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25-ORD-248

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In re: Carrie Straub/Fayette County Public Schools

Summary: Fayette County Public Schools ("FCPS") did not violate the Open Records Act ("the Act") when it withheld privileged attorney-client communications under KRE 503 and investigative materials pertaining to an ongoing investigation under KRS 61.878(1)(i) and (j).

Open Records Decision

Carrie Straub ("the Appellant"), a former FCPS employee, requested "any and all records related to the complaint filed against [her] that led to [her] placement on leave and referral to" the Education Professional Standards Board ("EPSB") in May 2025. The Appellant specified that she sought the "original complaint or misconduct report filed on May 28th[, c]ommunications sent to EPSB[, i]nternal emails/memos about the decision to place [her] on leave[, and a]ny related internal investigations or findings." In a timely response, FCPS provided a copy of its communication to EPSB but denied the remainder of the request under KRS 61.878(1)(a), (h), and (i), explaining that "the records are part of an active administrative investigation and are considered preliminary until the investigation is complete and final action is taken." In response to a request from the Appellant for clarification, FCPS stated the withheld records consisted of a "[p]reliminary investigative report with corresponding exhibits" and "[i]nternal correspondence that includes the initial complaint and discussions regarding the investigation between legal counsel, director of HR, and the investigating officer." FCPS explained that "[f]inal action has not been taken by the investigating agency," and "FCPS cannot reasonably redact or segregate the content without destroying the meaning of the record as the entirety of the record would have to be redacted." This appeal followed.

On appeal, FCPS identifies the withheld documents as "a preliminary investigative report and a series of emails that are related to the investigation," including "the initial complaint that led to the initiation of the investigation and correspondence related to the investigation between the assigned investigator, legal counsel, and district staff." FCPS cites KRS 61.878(1)(i) and (j) for the proposition

that “records from a school’s ongoing administrative investigation are preliminary until final action is taken on the matter.” FCPS also argues that “[i]nternal emails regarding an administrative investigation [are] exempt from disclosure because they are confidential communications with district personnel that were provided to the Office of Legal Counsel for the purpose of facilitating legal services for the district.” In support of this argument, FCPS cites KRS 61.878(1)(k) and (l), KRE 503, and FRE 501.

Under KRS 61.878(3), “[n]o exemption” under KRS 61.878(1) “shall be construed to deny, abridge, or impede the right of a public agency employee . . . to inspect and to copy any record including preliminary and other supporting documentation that relates to him or her.” *Id.* Although it is unclear from the record whether the Appellant was an employee or a former employee of FCPS at the time of her request, this Office has consistently held that KRS 61.878(3) applies to former public agency employees who request records relating to their public employment. *See, e.g.*, 21-ORD-180; 15-ORD-158; 97-ORD-087. However, “a public employee’s right of access does not extend to records that are made confidential by state law, including records protected by the attorney-client privilege or the work product doctrine.” 23-ORD-234.

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 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, FCPS has identified the privileged records as “discussions regarding the investigation between legal counsel, director of HR, and the investigating officer” and as “confidential communications with district personnel that were provided to the Office of Legal Counsel for the purpose of facilitating legal services for the district.” This description, while minimal, suffices to establish that the records withheld under the privilege were confidential communications between representatives of the client and attorneys in their capacity of rendering professional legal services to FCPS. Accordingly, FCPS did not violate the Act when it withheld those communications under KRE 503.

The Appellant also objects to the withholding of the remainder of the investigative records as “preliminary.” KRS 61.878(1)(i) exempts from inspection “[p]reliminary drafts, notes, [and] correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency.” KRS 61.878(1)(j) exempts from disclosure “[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended.” With regard to administrative investigative files, the Office has consistently held that “records related to an ongoing investigation or disciplinary proceeding are preliminary and exempt from inspection under KRS 61.878(1)(i) and (j).” 23-ORD-009 (citing 21-ORD-169; 16-ORD-231; 14-ORD-234). Such records, including the initiating complaint, are exempt from disclosure before the agency has taken final action. *See, e.g.*, 24-ORD-201 (holding “[r]ecords that are part of an ongoing administrative investigation, including the initiating complaint, are exempt from public inspection under KRS 61.878(1)(i) and (j) until final action is taken on the matter”); *see also Univ. of Ky. v. Courier-Journal & Louisville Times Co.*, 830 S.W.2d 373, 378 (Ky. 1992) (holding “investigative materials that were once preliminary in nature lose their exempt status once they are adopted by the agency as part of its action”); *Ky. State Bd. of Medical Licensure v. Courier-Journal & Louisville Times Co.*, 663 S.W.2d 953, 956 (Ky. App. 1983) (holding “once final action is taken by the [agency], the initial complaints must be subject to public scrutiny”). A public agency is not required to release records prior to final disposition of a disciplinary action because “piecemeal disclosure along the path of the decision-making process is not mandatory.” *Univ. of Louisville v. Sharp*, 416 S.W.3d 313, 315 (Ky. App. 2013).

Although KRS 61.878(3) grants a public employee the right to inspect and copy “preliminary and other supporting documentation that relates to him or her,” that right does not extend to “any documents relating to ongoing criminal or administrative investigations by an agency.” *Id.* Accordingly, the Appellant only has a right of access to the investigative materials if the investigation is not ongoing.

In the disciplinary context, final agency action on an internal investigation may take the form of either disciplinary action or a decision to take no action. *See, e.g., Palmer v. Driggers*, 60 S.W.3d 591, 600 (Ky. App. 2001) (finding an agency's acceptance of a police officer's resignation constituted "final action" to a disciplinary proceeding" pending against him because the agency decided to take no action on the complaint). Here, however, FCPS explains that, although the Appellant is no longer employed by FCPS, "the investigation is still ongoing" because FCPS "does not close or cease to investigate cases when an employee leaves the district prior to the completion of said investigation." FCPS states it expects the investigation "to be completed by Fall 2025." Thus, the present case is distinguishable from *Palmer* in that FCPS has not yet decided to take no action on the complaint, but is continuing its investigation.¹ Accordingly, FCPS did not violate the Act when it withheld the investigative materials under KRS 61.878(1)(i) and (j).²

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
James M. Herrick
Assistant Attorney General

¹ The fact that the matter has been referred to EPSB constitutes a reason for FCPS to continue its investigation, as a school district is required to inform EPSB "of the full facts and circumstances" of a matter and "forward copies of all relevant documents and records." KRS 161.120(3)(b).

² The Appellant alleges the documents in the investigative file include a notice placing her on administrative leave and "[g]eneric HR instructions not to enter district property without approval; standard badge/technology collection procedures," which she claims are not exempt preliminary records. However, FCPS does not identify those documents as being among the records withheld. The Office cannot adjudicate disputed questions of fact. *See, e.g., 22-ORD-010*. Furthermore, the Appellant did not request those documents specifically. *See 20-ORD-148* (noting the distinction between a request for records pertaining to an investigation and a request for "specifically identified records that may be used as evidence in an investigation but were not created in the course of the investigation").

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Distributed to:

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