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**24-ORD-089**

April 1, 2024

In re: Vivian Miles/Cabinet for Health and Family Services

***Summary:*** The Cabinet for Health and Family Services ("the Cabinet") violated the Open Records Act ("the Act") when it denied a request as too imprecise under KRS 61.872(3)(b). The Cabinet also failed to meet its burden of proof that the attorney-client privilege applied.

***Open Records Decision***

On March 4, 2024, Vivian Miles ("Appellant") requested copies of "[a]ll correspondence/records/emails/texts/Voicemails" between any two of three identified Cabinet employees or the "Office of Legal Services[,] involving any of the following terms: contract, hearing and/or emergency, as related to Brighter Futures or any staff or owners." The Appellant specified the scope of her request was for communications exchanged between August and December 2019. The Cabinet denied the request for two reasons. First, the Cabinet claimed the request "does not precisely describe the records," as required by KRS 61.872(3), because it "does not specify any particular employees within the Cabinet's Office of Legal Services but rather requests all correspondence between the listed Cabinet employees and the Office of Legal Services as a whole." Second, the Cabinet claimed that "any records responsive to [the] request would be communications between the Cabinet's Office of Legal Services and Cabinet employees, which are exempt from disclosure pursuant to the protections of attorney-client privilege under KRE 503, incorporated into the [Act] by operation of KRS 61.878(1)(l)." This appeal followed.

Under KRS 61.872(3)(b), "[t]he public agency shall mail copies of the public records to a person . . . after he or she precisely describes the public records which are readily available within the public agency." A description is precise "if it describes the records in definite, specific, and unequivocal terms." 98-ORD-17 (internal quotation marks omitted). This standard may not be met when a request does not "describe records by type, origin, county, or any identifier other than relation to a subject." 20-ORD-017 (quoting 13-ORD-077). In particular, requests for any and all records "related to a broad and ill-defined topic" generally fail to precisely describe the

records. 22-ORD-182; *see, e.g.*, 21-ORD-034 (finding a request for any and all records relating to "change of duties," "freedom of speech," or "usage of signs" did not precisely describe the records).

Here, the Appellant did not seek "any-and-all records" related to a broad and ill-defined topic. Rather, she sought communications between certain named employees or the Office of Legal Services relating to a specific entity, Brighter Futures, or its staff or owners. Further, the Appellant narrowed the scope of her request to only those communications that contain any of three specific keywords. Still further, the Appellant narrowed the request by limiting its scope to only those communications exchanged during a five-month period.

Although the Cabinet faults the Appellant for not "provid[ing] the names of employees within the Cabinet's Office of Legal Services" who might possess responsive records, the Act does not require the Appellant to do so. Because she seeks copies of records by mail, the Act requires her to precisely describe the *records* sought, not their potential location. The agency is the party responsible for ascertaining the location of responsive records or the personnel who may possess them. *See Univ. of Ky. v. Kernel Press, Inc.*, 620 S.W.3d 43, 48 n.2 (Ky. 2021) ("ORA requests routinely seek 'all documents pertaining to [subject matter].' The responsibility for identifying responsive records and any applicable exception lies with the receiving public agency, not the requester."). Regardless, the Appellant did provide the names of three specific employees who may have corresponded with each other or with the Office of Legal Services, which added even more specificity to her request.

The Cabinet argues it should not have "to determine the name of every single attorney and staff member employed by the Cabinet" between August and December 2019 to conduct a search. But the Cabinet cannot claim the Appellant has greater knowledge of its personnel than it does. It is disingenuous for the Cabinet to claim ignorance of who works, or previously worked, in its Office of Legal Services as a basis to deny the Appellant's request.[1] The Cabinet also claims it does not know the names of the owners or employees of Brighter Futures, but that question can be addressed to the employees the Appellant named and the employees in the Office of Legal Services who dealt with Brighter Futures, as "employees in possession of responsive [records] would be in the best position to search for them." 23-ORD-304.

The Office has previously found that a request for any emails sent or received by agency personnel containing certain keywords is not a vague request. *See, e.g.*, 23-ORD-006 (involving emails of 13 employees); 23-ORD-010 (same); 23-ORD-230

[1] Of course, if records from 2019 no longer exist because they were destroyed following an employee's departure and in conformity with an applicable retention policy, then the Cabinet could certainly deny the request on that basis. But before claiming no responsive records exist, the Cabinet must first search for them.

(emails of 30 employees). As stated in 23-ORD-230, "The fact the agency may employ 30 people reflects the burden of the search, not the inability to conduct one because the agency cannot determine what is being sought." Here, the fact that the Cabinet may employ numerous people in its Office of Legal Services may make its search burdensome, but it does not make the Appellant's request any less specific. *See* 24-ORD-048. Simply put, the Appellant's request only requires the Cabinet to ask certain employees to search for three keywords in their communications if they have dealt with the entity known as Brighter Futures. As such, the request is sufficiently specific for the Cabinet to conduct the search the Act requires. Thus, the Cabinet violated the Act when it denied the Appellant's request under KRS 61.872(3)(b).

The Cabinet also claims all responsive records that include the Office of Legal Services would be protected by the attorney-client privilege. 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). 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).

The Cabinet must describe the records with enough specificity to permit the Appellant to assess the propriety of its privilege claim. *See* 24-ORD-062. It is not sufficient to claim the communications were between the attorney and the client; rather, they must also have been confidential and "made for the purpose of facilitating the rendition of professional legal services." KRE 503(b). Here, the Cabinet claims any communications involving the Office of Legal Services would be privileged. But, in this case, the Cabinet cannot know the content or purpose of any responsive records, or whether the communications were confidential, because it has not even searched for them. Thus, the Cabinet has not met its burden of proof under

KRS 61.880(2)(c) that the attorney-client privilege applies.[2] Accordingly, the Cabinet violated the Act when it denied the Appellant's request on the basis of attorney-client privilege without adequate justification.[3]

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
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Assistant Attorney General

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Distributed to:

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[2] If, however, the Cabinet conducts a search for responsive records and finds communications that are indeed privileged, it may reassert the privilege with respect to those discrete communications, so long as it provides sufficient detail to allow the requester to determine the propriety of the privilege. *See City of Fort Thomas*, 406 S.W.3d at 848–49.

[3] The Appellant has provided an email she claims is *prima facie* evidence that responsive records exist. However, the Cabinet has not denied that any records exist.