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24-ORD-119

May 10, 2024

In re: *Lexington Herald–Leader*/City of Richmond

Summary: The City of Richmond ("the City") violated the Open Records Act ("the Act") when it denied a request for records without explaining how the attorney-client privilege applied to the records it withheld. On appeal, the City met its burden to show that the attorney-client privilege applied to disputed communications. The City also carried its burden of showing that KRS 61.878(1)(i) applies to withhold an anonymous email alleging employee misconduct until the City's investigation concludes and final action is taken.

Open Records Decision

On April 1, 2024, the *Lexington Herald–Leader* ("Appellant") asked the City to provide copies of all emails sent by City commissioners or City employees to a private attorney or any employees affiliated with the attorney's law firm. The Appellant also sought "any complaint documentation filed against" an identified City employee "which alleges misconduct, sexual or racial comments, or unethical practices towards employees."

In a timely response, the City stated the requested emails between the City and the private attorney "are subject to attorney client [*sic*] privilege and are thus exempt from disclosure." Regarding the Appellant's request for "complaint documentation," the City stated, "Upon information and belief, the document referenced in [the] request does exist, however, it is not in the possession of the Official Records Custodian." The City further claimed that, even if its records custodian possessed the document, it would nevertheless be exempt under KRS 61.878(1)(i) as correspondence with a private individual that was not intended to give notice of final action by the City. This appeal followed.

On appeal, the Appellant argues the City's response did not sufficiently explain how the exceptions on which it relied support its denial. 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). 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).

An agency's duty to explain how an exception applies extends to any claim of attorney-client privilege, which 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). "Representative of the client" is defined broadly to include any "person having authority to obtain professional legal services, or to act on advice thereby rendered on behalf of the client." KRS 503(a)(2)(A).

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,* 406 S.W.3d at 848–49.

Here, the City 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 City's invocation of the attorney-client privilege. However, on appeal, the City explains that the law firm in question has been retained to provide legal services to the City, and that "the communications between [the law firm] and the City are made in the course of and relating to the representation secured by the services contract, [and] the City has not authorized disclosure of same." The City's description of the emails on appeal, while minimal, is sufficient to carry its burden of showing that the attorney-client privilege applies. Specifically, instead of just asserting the emails are privileged without explanation, the City has now explained that the attorney works for a private law firm that is on retainer to provide legal services to the City, and that all the City's communications with the attorney and the law firm relate solely to the purposes for which the law firm was retained.[1] As such, the City did not violate the Act by withholding its privileged communications with its attorney.

Unlike its mere assertion that the attorney-client privilege applied to some records, the City's initial response explained in more detail its denial of the request for "complaint documentation." Relying on KRS 61.878(1)(i) and 18-ORD-117, the City claimed the email was from a private citizen, with the expectation of remaining confidential, and the citizen merely "expresses concerns rather than advocating for particular action." As such, the City explained how it believed KRS 61.878(1)(i) applied based on prior decisions of the Office. However, while the City's explanation complied with its requirement under KRS 61.880(1) to provide a "brief explanation of how the exception applies to the record withheld," the Office cannot determine from the record on appeal that the email in question truly constitutes "correspondence with a private individual."

On appeal, the City explains that the email is from an anonymous person who *claims* to be a City employee. The City further explains that the email makes various allegations of impropriety against another City employee. If the anonymous person really is a City employee, and he or she is describing events he or she observed while in that capacity regarding another City employee, then the anonymous person is not a "private individual." Ultimately, the Office cannot resolve factual disputes in the context of an open records appeal. *See, e.g.*, 23-ORD-330 (factual dispute about

[1] Unlike an attorney who is also an employee of the City, who routinely may be a party to communications not related directly to the provision of legal services to the City, private attorneys are less likely to engage in communications for any purpose other than the reason for which they were retained. Further, the Office notes the Appellant only sought emails sent by the City (*i.e.*, the client) to the attorney. It stands to reason that the City would only send an email to its retained private counsel for the purpose of seeking professional legal services from that attorney. The Appellant did not ask for communications sent by the attorney to the City, which may include billing records or invoices. Generally, such records are only privileged to the extent the invoices contain discussions of privileged information. *See Jackson v. Ethicon, Inc.*, 566 F.Supp.3d 757, 767–69 (E.D. Ky. 2021).

whether meeting minutes had been made final); 23-ORD-317 (factual dispute about whether all responsive records were provided). As such, the Office cannot determine whether the anonymous person is a "private individual" or a City employee.

Regardless of whether the anonymous person is a City employee or a "private individual," the City's description of the content of the email more closely resembles a complaint against a public employee. Although the City claims the email is not a "formal complaint," because the person did not comply with the City's policy of filling out the appropriate form and signing his or her name, the email caused the City to initiate an investigation of the subject of the email.[2] Kentucky courts have long held that complaints giving rise to a formal investigation of a public employee may be withheld from inspection under KRS 61.878(1)(i) and (j), but only until the investigation is completed and final action is taken. *See Ky. Bd. of Med. Licensure v. The Courier–Journal and Louisville Times Co.*, 663 S.W.2d 953, 956 (Ky. App. 1983) (holding that "once final action is taken by the [agency], the initial complaints must be subject to public scrutiny"); *Palmer v. Driggers*, 60 S.W.3d 591, 595–97 (Ky. App. 2001) (holding that an employee's resignation before the agency's investigation concluded constituted "final action" such that the initiating complaint lost its preliminary status).[3] Here, the City states the investigation of the employee has not yet concluded. Accordingly, the City properly relied on KRS 61.878(1)(i) to deny the Appellant's request.

A party aggrieved by this decision may appeal it by initiating an action in the appropriate circuit court under KRS 61.880(5) and KRS 61.882 within 30 days from the date of this decision. Under 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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[2] For this reason, the City's claim that it does not "possess" the email is without merit. Presumably, by claiming not to possess the email, the City argues the email is not a "public record" under KRS 61.870(2). The email was allegedly sent to a City commissioner's private email account. But the City commissioner nevertheless informed the City of the email's contents, which subsequently led the City to begin an investigation. In other words, the City *used* the email for an official purpose—to begin an investigation that may result in disciplinary action. As such, the use of the email makes it a "public record," regardless of whether the records custodian currently has physical custody of it. *See, e.g.*, 23-ORD-057; 20-ORD-109.

[3] Contrary to the Appellant's assertion, *Palmer* does not stand for the proposition that complaints against public employees are *never* exempt under KRS 61.878(1)(i) and (j). Rather, the issue in *Palmer* was whether final action had been taken with respect to the investigation. The *Palmer* court held the public employee's resignation was itself the "final action" of the agency, and therefore, the exemptions no longer applied.

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