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26-ORD-013

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In re: Jess Clark/Kentucky Department of Education

Summary: The Kentucky Department of Education (“the Department”) did not violate the Open Records Act (“the Act”) when it denied a request for records exempt under KRE 503 and the attorney work product doctrine.

Open Records Decision

Jess Clark (“the Appellant”) submitted a request to the Department seeking a copy of “all EPSB [Education Professional Standards Board] files” regarding a named individual, “including but not limited to all investigatory notes, files, findings, recordings, interviews, transcripts and complaints.” In a timely response, the Department provided the requested records in part, but stated it was “withholding records that are exempt from inspection pursuant to KRS 61.878(1)(l) and the attorney-client privilege,” specifically “attorney’s notes, investigatory materials prepared for litigation, correspondence, and memoranda between agency staff and representatives.” Citing KRE 503 and CR 26.02, the Department explained that “the records contain core attorney work product including the attorney’s conclusion, opinions and legal theories, legal advice to clients, and confidential communications related to legal services.”¹ This appeal followed.

The Appellant makes two arguments on appeal. First, she claims the Department improperly withheld, under the attorney-client privilege, records relating to an investigation conducted by an investigator hired by the Department. The Department describes the withheld records as “emails between the agency’s investigator and the attorney for the EPSB, communications from the attorney

¹ The Department also redacted certain material from the records under KRS 61.878(1)(a); the Family Education Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, as incorporated into the Act by KRS 61.878(1)(k); and the Kentucky Family Educational Rights and Privacy Act, KRS 160.700 *et seq.*, as incorporated into the Act by KRS 61.878(1)(l). The Appellant does not challenge any of those redactions in this appeal.

regarding who should be interviewed and what questions should be asked, [and] the investigator’s memorandum to the attorney.”² According to the Department, “all records in this category are protected by the attorney-client privilege and work product protection.”

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 those between the lawyer and a representative of the lawyer, KRE 503(b)(2). “Representative of the lawyer” is defined broadly to include a “person employed by the lawyer to assist the lawyer in rendering professional services.” 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, 774 (Ky. App. 2001). 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.* Records protected by the work product doctrine may 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.

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 under the Act. 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,

² These records were only identified by the Department in a supplemental response to the request, issued after the Appellant initiated this appeal. However, as both parties have presented arguments regarding the application of the attorney-client privilege to these records, the issue is ripe for review.

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 explains that it “contracts with a third-party investigator [who] is working as a representative of the EPSB attorney [at] all times during the investigation.” Additionally, the Department quotes language from its contract with the investigator stating “all investigations and recommendations will be in consultation with the Office of Legal Services[, which] will provide contractor with all necessary information on each investigation,” and “the investigator will serve as an authorized agent for the KY Department of Education, Office of Legal Services.”

Under this contract, according to the Department, “the attorney provides an investigation memorandum that includes the attorney’s mental impressions and opinions to the investigator listing witnesses to interview, and topics and questions to address during interviews.” After conducting the interviews, the investigator submits an “investigation memorandum” to the attorney that “contains the information obtained by the investigator.” The Department asserts that “[t]he reports, notes, or interviews created by the investigator are at all times under the control and direction of an EPSB attorney and created to help advise the EPSB and to prepare for an administrative hearing.”

“A document need not be created by a party’s attorney to be work-product. The policy of protecting counsel’s work product prior to litigation applies with equal force to the work product of the party’s other representatives, including private investigators.” *Duffy v. Wilson*, 289 S.W.3d 555, 559 (Ky. 2009). In 24-ORD-270, the Office affirmed the Department’s denial of a request for the emails exchanged between its investigator and the EPSB attorney relating to an investigation, the attorney’s instructions regarding the interviews, and the investigation memorandum to the attorney, as “either exempt under the attorney-client privilege [or] core work product created by the investigator to assist EPSB’s attorney in preparation for a potential hearing.” As the facts in this appeal are indistinguishable from those in 24-ORD-270, the Department did not violate the Act when it withheld the communications between its investigator and the EPSB attorney under the attorney-client privilege and the work product doctrine.³

The Appellant’s second argument is that the Department improperly claimed the investigative materials were “exempt as preliminary.” KRS 61.878(1)(i) exempts from disclosure “[p]reliminary drafts, notes, [and] correspondence with private individuals, other than correspondence which is intended to give final notice of final action of a public agency,” whereas KRS 61.878(1)(j) exempts from disclosure

³ Although the Department presents arguments that direct communications between EPSB and its attorney are also subject to the attorney-client privilege or the work product doctrine, the Appellant has not disputed that claim. The Office therefore need not address that issue.

“[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended.” However, the Department did not withhold any records under KRS 61.878(1)(i) or (j), nor did it otherwise assert that any records were “preliminary.” Accordingly, the Department did not violate the Act as alleged by the Appellant.

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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