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25-ORD-077

March 24, 2025

In re: Sarah Thomas/University of Kentucky

Summary: The University of Kentucky ("the University") did not violate the Open Records Act ("the Act") when it withheld confidential attorney-client communications under KRE 503(b). However, the University violated the Act when it failed to grant or deny a request for records within five business days and did not properly invoke KRS 61.872(5). The University did not violate the Act when it denied a voluminous request for records because it would place an unreasonable burden on the agency.

Open Records Decision

This appeal concerns two separate requests for public records submitted to the University by Sarah Thomas ("the Appellant"). On January 9, 2025, the Appellant requested all emails between an Assistant General Counsel and an Equal Opportunity Investigator at the University between June 1, 2024, and January 8, 2025.[1] In response, the University provided some records, but withheld or redacted others for three reasons. First, the University redacted information pertaining to "another IEEO [Institutional Equity and Equal Opportunity] matter, not related to [the Appellant's] complaint," as an "invasion of personal privacy" under KRS 61.878(1)(a). Second, the University withheld materials that were part of an ongoing investigation of the Appellant's complaint by the University's IEEO office and constituted either "[p]reliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency" under KRS 61.878(1)(i) or "[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended" under KRS 61.878(1)(j). Finally, the University invoked the attorney-client privilege under KRE 503(b) to withhold "communications between [its] attorneys and other university officials including requests for legal advice and

[1] The University's response to this request was determined to be untimely in 25-ORD-076.

providing information necessary for the University's attorneys to formulate legal advice." This appeal followed.

The Appellant makes two objections to the University's response. First, she claims the records provided "did not include direct email correspondence between" the two individuals identified in her request, but contained emails that "were not directly exchanged between the two individuals." However, the University has identified certain categories of withheld or redacted records and its reasons for omitting them. The Office cannot resolve factual disputes between the parties, such as a "disparity in the records [the Appellant] expected to be produced but which were not provided by" the University. 18-ORD-100.

The Appellant's second objection is to the University's invocation of 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). 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 a "person having authority to obtain professional legal services, or to act on advice thereby rendered on behalf of the client." KRE 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 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 University characterized the communications in question as "including requests for legal advice and providing information necessary for the University's attorneys to formulate legal advice." While minimal, this description is sufficient to sustain that the withheld communications are protected by the attorney-

client privilege. Therefore, the University did not violate the Act when it withheld those communications.[2]

On January 13, 2025, the Appellant submitted a new request to the University for all emails "sent or received by" three individuals from June 1, 2021, to July 1, 2023, containing the word "neurosurgery" or the abbreviation "NS." The University has identified the three individuals as the "chief medical officer for [the] Chandler Medical Center [and for some time] acting chief medical officer of all of the University's healthcare operations"; the "provost and co-executive vice president for health affairs"; and the University President. In an initial response dated January 17, 2025, the University stated it would "need 45 days to respond" because it must "(1) gather records that are potentially responsive; (2) evaluate those documents to determine if the records are responsive; (3) determine if the responsive documents are exempt; and (4) if the documents are exempt[,] redact the exempt materials." On appeal, the Appellant asserts the University did not provide a "detailed explanation" under KRS 61.872(5) for extending its response time. The University claims it gave a detailed explanation by stating the records must be gathered, evaluated, reviewed, and redacted. However, the Act contemplates that all those actions should be completed within five business days for every request, unless KRS 61.872(5) applies. The University's response did not claim the records were "in active use, in storage or not otherwise available" under KRS 61.872(5) or explain why delay was necessary beyond the normal five-day period provided by KRS 61.880(1).

On appeal, the University argues, in effect, that the reason for delay should have been obvious because the Appellant's request implicated a large number of records. While it is true that persons requesting large volumes of records may "expect reasonable delays in records production," 12-ORD-228, the reasonableness of such a delay "is a fact-intensive inquiry." 21-ORD-045. Furthermore, even if the University had informed the Appellant that the records were voluminous, that alone would not have been a sufficiently "detailed explanation" under KRS 61.872(5). *See, e.g.,* 21-ORD-248 n.2 (finding insufficient the explanation that a request "covers a large number of records; therefore, additional time is necessary to compile and review the requested records and identify any exempt records or records that otherwise require redaction"). Therefore, the University's response did not comply with the Act. *See* 25-ORD-076. Furthermore, because the University received the Appellant's request on January 13, 2025, its final response was due on January 21, 2025, absent a proper invocation of KRS 61.872(5). Therefore, the University violated the Act when it failed to grant or deny the Appellant's request within five business days.

[2] The Appellant claims it was somehow improper for an IEEO investigator to communicate with an Assistant General Counsel regarding an investigation. However, an IEEO investigator, like any University employee, could reasonably be expected to seek advice from legal counsel in the performance of her duties. As long as the communications were confidential and made for the purpose of facilitating the rendition of professional legal services, the attorney-client privilege applies.

On January 31, 2025, after this appeal was initiated, the University issued its final response to the Appellant's January 13, 2025, request. The University denied the request as "unreasonably burdensome" under KRS 61.872(6) due to the volume of responsive records and the time required to review and redact them. Specifically, the University stated there were 1,498 records consisting of 111,697 pages, which would require 1,861.62 hours to review and redact. Alternatively, the University denied the request in part under the Health Insurance Portability and Accountability Act ("HIPAA"), "to the extent that the records are patient-protected information." Additionally, the University asserted other bases for withholding responsive records, including records implicating personal privacy under KRS 61.878(1)(a), protected education records of students under the Family Education Rights and Privacy Act ("FERPA"), preliminary records under KRS 61.878(1)(i) and (j), and confidential attorney-client communications under KRE 503(b).

If a request for records "places an unreasonable burden in producing public records[,] the official custodian may refuse to permit inspection of the public records or mail copies thereof. However, refusal under this section shall be sustained by clear and convincing evidence." KRS 61.872(6). "When determining whether a particular request places an unreasonable burden on an agency, the Office considers the number of records implicated, whether the records are in a physical or electronic format, and whether the records contain exempt material requiring redaction." 22-ORD-221. Of these, the number of records implicated "is the most important factor to be considered." 22-ORD-182.

Here, the University has identified 1,498 records that are responsive to the Appellant's request, consisting of 111,697 pages. Moreover, the University asserts that many of the records are likely to be subject to federal confidentiality laws, such as HIPAA and FERPA. The University estimates, at the rate of one minute per page, it would take over 1,861 hours to review and redact the records. Thus, an individual employee would be required to expend over 46 weeks at 40 hours per week to process the Appellant's request. In 25-ORD-042, the Office found the University had met its burden of "clear and convincing evidence" that it would be unreasonably burdensome to redact 53,343 pages of records where the process would require between seven and 22 weeks of staff time. Here, the number of pages and time for compliance are vastly greater than those in 25-ORD-042.

The Appellant argues the University's estimate is excessive because the University should be able to use electronic methods to identify and exclude emails that may be duplicates, or to "filter" exempt material automatically. However, the Appellant has presented no evidence, nor can it be presumed, that the University possesses such technology or that it would be effective in ensuring proper redaction. Indeed, the University has recently explained it has no such technology and must

review each email "by hand" to determine any necessary redactions. *See* 25-ORD-042. Thus, the fact that the records are electronic does not reduce the burden of compliance here. Accordingly, the University has met its burden of proof under KRS 61.872(6) and therefore did not violate the Act when it denied the Appellant's January 13, 2025, request as unreasonably burdensome.[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.

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/s/ James M. Herrick
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[3] Because KRS 61.872(6) is dispositive of the issue on appeal, it is unnecessary to address the University's alternative grounds for partially denying the request.