COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

RUSSELL COLEMAN
ATTORNEY GENERAL

1024 CAPITAL CENTER DRIVE
SUITE 200
FRANKFORT, KY 40601
(502) 696-5300

25-ORD-320

October 16, 2025

In re: Devin Buchholz/Department of Veterans' Affairs

Summary: The Department of Veterans' Affairs ("the Department") 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

Devin Buchholz ("the Appellant"), a former employee of the Department, submitted a six-part request for records relating to his "employment, discipline, and separation from the agency." At issue in this appeal are Parts 2, 3, and 5 of the request. In Part 2, the Appellant requested "[a]ll disciplinary records or documentation of any adverse employment actions taken against" him, including "[a]llegations," "[i]nvestigative reports," "[w]itness statements," "[s]upervisor statements," "[w]ritten or verbal warnings," "[r]ecommendation memos," and "[f]inal decision letters or termination notices." In Part 3, he requested "[a]ll internal and external communications that reference [him] by name including former last name (or relevant identifiers such as employee ID)," including "[e]mails, text messages, memos, or messages between [Department] supervisors, HR personnel, or legal counsel," "[c]ommunications with any agency leadership, the Personnel Board, or other state entities," and "[a]ny correspondence with outside counsel, legal consultants, or advisory entities regarding [his] employment or separation." In Part 5, he requested "[a]ny records of complaints made against [him], including anonymous or informal complaints, and any responses, findings, or disciplinary outcomes associated with those."

In a timely response, the Department granted the request in part but withheld "54 pages of investigative materials"[1] consisting of "protected witness statements, legal conclusions, and internal agency determinations." Specifically, the Department withheld "legal advice provided to the agency and communications made in confidence between legal counsel and agency staff" under the attorney-client privilege in KRE 503. In addition, the Department withheld "preliminary drafts, notes, or recommendations that are part of the agency's internal decision-making process . . . under KRS 61.878(1)(i) and (j) . . . to preserve the integrity of internal deliberations and candid discussions within public agencies, and to prevent the chilling effect that may result from compelled disclosure of pre-decisional materials."[2] This appeal followed.

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." *Id*. Although the Appellant was actually a former employee of the Department at the time of his request, the 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

---

[1] After receiving notice of this appeal, the Department provided 12 of the disputed 54 pages to the Appellant. Because this appeal is now moot as to those 12 pages, the records currently at issue consist of 42 pages. *See* 40 KAR 1:030 § 6.

[2] The Department also redacted "sensitive personal information . . . such as witness identities and private third-party data" under KRS 61.878(1)(a). On appeal, the Appellant states he does not object to these redactions of "[n]ames and identifying personal information."

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) (acknowledging 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 Department identified the privileged records as "legal advice provided to the agency and communications made in confidence between legal counsel and agency staff." This description, while minimal, suffices to establish that the records withheld under the privilege were confidential communications with attorneys in their capacity of rendering professional legal services to the Department. Accordingly, the Department did not violate the Act when it withheld those communications under KRE 503.

The Appellant also objects to the withholding of other investigative materials as "preliminary" and "pre-decisional." 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 Med. 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," 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 Department's investigative materials if the investigation is not ongoing. On appeal, the Appellant claims the investigation is "no longer preliminary" because "disciplinary action was taken and [his] termination was directly tied to the findings of these investigations," which pertained to allegations of sexual harassment. However, the Department disputes this assertion. According to the Department, the Appellant began his employment as a probationary classified employee on June 28, 2023, and was terminated on December 16, 2023, during his six-month probationary period. Under KRS 18A.111(1), "[a]n employee may be separated from his position . . . during [the six-month] initial probationary period and shall not have a right to appeal, except as provided by KRS 18A.095."[3] For this reason, the Department states the Appellant's termination "was not a disciplinary action" but a probationary separation.

Under ordinary circumstances, an internal investigation of this nature is concluded by final agency action, which can 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, the Department claims neither of those events has occurred. On the one hand, the Department states the Appellant was separated from employment during probation, so no disciplinary action was taken. On the other hand, the Appellant is actively pursuing various legal challenges to his separation, including a civil action in the Franklin Circuit Court,[4] a complaint before the Kentucky Commission on Human Rights, and a charge before the Equal Employment Opportunity Commission. In each of those proceedings, according to the Department, the Appellant "is seeking reinstatement to his former position." Accordingly, the Department maintains it has not completed the sexual harassment investigation but is merely holding it in abeyance "until the administrative and judicial proceedings close without the [Appellant's] reinstatement or the agency completes the investigation following any reinstatement." Thus, the Department claims it has not made a decision to take no action because it intends to continue its investigation in the event the Appellant is ordered reinstated.

---

[3] The only appeal rights granted to a probationary employee under KRS 18A.095 pertain to "an action alleged to be based on discrimination due to [any] category protected under state or federal civil rights laws." KRS 18A.095(11)(a).

[4] The Appellant acknowledges he is seeking the records "for ongoing litigations [*sic*] currently before the Franklin Circuit Court related to [his] personnel board appeal."

In response to a further inquiry from this Office, the Department has provided a copy of the Appellant's notice of termination dated December 15, 2023. The notice did not state "[t]he specific reasons for dismissal," which must be provided to a tenured employee under KRS 18A.095(2)(a), as the Appellant held only probationary status at the time. Thus, the termination was not a "disciplinary action" in the sense that it was not an action governed by the notice requirements of KRS 18A.095. However, the Department explains the "Appellant was terminated for cause during his probationary period." Nevertheless, the Department claims the "Appellant was not terminated for reasons due to [the] investigation."

Disputing this claim, the Appellant provides a motion to dismiss filed with the Kentucky Personnel Board on April 3, 2024, in which the Department stated, "By November 28, 2023, approximately 10 female nursing employees had brought complaints against [the Appellant] related to the creation of a toxic work environment. *At the conclusion of the investigation*—and based on the totality of the circumstances—[the Appellant] was dismissed" (emphasis added). From this language, the Appellant infers that the investigation was in fact completed and was used as the basis for his termination. However, in the same motion to dismiss, the Department stated the Appellant "was informed that his dismissal was associated with his probationary performance," including two specific incidents that had resulted in oral and written counseling in September and October 2023. This statement is consistent with the Department's assertion that the Appellant's termination was for cause but was not based on the investigation.

The Appellant also cites an "Employer Statement" form filed with the Office of Unemployment Insurance on March 15, 2024, which asked the question, "What was the final incident that occurred to cause the employer to discharge the claimant?" The Department responded: "On or about November 26, 2023, nursing assistants reported hostile work environment the [*sic*] unit manager and the Assistant Director of Nursing. The matter was investigated by the HR Branch manager and HR manager." Based on this language, the Appellant claims the investigation itself was the "final incident" that caused his termination. However, it appears equally likely that the Department was referring to the *allegations* as the "final incident" leading to the Appellant's termination, rather than the subsequent investigation.[5]

Further, another document in the record tends to indicate the Department's investigation was not in fact completed. The Appellant provides a copy of an "Investigation Report" signed by an "Investigating Manager" on December 14, 2023, the day before the Appellant's notice of termination. The report lists the persons interviewed by the investigator and "Findings," which merely list the allegations

[5] Even assuming those allegations were part of the reason for the Appellant's termination, the issue on appeal is whether the investigation was completed and adopted as the basis of the Department's final action.

made in those interviews. The following section is labeled "Actions – Based on finding, these are the actions taken." In the "Action Taken" column, the investigator wrote that she "[g]ave interview results to Joni" on December 13, 2023. No further action is listed as having been taken. No finding was made as to whether the allegations were substantiated, nor was any recommendation made as to whether disciplinary action was warranted. The next section, "Follow Up," is left completely blank.

From the totality of the record, it appears the Department made what it describes as "legal conclusions" and "internal agency determinations" in the course of its investigation but opted to terminate the Appellant from his employment in December 2023, based on work performance, before his probationary period expired later that month. In so acting, the Department left its investigation unfinished and fully intends to resume it in the event the Appellant should be reinstated as the result of litigation.[6] Thus, although the circumstances of this appeal are unusual, the Department has met its burden to show its investigation of the Appellant remains "ongoing" despite his current status as a former employee. *Cf.* 25-ORD-248 (finding a former employee was not entitled to inspect materials pertaining to an investigation that was still ongoing after she left employment). Accordingly, the Department did not violate the Act when it withheld investigative materials under KRS 61.878(1)(i) and (j).[7]

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

[6] It is not for the Office to determine what future actions the Department may take regarding this investigation, but merely that it intends to take some action.

[7] The Appellant further argues he is entitled to inspect the disputed records under the Thompson-Hood Veterans Center's sexual harassment policy. However, "the Attorney General is only authorized under KRS 61.880(2)(a) to adjudicate disputes arising under *the Act,* not issues arising under an agency's bylaws or internal policies." 25-ORD-102 (emphasis in original).

#390

Distributed to:

Mr. Devin Buchholz
Lily Chan Patteson, Esq.