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-054

March 5, 2024

In re: Brandon Voelker/Ashland Independent School District

Summary: The Ashland Independent School District ("the District") violated the Open Records Act ("the Act") when it denied a request for records without explaining how the exceptions on which it relied applied to each category of records withheld. However, the District did not violate the Act when it denied a request for communications that are exempt under the attorney-client privilege.

Open Records Decision

On behalf of his client, attorney Brandon Voelker ("the Appellant") submitted a request to the District for copies of "all emails, texts, or other communications between any" District employees or the District's agents related to the Appellant's client or his son.[1] In response, the District provided responsive emails.[2] However, the District stated it "is not producing private text messages of District employees, preliminary or investigative reports or memoranda, or communications between District employees and counsel, as such documents are not considered public records and/or are exempt pursuant to KRS § 61.878(1)(i), (j), (l), and/or (s)." It also stated that communications between the District's representatives and legal counsel "are

[1] The Appellant also sought other records related to a private entity, which the District has provided and are not relevant to this appeal. By separate request, the Appellant also asked for any communications between the District's employees related to two other individuals. However, the Appellant did not provide the Office with a copy of that request. As such, any dispute related to the Appellant's second request is not properly before the Office. *See* KRS 61.880(2)(a) (requiring a person seeking the Office's review of an agency's denial of a request to inspect records to provide a copy of both the original request and the agency's response). Regardless, the District states on appeal that is does not possess any records responsive to the Appellant's second request.

[2] Although the Appellant submitted his request on December 28, 2023, the District did not respond until January 26, 2024. It is not clear when the District received the Appellant's request, but the Appellant has not challenged the timeliness of the District's response.

An Equal Opportunity Employer M/F/D

subject to the attorney-client privilege and are also exempt under KRS § 61.878(1)(l) and KRE 501." This appeal followed.[3]

If an agency denies a request to inspect records, 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 Fort 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).

Here, the District's initial response adequately explained some exceptions on which it relied, but failed to adequately explain how, or to what records, other exceptions applied. For example, the District denied the Appellant's request to the extent he sought any text messages contained on privately owned devices by explaining that such messages are not "public records" within the meaning of KRS 61.870(2) because they are not in the District's possession or being used for any official purpose. But the District did not state whether any responsive text messages existed on District-owned devices, and, if so, why they were being withheld.

---

[3] The District also stated the Appellant's client had submitted a complaint with the Education Professional Standards Board, which was still pending at the time of the Appellant's request. As such, to the extent the Appellant sought records related to that investigation, the District refused to produce them as they "are also considered preliminary drafts, notes, and correspondence within the meaning of KRS § 61.878(1)(i)." The District also withheld any communications maintained in its employees' personnel files. The Appellant has not challenged these portions of the District's response.

On appeal, the Appellant does not challenge the District's claim that text messages on privately owned devices are not subject to inspection. However, the Appellant correctly notes that, "to the extent the District has provided the phone and/or is in possession of emails, text or other communications regarding District Employees and [the Appellant's client], they are required to be turned over." The Appellant argues that the District must possess some responsive text messages because it also invoked the "preliminary" exceptions under KRS 61.878(1)(i) and (j). Indeed, the District's initial response lumped all categories of records together and said they were all "exempt pursuant to KRS § 61.878(1)(i), (j), (l), and/or (s)." The District's initial failure to explain how each exception applied to each category of record makes it difficult for the requester to determine the propriety of any of the claimed exceptions. As such, the District's "limited and perfunctory" response violated the Act. *Edmondson*, 926 S.W.2d at 858.

On appeal, the District has clarified that it has only issued cell phones to three of its employees. No responsive text messages exist on two of those cell phones. However, the cell phone issued to the Superintendent *does* contain text messages related to the Appellant's client. Nevertheless, the District explains it is currently involved in litigation with the Appellant's client and all the responsive text messages were exchanged between the Superintendent and the District's legal counsel. As such, the District claims these text messages are privileged attorney-client communications.

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

An Equal Opportunity Employer M/F/D

assess the propriety of the agency's claims, then the public agency will have discharged its duty.[4] *See City of Fort Thomas*, 406 S.W.3d at 848–49.

Here, the District explains that it is involved in litigation with the Appellant's client and the Superintendent has communicated with legal counsel through text messages. Although the District has not explicitly stated that the text messages were exchanged to facilitate legal services in connection with that litigation, that connection is clearly implied. Thus, the District's explanation, although minimal, is sufficient for the Office to conclude that the text messages it withheld are within the scope of the privilege. Accordingly, it did not violate the Act by withholding them.[5]

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/ Marc Manley
Marc Manley
Assistant Attorney General

#51
Distributed to:
Brandon Voelker
Mitchell Hall, Jr.
Sean Howard

---

[4] The District's initial response merely stated that "communications between the District and its representatives and [legal] counsel are subject to the attorney-client privilege and are also exempt under KRS § 61.878(1)(l) and KRE 501." However, the communications must be made for the purpose of facilitating legal services. Thus, the District's initial response was deficient because it drew no connection between the communication withheld and the legal services being provided. Moreover, the District did not clearly state it possessed such communications and was, in fact, withholding them under the privilege.

[5] Although it has not expressly abandoned its prior reliance on KRS 61.878(1)(i) and (j), the District has not argued on appeal that these exceptions apply to the withheld text messages. As explained previously, it is not clear why the District invoked the preliminary exceptions because it did not state which records it was withholding under those exceptions, other than records related to an ethics complaint that had been filed and which the Appellant did not request. Regardless, because the District properly withheld these communications under the attorney-client privilege, it is unnecessary to determine whether they are also exempt under KRS 61.878(1)(i) or (j).