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26-ORD-063

February 24, 2026

In re: WAVE 3 News/Louisville Metro Government

Summary: The Louisville Metro Government (“Metro”) did not violate the Open Records Act (“the Act”) by withholding the requested investigative report its outside counsel prepared for its Department of Human Resources (“HR”) because it was a confidential communication made for the purpose of facilitating the rendition of legal services by counsel to its client and is therefore exempt under KRE 503, which is incorporated into the Act by KRS 61.878(1)(l). Metro’s original response violated KRS 61.880(1) by failing to cite KRE 503 and explain how it applied to the record that Metro was withholding.

Open Records Decision

On December 18, 2025, Alena Noakes of WAVE 3 News (“the Appellant”) submitted a request to Metro via its online NextRequest platform asking for “a copy of the investigative report compiled by outside counsel regarding the conduct of Codes and Regulations leadership since January 2025.” The Appellant noted that, “According to a note on multiple HR case reports dated 7/25/25, the report and remaining complaints were provided to the Cabinet for Economic Development Executive Director Jeff O’Brien for further management.”¹ In addition, the Appellant requested a copy of “documentation of what actions, if any, were taken by O’Brien and/or any other member of [Metro] staff to address the conclusions/results of that investigation.” On December 29, 2025, Metro provided the Appellant with a copy of a memorandum directed to Richard Price, Director of the Department of Codes and Regulations (“Codes and Regulations”), and O’Dell Henderson, Assistant Director of Codes and Regulations, by Metro’s HR Department that summarizes the results of the investigation by the McBrayer Law Firm (“McBrayer”), which Metro retained to investigate the complaints and report its findings. Metro also provided the Appellant with redacted copies of the underlying complaints but did not disclose the requested investigative report created by McBrayer. The Appellant subsequently questioned

¹ Mr. O’Brien is the direct supervisor of the Director of the Department of Codes and Regulations.

Metro's withholding of the investigative report, asserting that Metro had waived any privilege by releasing the memorandum containing McBrayer's findings. Without further explanation, Metro stated, "Pursuant to KRS 61.878(1)(l) the report will not be released, as it is protected by the attorney-client privilege and thus not subject to release." Metro did not cite Kentucky Rules of Evidence ("KRE") 503, where the attorney-client privilege is codified, or explain how it applies under these circumstances; KRE 503 is, however, incorporated into the Act by KRS 61.878(1)(l). This appeal followed.

Under the Act, a public agency must respond to a request for records "within five (5) days, excepting Saturdays, Sundays, and legal holidays, after the receipt of any such request." KRS 61.880(1). A public 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." KRS 61.880(1).

Metro's original response merely cited the attorney-client privilege but did not provide any explanation of how it applied to McBrayer's investigative report, as KRS 61.880(1) requires. *See also* KRS 61.880(2)(c). 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). In other words, "[t]he 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). However, a public 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). 26-ORD-024. Metro's original response cited the attorney-client privilege but failed to provide a "brief explanation" of how it applies here, both of which KRS 61.880(1) requires. Therefore, Metro's "limited and perfunctory response" violated the Act. *See also* KRS 61.880(2)(c).

However, 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 disclosure public records that are protected under the attorney-client privilege. *Hahn v. Univ. of Louisville*, 80 S.W.3d 771 (Ky. App. 2001). 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. *City of Fort Thomas*, 406 S.W.3d 842 at 848–49 (stating 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"); 25-ORD-077.

On appeal, Metro now states how the attorney-client privilege codified in KRE 503 applies. Metro explains it operates an "ethics tipline" that allows both Metro employees and members of the public to report alleged violations of Metro's Code of Ethics. Beginning in January 2024, the Metro tipline received multiple complaints of alleged misconduct by the Director and the Assistant Director of Codes and Regulations. Metro hired McBrayer to investigate the complaints "and provide a legal analysis of the alleged misconduct." Upon completing the investigation, McBrayer provided Metro with a "report that included its findings and analysis." On July 24, 2025, Metro's HR Department prepared a memorandum notifying leadership at Codes and Regulations of McBrayer's findings and requiring the Director and the Assistant Director to complete specific leadership training courses in light of those findings. Metro provided the Appellant with a copy of this memorandum.

Metro then argued, "The attorney-client privilege consists of three elements: The relationship of attorney and client, communication by or to the client relating to the subject matter upon which professional advice is sought, and the confidentiality of the expression for which the protection is claimed."² Metro also noted, "The term 'client' is defined to include 'a person, including a public officer, corporation, association, or other organization or entity, *either public or private*, who is rendered professional legal services by a lawyer. . . ." KRS 503(a)(1)." Finally, Metro asserted, "The privilege extends to communications from attorney to client 'if they constitute legal advice or tend directly or indirectly to reveal the substance of a client confidence.'"

Metro cures the deficiencies in the original response by explaining on appeal that a private law firm, McBrayer, created the investigative report, after Metro retained McBrayer to investigate complaints that Metro received on its tipline concerning leadership at Codes and Regulations and to advise employees in Metro's HR Department. The engagement of McBrayer by Metro "created an attorney-client relationship," and the report "includes information shared in confidence between the client (Human Resources) and the attorney (McBrayer) for the purpose of obtaining

² See 08-ORD-022 (citing Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 5.10 (Michie, 3rd ed. 1993), citing in turn *United States v. Schwimmer*, 892 F.2d 237, 243 (2nd Cir. 1989)).

legal advice.” Further, the results of McBrayer’s investigation “include the attorney’s impressions and legal opinions concerning the alleged misconduct and whether the conduct constitutes a violation of Louisville Metro ethics rules or policies.” Accordingly, it represents a confidential communication from an attorney to a client made for the purpose of rendering professional legal services and is exempt from public disclosure under KRE 503 and KRS 61.878(1)(l). Thus, Metro did not violate the Act by withholding the requested investigative report on that basis.³

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/ Michelle D. Harrison
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Distributed to:

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³ Because KRS 61.878(1)(l) and KRE 503 justify Metro’s denial, consideration of its alternative basis for denial is unwarranted.