COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

RUSSELL COLEMAN
ATTORNEY GENERAL

1024 CAPITAL CENTER DRIVE
SUITE 200
FRANKFORT, KY 40601
(502) 696-5300

26-ORD-095

March 13, 2026

In re: Harold Bardin/Kentucky Department of Veterans' Affairs

Summary: The Kentucky Department of Veterans' Affairs ("the Department") did not violate the Open Records Act ("the Act") when it withheld email exempt under the attorney-client privilege or when it did not provide records it does not possess.

Open Records Decision

Harold Bardin ("the Appellant") submitted a five-part request to the Department for records related to him or to his activities on social media.[1] In response, the Department responded to each subpart of the request stating whether responsive records did or did not exist and provided nonexempt responsive records. The Department noted that the Appellant's description of topics was not precise and did not adhere to KRS 61.872(3)(b)'s requirements that a request "precisely describe" the records sought and that all its social media posts were publicly available, but stated that it had opted to conduct a search for responsive records. The Department denied the Appellant's request as to 25 internal emails between its staff and legal counsel under the attorney-client privilege and KRE 503. The Department explained that the emails contained legal advice given to the Department by its legal counsel and communications "made in confidence between legal counsel and agency staff." This appeal followed.

[1] Specifically, the Appellant sought: (1) any records that referenced him, his social media accounts, a social media page belonging to the Department, LinkedIn accounts that reference him, his actions as a veterans' advocate, discussions of his advocacy for veterans, and legal communications regarding his advocacy activities; (2) communications between the Department and the Office of the Governor regarding the same topics; (3) internal Department communications regarding the same topics; (4) communications between the Department and Disabled American Veterans International regarding the same topics; and (5) communications between the Department and the U.S. Department of Veterans Affairs.

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).

Here, the Council's initial invocation of KRE 503 explained that the withheld emails contained communications between Department staff and its legal counsel and contained the counsel's legal advice. Although minimal, this description is 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 Department did not violate the Act when it withheld emails exempt under the attorney-client privilege.[2]

[2] The Appellant also claims a "privilege log" must be produced for any material withheld 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.

The Appellant further complains that he has not received all records responsive to his request. The Department maintains it has provided the Appellant with all responsive 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.

The Appellant asserts that an email produced by the Department, which refers to a specific Department Facebook post, is *prima facie* evidence that similar communications exist. However, the Appellant has not provided this email to the Office. Moreover, based on the Appellant's description of the email, it does not appear to reference any other Department communications and, therefore, would not support a *prima facie* case that similar emails exist. Thus, the Office cannot find that the Department violated the Act by not providing records it does not possess.

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
Zachary M. Zimmerer
Assistant Attorney General

#775

Distributed to:

Harold Ray Bardin
Lily Chan Patteson