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25-ORD-415

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In re: Ricky Ladd/Graves County School District

Summary: The Graves County School District (“the District”) violated the Open Records Act (“the Act”) when it failed to cite the specific exemption authorizing it to redact public records. However, the District did not violate the Act when it redacted material from attorney billing records on the basis of attorney-client privilege and the work product doctrine.

Open Records Decision

Ricky Ladd (“the Appellant”) submitted a request to the District for “all invoices, and payment records” mentioning the name of the District’s attorney. In a timely response, the District provided copies of the records, but redactions were made to most of the descriptions of services in the attorney’s billing records. This appeal followed.

Under KRS 61.880(1), “[a]n agency response denying, in whole or in part, inspection of any record shall include a statement of the specific exception authorizing the withholding of the record and a brief explanation of how the exception applies to the record withheld.” Here, in its initial response, the District cited no exemption authorizing the redaction of the billing statements, nor did it explain how an exemption applied. Thus, the District violated the Act.

On appeal, however, the District cites as grounds for redaction “[a]ttorney-client privilege and the doctrine of attorney work product[,] incorporated into the [Act] pursuant to KRS 61.878(1)(l), read in conjunction with KRE 403 and CR 26.02.” 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).

The attorney work-product doctrine, on the other hand, “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). “[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, the redacted work-product material appears in the attorney’s bills, which he sent to his client. Because the purported attorney work product “is contained in [the attorney’s] communications to his client, it is not necessary here to consider the work product separately from the attorney-client privilege.” 21-ORD-111.

KRS 61.878(1)(l) operates in tandem with KRE 503 to exclude from public inspection public records protected by the attorney-client privilege. *Hahn v. Univ. of Louisville*, 80 S.W.3d 771 (Ky. App. 2001). Records protected by the work-product doctrine may likewise be withheld from public inspection under KRS 61.878(1)(l) and CR 26.02(3). *See Univ. of Ky.*, 579 S.W.3d at 864–65. However, when a party invokes the attorney-client privilege or the work-product doctrine 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)).

To provide the “brief explanation of how the exception applies to the record withheld” that KRS 61.880(1) requires when an agency denies a request, the agency should provide a sufficient description of the records being withheld under the privilege to allow the requester to judge 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.”).¹

In the case of attorney billing records, a “blanket redaction of all descriptive portions” is improper “without particularized demonstration that each description is privileged.” *Commonwealth, Cabinet for Health & Family Servs. v. Scorsone*, 251

¹ In correspondence with the District, the Appellant has claimed a “privilege log” must be produced for any material redacted under the attorney-client privilege. However, the Office’s decisions have not required a formal privilege log when the agency’s description of the records is sufficient to determine whether the privilege applies. *See, e.g.*, 21-ORD-140; 21-ORD-087.

S.W.3d 328, 330 (Ky. App. 2008). However, a public agency may redact “information such as the names of individuals with whom the [attorney] communicated, the subject matter discussed, topics of research, etc., the disclosure of which ‘could possibly compromise the agency’s [position] by providing insight into its attorneys’ . . . thought processes and legal strategy and could properly be classified as substantive legal matters protected by the attorney-client privilege and work product doctrine.’” 09-ORD-055 (quoting 05-ORD-049). Thus, the agency need only permit inspection of those portions describing, “in general terms, the nature of the services provided such as, for example, ‘review and analyze letter,’ ‘research and analyze,’ ‘preparation of letter,’ ‘preparation for meeting with the Fiscal Court.’” 05-ORD-029.

Here, the District provided billing statements showing the dates of service, the attorney providing services, the hourly rate, hours spent, and total charges for each entry. The District left intact the general terms describing the services provided for each entry, such as “review,” “phone,” “letter,” “draft,” “email,” and “attend board meeting,” while redacting only the more specific descriptions it claims are protected by the attorney-client privilege. Accordingly, the District’s partial redactions to the descriptions of services did not violate the Act.

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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#686

Distributed to:

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