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In re: Jessica Thornton/Louisville Metro Government

Summary: Louisville Metro Government ("Metro") did not violate the Open Records Act ("the Act") when it denied inspection of a privileged memorandum from its attorney to its human resources division. However, Metro violated the Act when it denied a request for emails as unreasonably burdensome.

Open Records Decision

This appeal involves two requests to inspect records Jessica Thornton ("the Appellant") submitted to Metro. Her first request sought four categories of records related to an employee's use of sick leave and "testimonies or documents" related to that employee's complaint against the Appellant. After the Appellant agreed to narrow the scope of her request, Metro provided all requested records except records relating to the complaint the employee had filed against the Appellant and the subsequent investigation. When the Appellant inquired about the status of these records, Metro provided three memorandums, which summarize the results of the investigation, but withheld a "21-page confidential summary of attorney work product" regarding the investigation because it is an "attorney-client privileged communication, made confidential by Kentucky Rule of Evidence 503." The Appellant's only objection to Metro's disposition of her request is its claim that the 21-page memorandum is exempt from inspection.

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). 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). On appeal, Metro explains the memorandum was created

by a private attorney, who had been retained to advise employees in the human resources division. The memorandum summarized the results of the investigation that had been conducted in response to the complaint. Accordingly, it represents a communication from an attorney to a client for the purpose of rendering professional legal services and is exempt from inspection under KRE 503 and KRS 61.878(1)(l).

The Appellant's second request sought emails exchanged between five employees containing the keywords "Jessica Thornton," "Assistant Director of Facilities," "Assistant Director of Facilities and Fleet," or "Administrator." Metro asked the Appellant to provide a date range to narrow the scope of her request and the Appellant specified that she sought all responsive emails from 2014 to the present. Metro responded and informed the Appellant that it had located "over 2,607" potentially responsive emails and that it would be unreasonably burdensome to review them for responsiveness and possible exemptions. *See* KRS 61.872(6). It stated that it takes between three and five minutes for an employee to review each email, and therefore, it would take between "130.35 hours" and "217.25 hours" to facilitate the request. It therefore asked the Appellant to narrow the scope of her request.

The Appellant obliged and removed one of the five employees from her request. She also narrowed the temporal scope of another employee's emails to 3.5 years. This resulted in Metro locating 1,219 responsive emails, which it continued to claim was too burdensome to review. Using the same three-to-five minute calculation, it stated the Appellant's narrowed request would still result in "60.95 hours to 101.58 hours" of review time. Metro then asked the Appellant to narrow her request even further.

The Appellant questioned why so many potentially responsive emails existed, but nevertheless attempted to narrow her request by searching only one employee's account in the past 3.5 years for all of the original keywords and another employee's account from 2014 to present containing only "Jessica Thornton." Metro conducted another search using these parameters and found 210 emails in the first employee's account exchanged during the 3.5-year period, but over 20,000 emails in the second employee's account during the 9-year period. It explained that by searching with the keyword "Jessica Thornton" the results located every email that employee sent to or received from the Appellant, and every email that contained her name, in the last 9 years. The Appellant then asked if Metro could search using only the name "Jessica," but Metro stated that would broaden the scope or the request rather than narrow it. Metro therefore fully denied the Appellant's request as unreasonably burdensome.

Under KRS 61.872(6), a public agency may deny a request to inspect records "[i]f the application places an unreasonable burden in producing public records or if the custodian has reason to believe that repeated requests are intended to disrupt other essential functions of the public agency." However, an agency must substantiate its denial "by clear and convincing evidence." *Id.* When determining whether a

particular request places an unreasonable burden on an agency, the Office considers the number of records implicated, whether the records are in a physical or electronic format, and whether the records contain exempt material requiring redaction. *See, e.g.*, 97-ORD-088 (finding that a request implicating thousands of physical files pertaining to nursing facilities was unreasonably burdensome, where the files were maintained in physical form in several locations throughout the state, and each file was subject to confidentiality provisions under state and federal law). In addition to these factors, the Office has found that a public agency may demonstrate an unreasonable burden if it does not catalogue its records in a manner that will permit it to query keywords mentioned in the request. *See, e.g.*, 96-ORD-042 (finding that it would place an unreasonable burden on the agency to manually review thousands of files for the requested keyword to determine whether such records were responsive).

Neither the number of records at issue nor the fact they must be redacted, in isolation, is dispositive of whether a request is unreasonably burdensome. However, the Office has previously found that searching and sorting through 5,000 emails to separate exempt emails from nonexempt emails was not an unreasonable burden, when it was not clear the emails contained information that was required to remain confidential by law. *See, e.g.*, 22-ORD-255. Here, Metro's first search resulted in 2,607 emails. While Metro may have been able to sustain the need to delay access to those emails under KRS 61.872(5), it certainly has not sustained by clear and convincing evidence that the task places such an unreasonable burden on the agency that the request could be fully denied under KRS 61.872(6). Indeed, Metro stated it could take up to five weeks to complete the review. Moreover, the Appellant agreed to narrow the scope of her request such that Metro's new search lowered the number of responsive emails to 1,219. It certainly is not an unreasonable burden to review 1,219 emails.[1] Accordingly, Metro has not sustained by clear and convincing evidence that the Appellant's request places an unreasonable burden on it and it violated the Act by denying the Appellant's request.

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.

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[1] On appeal, Metro relies on 14-ORD-181 for the proposition that the Act does not require an agency to engage in an "exhaustive search" or embark on a "fishing expedition" for responsive records. But in that decision, the Office held the University of Louisville violated the Act by failing to conduct a search in good faith. The Office noted that only a few employees likely possessed responsive records, and thus, the University could not claim it had to search the records of hundreds of employees. Similarly, here, the Appellant has specifically limited her request to five employees, at most, and Metro *already completed* its search of those employees' email accounts. All that remains is for Metro to review the records it has located for responsiveness and to determine if any are exempt from inspection.

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