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OFFICE OF THE ATTORNEY GENERAL

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26-ORD-080

March 10, 2026

In re: Marche Campbell/London City Council

Summary: The London City Council ("the Council") violated the Open Records Act ("the Act") when it denied a request for records without explaining how the attorney-client privilege applied to the records it withheld. On appeal, the Council met its burden of proof that certain records were protected by the attorney-client privilege. The Council did not violate the Act when it did not provide records it does not possess.

Open Records Decision

Marche Campbell ("Appellant") submitted a ten-part request related to ordinances introduced at the Council's December 1, 2025, meeting. Specifically, the Appellant requested: (1) draft versions of five ordinances; (2) financial records[1] related to the impact of those ordinances; (3) any communications between the City Council's members, the City's mayor, the City Clerk, any department heads, any outside counsel, any outside consultant, and lobbyist, organization, or citizen involved in drafting the ordinances; (4) metadata for the ordinances; (5) records used at the December 1, 2025, Council meeting; (6) legal memos related to the ordinances; (7) department impact assessments; (8) budgeting documents used to prepare a particular ordinance; (9) documents showing who drafted a particular ordinance; and (10) records showing whether the ordinances were made available to the City Council's members prior to the December 1 meeting.

In response, the Council granted the request in part and denied it in part. To start, the Council provided an email between its counsel and the City Clerk containing the ordinances, a thumb drive containing "data utilized in formulating the

[1] Specifically, the Appellant sought fiscal impact statements, cost impact sheets, budget analysis, impact on revenues or expenditures, department cost projections, staffing cost calculations, or any other financial analysis records.

pay plan," and a "copy of documents read at the December 1, 2025," meeting. The Council stated that it possessed four categories of responsive emails between its counsel and its members, which it was withholding under the attorney-client privilege and KRE 503. The Council explained that the attorney-client privilege applied because the communications were between "some of its members" and its "legal counsel."[2] The Council further stated that, "[o]ther than the foregoing exempt materials, there are no other responsive documents." This appeal followed.

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 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)

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)..

[2] The Council also withheld the records under KRS 61.878(1)(i) and (j) "to the extent that [the Appellant's] request seeks draft documents[,] preliminary memoranda, [or] communications with private individuals."

Here, the Council's initial invocation of KRE 503 merely stated that the requested communications "involve[ ] communications between City Council and/or some of its members with its legal counsel, and is exempt." This statement failed to provide a description of the texts with enough specificity to permit the Appellant to assess the propriety of the Council's invocation of the attorney-client privilege. On appeal, however, the Council has supplemented its response by explaining it withheld four emails containing, respectively, (1) "a draft ordinance and legal advice," (2) "a draft budget ordinance and legal advice regarding same," (3) "a request for legal advice concerning an ordinance," and (4) "legal advice concerning budget issues in light of a lawsuit that had been filed against the City and its City Council." These descriptions are sufficient to determine that the withheld emails are protected by the attorney-client privilege under KRE 503 and KRS 61.878(1)(l). *See, e.g.,* 25-ORD-038. Accordingly, the Council did not violate the Act when it denied the Appellant's request for those text messages.[3]

The Appellant further alleges the Council should have provided additional fiscal analysis records. Once a public agency states affirmatively that no additional records exist, the burden shifts to the requester to make a *prima facie* case that additional records do exist. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov't,* 172 S.W.3d 333, 341 (Ky. 2005). If the requester makes a *prima facie* case that the records do or should exist, "then the agency may also be called upon to prove that its search was adequate." *City of Fort Thomas v. Cincinnati Enquirer,* 406 S.W.3d 842, 848 n.3 (Ky. 2013) (citing *Bowling,* 172 S.W.3d at 341). A requester must provide some evidence to make a *prima facie* case that additional records exist, such as the existence of a statute or regulation requiring the creation of the records or other factual support for the existence of the records. *See, e.g.*, 21-ORD-177; 11-ORD-074. A requester's bare assertion that certain records exist or should exist is insufficient to make a *prima facie* case that the records actually do exist. *See, e.g.*, 22-ORD-040.

To make a *prima facie* case that additional records exist, the Appellant provided records suggesting that the proposed ordinances would have substantial impact on the City. However, even accepting that conclusion as true, it does not make a *prima facie* case that the City possesses financial analysis records suggesting the same. Accordingly, the Office cannot find that the Council violated the Act when it did not provide records it does not possess.

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[3] Because the emails are exempt under the attorney-client privilege, the Office need not address the Council's additional reliance on KRS 61.878(1)(i) and (j).

A party aggrieved by this decision may appeal it by initiating an action in the appropriate circuit court under KRS 61.880(5) and KRS 61.882 within 30 days from the date of this decision. Under 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/ Zachary M. Zimmerer
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Assistant Attorney General

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Distributed to:

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