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26-ORD-024

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In re: Michael McDaniel/University of Kentucky

Summary: The University of Kentucky (“the University”) violated the Open Records Act (“the Act”) when it partially denied a request for records without explaining how the cited exemptions applied to the records it withheld. On appeal, the University carried its burden of showing that KRS 61.878(1)(i) and KRE 503 applied to the withheld preliminary drafts and attorney-client privileged communications.

Open Records Decision

Michael McDaniel (“the Appellant”) submitted a request to the University for “[a]ny documents discussing, explaining, or justifying the reason for removing or amending [Administrative Regulations] section ‘B.1.f.(3) Suspension,’ including internal communications, memos, rationale statements, recommendation letters, or summaries of procedural or legal considerations.”¹ In a timely denial, the University stated, “to the extent that records may exist which are responsive[,] those records are preliminary . . . pursuant to KRS 61.878(1)(i) and (j) and/or attorney-client privileged.” The University provided no further explanation. This appeal followed.

The Appellant argues the University’s response did not sufficiently explain the exceptions to the Act on which it relied. When a public agency denies a request under the Act, it must give “a brief explanation of how the exception applies to the record withheld.” KRS 61.880(1). The agency’s explanation must “provide particular and detailed information,” not merely a “limited and perfunctory response.” *Edmondson v. Alig*, 926 S.W.2d 856, 858 (Ky. 1996). “The agency’s explanation must be detailed enough to permit [a reviewing] court to assess its claim and the opposing party to challenge it.” *Ky. New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76, 81 (Ky. 2013). An agency is not “obliged in all cases to justify non-disclosure on a line-by-line or document-by-document basis.” *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 851 (Ky. 2013). Rather, “with respect to voluminous [open records]

¹ The other portions of the Appellant’s multi-part request are not at issue in this appeal.

requests . . . it is enough if the agency identifies the particular kinds of records it holds and explains how [an exemption applies to] the release of each assertedly exempt category.” *Id.* (discussing the “law enforcement exception” under KRS 61.878(1)(h)). Of course, “if the agency adopts this generic approach it must itself identify and review its responsive records, release any that are not exempt, and assign the remainder to meaningful categories. A category is meaningful if it allows the court to trace a rational link between the nature of the document and the alleged” exemption. *Id.* (quotation omitted). Here, the University merely cited KRS 61.878(1)(i) and (j) without explaining the types of records to which they applied or how each exception applied to the particular records withheld. Thus, the University violated the Act.

The University’s initial response likewise failed to explain how the attorney-client privilege applied to the particular records it withheld. 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*, 406 S.W.3d at 848–49 (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 violated the Act when its initial written response failed to provide a description of the records with enough specificity to permit the Appellant to assess the propriety of the University’s invocation of the attorney-client privilege.

On appeal, the University claims the records withheld under KRS 61.878(1)(i) and (j) fall into two categories: “early drafts of documents” and “communications between various university officials.” KRS 61.878(1)(i) exempts from public disclosure “[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.” A preliminary draft is “a tentative version, sketch, or outline” of a final document. 05-ORD-179. Preliminary drafts “by their very nature are rejected when a final [version] is approved.” 24-ORD-193. Thus, a preliminary draft does not lose its preliminary status when the agency takes final action. *See, e.g.*, 21-ORD-089. Therefore, the University did not violate the Act when it withheld “early drafts of documents” under KRS 61.878(1)(i).

As for the “communications between various university officials,” the University claims these are exempt under KRS 61.878(1)(j). That provision exempts from public disclosure “[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended.” Here, the University describes the internal communications as “recommendations or proposed policies” that resulted in a new set of administrative regulations superseding, among many others, the former regulation known as “B.1.f.(3) Suspension.” As the Office has recognized, “communications containing edits or suggested changes to a preliminary draft” are tantamount to preliminary drafts themselves. 24-ORD-157; *see also* 24-ORD-035; 22-ORD-204; 21-ORD-089; 16-ORD-180. Here, because the internal communications at issue represent the internal process of drafting an administrative regulation, they are exempt under KRS 61.878(1)(i), and it is “the final document [that] becomes available to the public.” 26-ORD-014. Accordingly, the University did not violate the Act when it withheld those communications, and it is unnecessary to consider the application of KRS 61.878(1)(j).

Turning to the records withheld under the attorney-client privilege, the University, on appeal, describes these as confidential “communications between the University’s attorneys and other university officials, seeking professional legal services from the University’s attorneys, including requests for advice, and providing information necessary for the University’s attorneys to formulate legal advice.” While minimal, this description suffices to establish that the withheld communications are protected by the attorney-client privilege. Thus, the University did not violate the Act when it withheld these communications.

In sum, the University violated the Act when it failed to explain, in its initial response, how the asserted exceptions to the Act applied to the records withheld. But the University did not violate the Act when it withheld records that constituted “preliminary drafts” under KRS 61.878(1)(i) or attorney-client privileged communications under KRE 503.

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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