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24-ORD-111

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In re: Scott Romano/Scott County Attorney's Office

Summary: The Scott County Attorney's Office ("the agency") violated the Open Records Act ("the Act") when it denied a request for records without explaining how the cited exemptions applied to the records it withheld. On appeal, the agency failed to carry its burden to show that KRS 61.878(1)(j), the attorney-client privilege, or the attorney work-product doctrine applied to withhold records.

Open Records Decision

On March 24, 2024, Scott Romano ("Appellant"), requested to inspect "emails, text messages and record of phone calls" exchanged between the members of the Scott County Fiscal Court, the Scott County Attorney, the Scott County Judge/Executive, or the county's human resources director regarding open records requests he submitted from January 1 to March 24, 2024. In a timely response, the agency stated, "To the extent that any such records exist, the requested records are exempt from inspection" under KRS 61.878(1)(j) and (l). The agency quoted the language of the two subsections and further stated, "To the extent that they exist, any communications between the attorneys and [the two other named persons] and/or members of the Fiscal Court are protected by attorney-client privilege, codified at KRE 503, and incorporated into the [Act] by operation of KRS 61.878(1)(l)." This appeal followed.

Under KRS 61.880(1), a public agency must, within five business days, determine "whether to comply with the request" and notify the requester "of its decision." In responding to a request, an agency's "first obligation [is] to identify responsive records," not simply to "den[y] the request based on what a hypothetical [set of records] *might* contain." 19-ORD-194; 15-ORD-109. If a requested record does not exist, the public agency must affirmatively state as much. *See, e.g.,* 22-ORD-038. Thus, an agency violates the Act when it fails to determine whether any responsive records exist. *See, e.g.,* 19-ORD-194.

Furthermore, 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." *Kentucky New Era, Inc. v. City of Hopkinsville,* 415 S.W.3d 76, 81 (Ky. 2013). An agency does not comply with KRS 61.880(1) when, as here, it fails to identify the records it is withholding or explain how the claimed exemptions apply to them. *See, e.g.,* 21-ORD-169.

KRS 61.878(1)(j) exempts from public disclosure "[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended." Here, however, the agency merely quoted the language of the statute without explaining how it applied to the particular records it withheld.

Similarly, although the agency cited the attorney-client privilege under KRS 503, it failed to explain how the privilege applied to any particular records. The attorney-client privilege does not apply to every communication between an attorney and a client, but 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. General 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) (providing that the agency's "proof may and often will include an outline, catalogue, or index of responsive records and an affidavit by a qualified

person describing the contents of withheld records and explaining why they were withheld").

Here, the agency 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 either KRS 61.878(1)(j) or the attorney-client privilege. Thus, the agency violated the Act.

On appeal, the agency has provided only minimal additional information about the records withheld under KRS 61.878(1)(j). Specifically, it states, "To the extent that any [responsive] communications exist [they] are exempt from disclosure as preliminary memoranda." Again, the agency fails to confirm or deny that any records exist. It merely identifies a category of records under KRS 61.878(1)(j) to which it claims any hypothetical documents would belong. This is not a sufficient explanation. Records that are exempt under KRS 61.878(1)(j) may lose their preliminary status and become subject to disclosure under the Act if they are adopted as the basis of final agency action. *See Univ. of Ky. v. Courier-Journal & Louisville Times Co.,* 830 S.W.2d 373, 378 (Ky. 1992); *Ky. State Bd. of Medical Licensure v. Courier-Journal & Louisville Times Co.,* 663 S.W.2d 953, 956 (Ky. App. 1983); *City of Louisville v. Courier-Journal & Louisville Times Co.,* 637 S.W.2d 658, 659–60 (Ky. App. 1982). A public agency bears the burden of proof to sustain its action. KRS 61.880(2)(c). When an agency does not address the question of whether preliminary memoranda were adopted as the basis of final agency action, it fails to meet its burden of proof that KRS 61.878(1)(j) applies. *See, e.g.,* 22-ORD-068. Therefore, the agency violated the Act when it denied the Appellant's request under KRS 61.878(1)(j).

With regard to the records withheld under KRE 503, the agency merely claims they are privileged because they are communications between an attorney and a client, without describing the contents or purpose of any of the communications. This is inadequate to meet the agency's burden of proof that the communications were confidential and made for the purpose of providing professional legal services to Scott County. Accordingly, the agency violated the Act when it withheld records under KRE 503.[1]

[1] The Office's finding that the agency's failure to adequately explain how the attorney-client privilege applies to the records does not operate to waive the privilege if some responsive records would indeed fall under the scope of KRE 503. Public agencies do not forfeit the attorney-client privilege by issuing inadequate responses to requests for public records. Further, only a circuit court of competent jurisdiction can compel a public agency to produce records responsive to a request, as the Office's role in these dispute is only to issue a written decision determining whether the agency complied with the Act. *See* KRS 61.880(2). Further, the Appellant claims the attorney-client privilege is unavailable because of the "crime-fraud exception" in KRE 503(d)(1), but a party attempting to invoke the crime-fraud exception must provide at least some evidence that the communications were made in furtherance of a crime or fraud. *See, e.g., Lindsey v. Bd. of Trs. of Univ. of Ky.,* 552 S.W.3d 77, 87 (Ky. App. 2018); *Clark v. United States,* 289 U.S. 1, 15 (1933).

On appeal, the agency additionally asserts the attorney work-product doctrine for any responsive communications involving attorneys. The work-product doctrine "affords a qualified privilege from discovery for documents 'prepared in anticipation of litigation or for trial' by that party's representative, which includes an attorney." *Univ. of Ky. v. Lexington H-L Servs.,* 579 S.W.3d 858, 864 Ky. App. 2018). Records protected by the work-product doctrine may be withheld from public inspection under KRS 61.878(1)(l) and CR 26.02(3). *Id.* "[D]ocuments which are primarily factual, non-opinion work product are subject to lesser protection than 'core' work product, which includes the mental impressions, conclusions, opinions, or legal theories of an attorney." *Id.* Here, however, the agency has not claimed any responsive records were prepared in anticipation of litigation or for trial. Thus, the agency has not met its burden of proof that the work-product doctrine applies. Therefore, the agency violated the Act when it denied 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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/s/ James M. Herrick
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Distribution:

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