COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

RUSSELL COLEMAN
ATTORNEY GENERAL

1024 CAPITAL CENTER DRIVE
SUITE 200
FRANKFORT, KY 40601
(502) 696-5300

24-ORD-038

February 20, 2024

In re: Robert Mattheu/Boyle County Board of Education

Summary: The Boyle County Board of Education ("the Board") violated the Open Records Act ("the Act") when it partially denied a request for records without explaining how the cited exceptions applied to the records it withheld. On appeal, the Board met its burden of proof that certain records were exempt from disclosure under KRS 61.878(1)(i) or protected by attorney-client privilege. The requester did not present a *prima facie* case that the Board failed to conduct an adequate search or failed to provide all responsive nonexempt records.

Open Records Decision

On October 25, 2023, Robert Mattheu ("Appellant") submitted a request to the Board for copies of all emails sent "to or from" 16 named individuals between March 29 and October 20, 2023, containing certain keywords. In response, the Board provided approximately 3,900 pages of emails "with the exception of communications with [the Board's attorney] that are exempt due to the attorney-client privilege, redaction of any personally identifiable information,[1] and items pursuant to KRS 61.878(1)(j)."[2] This appeal followed.

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1 The Appellant has not objected to the redaction of "personally identifiable information."

2 The Appellant's original request was the subject of a previous appeal, 23-ORD-336. The Appellant appealed the District's initial response for, among other things, imposing an excessive fee for electronic records. During that appeal, the District issued a revised response on November 30, 2023. Then, following the decision in 23-ORD-336, the District issued another revised response to the Appellant's request on December 21, 2023, which is the subject of this appeal. Although the December 21 response makes reference to the District's earlier November 30 response, that prior response contained no further details regarding the records withheld by the Board. The Office notes that, although the Appellant did not provide a copy of the November 30 response with this appeal, it is part of the administrative record in 23-ORD-336. Ultimately, the Appellant is challenging the District's most recent response, not its previous one, and therefore, the Appellant has properly perfected his appeal by providing a copy of his request and the agency's response that he is challenging. *See* KRS 61.880(2)(a).

When a public agency denies a request under the Act, it must give "a brief explanation of how the exception applies to the record withheld." KRS 61.880(1). The agency's explanation must "provide particular and detailed information," not merely a "limited and perfunctory response." *Edmondson v. Alig,* 926 S.W.2d 856, 858 (Ky. 1996). "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). Here, the Board merely stated that some records were exempt under KRS 61.878(1)(j), but it did not identify those records or explain how the exception applied. Thus, the Board violated the Act.

On appeal, the Board explains that all the records it withheld under KRS 61.878(1)(j) were preliminary drafts of "final form documents [that] were provided." The exception the Board should have cited is KRS 61.878(1)(i), which exempts from disclosure "[p]reliminary drafts, notes, [and] correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency." Preliminary drafts do not lose their preliminary status when the public agency takes final action. *See* 21-ORD-089. Therefore, although the Board cited the wrong exception, it did not violate the Act when it withheld records that are exempt from disclosure under KRS 61.878(1)(i).

The Board's initial response likewise failed to explain in detail how the attorney-client privilege applied to the communications with its attorney. 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).

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. Gen. 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 v. Cincinnati Enquirer*, 406 S.W.3d 842, 848–49 (Ky. 2013).

Here, the Board violated the Act when its initial written response failed to provide a description of the records with enough specificity to permit the Appellant to assess the propriety of the Board's invocation of the attorney-client privilege. On appeal, however, the Board has corrected its initial violation by explaining that all the withheld emails "relate to the rendition of legal services such as the interpretation of a statute." This description, while minimal, suffices to establish that the Board's attorney was acting in his capacity of rendering professional legal services to the Board. Accordingly, the Board did not violate the Act when it withheld these disputed emails under KRE 503.

Finally, the Appellant claims the Board did not provide all nonexempt emails responsive to his request. The Board, however, claims it did. Once a public agency states affirmatively that it does not possess any additional records, the burden shifts to the requester to present a *prima facie* case that additional records do exist. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov't,* 172 S.W.3d 333, 341 (Ky. 2005). If the requester establishes a *prima facie* case that additional records do or should exist, "then the agency may also be called upon to prove that its search was adequate." *City of Fort Thomas,* 406 S.W.3d at 848 n.3 (citing *Bowling,* 172 S.W.3d at 341). To support a claim that the agency possesses responsive records that it did not provide, the Appellant must produce some evidence that calls into doubt the adequacy of the agency's search. *See, e.g.*, 95-ORD-96.

Here, the Appellant claims to have "discovered the existence of one document that [he] should have received, but did not," and is "concerned . . . that there may have been more documents withheld in error or that do not meet the standard for exemption." The Board, however, claims it did provide him the document in question and no further nonexempt records exist. The Office is unable to resolve factual disputes between a requester and a public agency, such as whether the agency provided a particular record. *See, e.g.,* 21-ORD-163. Therefore, the Office cannot find that the Board violated the Act in this case by failing to conduct an adequate search or failing to provide additional records.

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.

Russell Coleman
Attorney General

/s/ James M. Herrick
James M. Herrick
Assistant Attorney General

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Distributed to:

Mr. Robert Mattheu
Stephen Dexter, Esq.
Mark Wade, Superintendent