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-062

March 15, 2024

In re: Gretchen Stephenson/Planning and Development Services of Kenton County

Summary: Planning and Development Services of Kenton County ("the agency") violated the Open Records Act ("the Act") when it denied a request for records without sufficiently explaining how an asserted privilege applied. The agency also violated the Act when it denied a request for pleadings because they were in the possession of its attorney. However, the agency did not violate the Act when it did not provide records that do not exist or records that were "notes" exempted from disclosure under KRS 61.878(1)(i).

Open Records Decision

On February 6, 2024, Gretchen Stephenson ("Appellant") requested "[e]mails, [t]elephone conference notes, meeting notes and text messages" from January 2021 through December 2023 relating to a specific construction proposal, including "correspondences/notes between" the agency and the mayor, council members, the city attorney of Park Hills, three named individuals, and all Board of Adjustment members. The Appellant also requested the agency's "[p]leadings, filings, motions and orders granted" from specific litigation brought against the agency.

On February 16, 2024, after the agency had provided some responsive records, the Appellant inquired about the absence of certain motions filed by the agency in the litigation. She also asked about allegedly absent emails between the agency, its attorney, and the Park Hills city attorney. In response, the agency stated that "[a]ll correspondence/emails" had been included and that it did "not maintain copies of pleadings and all communications with its counsel are protected by Attorney/Client privilege." The Appellant then asked the agency "which exemption [it was] using to refuse access to the emails." After receiving no response to this inquiry, the Appellant initiated this appeal.

Subsequently, the agency provided a supplemental response to the Appellant, consisting of "several emails" it had determined "are not protected by attorney-client

privilege since a third party was copied." The agency noted, however, "that there are other emails between [its] legal counsel, counsel assigned to [the agency] by [its] insurance carrier and [agency] staff that are protected under attorney-client privilege (KRS 61.878/Rule 503) and therefore are not being provided." In response, the Appellant stated she "was not seeking" emails between the agency's staff and its attorneys, but rather emails between the Park Hills city attorney and the agency's "staff and attorney." The agency responded that it has already provided all responsive emails where a third party, such as the Park Hills city attorney, was included, and has withheld only "emails between [agency] legal counsel, counsel assigned to [the agency] by [its] insurance carrier and [agency] staff that are protected under attorney-client privilege (KRS 61.878/Rule 503)."

When a public agency denies a request under the Act, it must state the applicable exception under KRS 61.878(1) and 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 agency's initial response failed to identify an exception to the Act or explain how it applied to the withheld records.

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 proving the privilege applies. 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 agency identified the withheld emails as "communications with its counsel," but it failed to describe the records with enough specificity to permit the Appellant to assess the propriety of the agency's invocation of the attorney-client privilege. It is not sufficient to claim the communications were between the attorney and the client; rather, they must also have been "made for the purpose of facilitating the rendition of professional legal services." KRE 503(b). The agency therefore violated the Act when it initially failed to explain how the attorney-client privilege applied to the withheld emails.

On appeal, however, the Appellant has clarified she did not intend to request communications that were strictly between the agency and its attorneys. Thus, any such records would be outside the scope of the request. Further, because the agency has subsequently provided the communications involving an attorney, the client, and a third party, any dispute regarding those particular communications is now moot. *See* 40 KAR 1:030 § 6.

On February 20, 2024, in further correspondence relating to this appeal, the Appellant listed 19 specific items she alleges were wrongfully withheld. In response, the agency states it has "triple checked for items requested" and explains where all but five of them can be located within the records it has already provided.[1] Two of those remaining five items are described as "[n]otes from a telephone conference" with four named individuals in April 2021 and "[c]orrespondence between [the agency and the Park Hills city attorney] on setback information" in November 2022. The agency states these two records do not exist.

Once a public agency states affirmatively that a record does not exist, the burden shifts to the requester to present a *prima facie* case that the requested record exists. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov't,* 172 S.W.3d 333, 341 (Ky. 2005). A requester's bare assertion that an agency must possess requested records is insufficient to establish a *prima facie* case that the agency actually possesses such records. *See, e.g.*, 22-ORD-040. Rather, to present a *prima facie* case that the agency possesses or should possess the requested records, the requester must point to a statute, regulation, or some other factual support for the contention. *See, e.g.,* 21-ORD-177; 11-ORD-074. Here, the Appellant has not established a *prima facie* case that the alleged notes and correspondence exist. Accordingly, the City did not violate the Act by failing to provide these two documents.

[1] To the extent a factual dispute may exist between the parties as to whether a particular record was provided, the Office is unable to resolve such disputes. *See, e.g.,* 21-ORD-163.

The remaining three items the Appellant lists are records allegedly in the possession of the private attorney who represented the agency in the litigation to which the Appellant's request pertains. Two of these items are notes from telephone conferences between the Park Hills city attorney and the agency's attorney in May and August 2021. The third includes "[v]arious pleadings sent to" the Park Hills city attorney by the agency's attorney in September 2021. Regarding each of these three items, the agency asserts its private attorney is not an agency employee and the agency "does not maintain records on [his] behalf."

The initial question, therefore, is whether records in the possession of the agency's attorney that relate to agency litigation are public records under the Act. The definition of "public record" includes "all books, papers, maps, photographs, cards, tapes, discs, diskettes, recordings, software, or other documentation regardless of physical form or characteristics, which are prepared, *owned,* used, in the possession of *or* retained by a public agency." KRS 61.870(2) (emphasis added). Because the definition uses the disjunctive "or," records are "public records" if they are "owned . . . by a public agency," even if they are "in the possession of" someone outside the agency. *See, e.g.,* 23-ORD-344. This includes records in the possession of a private attorney relating to his representation of a public agency, because the file is "owned" by his client, the public agency. *See, e.g.*, 20-ORD-115; 06-ORD-032.[2] Accordingly, the records in the attorney's file are "public records" under the Act.

Whether the records are subject to inspection, however, is a different question. "Preliminary drafts, *notes,* [and] correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency," are exempt from public disclosure. KRS 61.878(1)(i) (emphasis added). Therefore, any notes taken by the agency's attorney from a telephone conversation would clearly be subject to that exemption.[3] This leaves only the "[v]arious pleadings sent to" the Park Hills city attorney by the agency's attorney in September 2021. Copies of publicly filed pleadings in a public agency's litigation file are public records of that agency. *See, e.g.*, 12-ORD-216; 10-ORD-060. Therefore, unless the agency can establish some basis for withholding those records, they are subject to public disclosure. Here, the agency has not attempted to do so. Accordingly, the agency violated the Act when it denied the Appellant's request for pleadings related to agency litigation.

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

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[2] This is true even when, as here, the private attorney is paid by an insurance company to defend the agency in litigation. *See* 20-ORD-115 n.1; 00-ORD-207; *see also* KBA Ethics Op. E-340 (July 1990) ("The [Kentucky] Rules [of Professional Conduct] take the view that the insured is the lawyer's client.").

[3] Because KRS 61.878(1)(i) clearly applies to the notes in question, it is not necessary to address whether they would be exempt as attorney work product.

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:

Gretchen Stephenson
Timothy B. Theissen, Esq.
Sharmili Reddy
Lori Remley