to clarify which records she claimed were missing, but it does not appear the Appellant described the records she believed were still missing. She then initiated this appeal on November 1, 2023, claiming the Fiscal Court had not provided all responsive records. In her initial complaint to the Office, she did not describe the records she believed should have been provided but were withheld.

After the Office issued notice of the appeal to the Fiscal Court, the Appellant sought to supplement her appeal by providing a list of the records she claimed should have been provided but were not. The Appellant also sought “a thorough review by an impartial third party to ensure the fairness of any redactions made.” In response, the Fiscal Court claims to have provided all responsive records it could locate and argues the Appellant had never previously provided it a list of the allegedly missing documents until after she supplemented her appeal. The Fiscal Court also argues its redactions were proper and faults the Appellant for not identifying the redactions she believes are improper.

As an initial matter, the Office must address its role in disputes under the Act. “If a complaining party wishes the Attorney General to review a public agency’s *denial* of a request to inspect a public record, the complaining party shall forward to the Attorney General a copy of the written request and a copy of the written response denying inspection.” KRS 61.880(2)(a) (emphasis added).<sup>2</sup> “The Attorney General shall review the request and denial and issue . . . a written decision stating whether the agency violated provisions of KRS 61.870 to 61.884.” The Attorney General’s review, therefore, is limited to ensuring that a public agency’s response conforms to the Act’s requirements in both form and timing, and adjudicating whether any claimed exception applies to records the agency withheld. The Attorney General is not a “finder of documents,” and cannot resolve factual disputes between the parties

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<sup>2</sup> A person may also seek the Attorney General’s review of an agency’s response that is short of denial if the person believes the agency is intentionally subverting the Act. See KRS 61.880(4). However, claims of subversion involve “the imposition of excessive fees, delay past the five (5) day period described in [KRS 61.880(1)], excessive extensions of time, or the misdirection of the” requester. *Id.*

about whether all responsive records have been provided. *See* 94-ORD-121. Accordingly, the Office cannot resolve the Appellant's main complaint on appeal, *i.e.*, that the Fiscal Court possess records in addition to the approximately 4,000 pages it has already provided to her.

The Office can, however, consider those portions of the Fiscal Court's response that have denied access to requested records. *See* KRS 61.880(2)(a). When a public agency denies a request, either wholly or partially, it must cite an exception that authorizes its denial and explain how the cited exception applies to the records or portions of records withheld. *See* KRS 61.880(1). Redacting records is tantamount to partially denying access to them. *See* KRS 61.878(4) (requiring an agency to separate exempt information in records from nonexempt information and providing the latter for inspection). Thus, when an agency redacts responsive records it must cite the exception authorizing the redaction and explain how it applies. Here, however, the Fiscal Court did not explain any of the redactions it made.<sup>3</sup> Accordingly, it violated KRS 61.880(1) by failing to explain its partial denial of the Appellant's request.

Similarly, the Fiscal Court denied the Appellant's request for correspondence between the Morgan County Attorney and a specific individual without explaining how an exception applied to the records. The Fiscal Court denied this portion of the request by stating only that the correspondence was "privileged." Presumably, it meant the correspondence was protected by the attorney-client privilege under KRE 503, which is incorporated into the Act by KRS 61.878(1)(l). However, the privilege only applies when a communication is between a lawyer and a client "for the purpose of facilitating the rendition of professional legal services to [a] client." KRE 503(b). Not every communication between a client and a lawyer is privileged because not every communication is for the purpose of providing legal services. *See, e.g., Lexington Public Library v. Clark*, 90 S.W.3d 53, 80 (Ky. 2002) (holding that business advice provided by an attorney to a client is not privileged under the rule). Thus, when a public agency invokes the attorney-client privilege as an exception to deny inspection, it must provide a sufficient description about the nature of the

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<sup>3</sup> The majority of the redactions made were banking and checking account numbers. The Office has previously found that disclosing bank account information places an unreasonable burden on agencies because it would require them to continuously change accounts if the information were disclosed. *See, e.g.,* 22-ORD-112; 16-ORD-012; 06-ORD-167. However, the Fiscal Court also redacted at least two emails among the 1,234 pages of emails it produced in response to the first category of the Appellant's request. The first appears at page 554 of that file and contains the subject line "Debris Tech Estimate through 6/24/2021." The second appears at page 1,062 and contains the subject line "Records Requested for Inspection." While there may be legitimate reasons to withhold these two emails, the Fiscal Court did not provide any justification for doing so in its response or on appeal. The Office will not speculate as to which exceptions may apply to them. Nor does the Office conclude that no exception applies such that the emails are subject to inspection. Rather, the Office notes only that the Fiscal Court was required to cite an exception in support of these redactions and it failed to do so.

documents to demonstrate that the communication was for the purpose of rendering legal services. *See, e.g.*, 22-ORD-262.

Here, the Fiscal Court merely claimed that all correspondence it possesses between the County Attorney and the named individual is privileged. That “limited and perfunctory” response does not comply with the requirement under KRS 61.880(1) that the public agency explain how a claimed exception applies to records it withheld. *See Edmondson v. Alig*, 926 S.W.2d 856, 858 (Ky. App. 1996) (holding a response that merely cites an exception without explaining how it applies violates KRS 61.880(1)). Accordingly, the Fiscal Court violated the Act when it denied access to requested records, either in whole or in part, without explaining how any exception applied to the records, or portions of records, it withheld.<sup>4</sup>

A party aggrieved by this decision may appeal it by initiating an 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 emailed to OAGAppeals@ky.gov.

**Daniel Cameron**  
**Attorney General**

s/ Marc Manley  
Marc Manley  
Assistant Attorney General

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Distribution:

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<sup>4</sup> As stated previously, however, the Office’s conclusion that the Fiscal Court’s response failed to comply with KRS 61.880(1) should not be construed to suggest that communications shielded by the attorney-client privilege must be disclosed. *See* note 3, *supra*. The Office merely concludes that the Fiscal Court’s failure to explain how the claimed exceptions applied to the records withheld violated the Act.