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26-ORD-192

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In re: Tina Burnell/Louisville Metro Council

Summary: The Louisville Metro Council ("the Council") did not violate the Open Records Act ("the Act") when it redacted preliminary recommendations, expressions of opinion, and scheduling discussions under KRS 61.878(1)(j); attorney-client privileged communications under KRE 503; and identities of employees receiving "diagnostic coaching" under KRS 61.878(1)(a).

Open Records Decision

Tina Burnell ("the Appellant") submitted a request to the Council for "all public records related to" the payment of $4,500 to The Acorn Group LLC ("Acorn") for consulting services. In response, the Council provided 74 pages of records with various redactions. This appeal followed.

On appeal, the Council explains that in 2025 it "sought the services of a human resources consultant [to] advise on team dynamics, supervisory skills, and professional culture among [its] employees," and Acorn "was selected to provide coaching services," which "involved a series of one-on-one meetings with key employees" and "a series of teem meetings with employees." The Appellant objects to several specific redactions to the records the Council provided, which will be addressed in turn.

First, the Appellant claims the Council "redacted the Statement of Work, proposal, objectives, deliverables, and all related emails as 'preliminary.'" However, the Council points out that the statement of work, objectives, and deliverables[1] appear on pages 24 and 25 of the records it provided, in a document titled "Engagement Objectives and Deliverables," and only two lines are redacted from the objectives with the notation "KRS 61.878(1)(j) preliminary recommendation not finalized." KRS 61.878(1)(j) exempts from disclosure "[p]reliminary

[1] The Council explains that the list of "deliverables" represents the "scope of work invoiced."

recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended." However, records exempt under KRS 61.878(1)(j) may lose their preliminary status and become subject to disclosure under the Act if they are "adopted as the basis of the final action taken." *See, e.g.,* 01-ORD-83 (citing *City of Louisville v. Courier-Journal & Louisville Times Co.,* 637 S.W.2d 658, 659-60 (Ky. App. 1982); *see also Ky. State Bd. of Medical Licensure v. Courier-Journal & Louisville Times Co.,* 663 S.W.2d 953, 956 (Ky. App. 1983); *Univ. of Ky. v. Courier-Journal & Louisville Times Co.,* 830 S.W.2d 373, 378 (Ky. 1992)). Here, the Council states the document produced was a "proposal [that] included a preliminary recommendation for potential future services not included in [the] invoice" to which the Appellant's request pertains. As this redaction relates to a proposal that was not adopted as the basis of final action, the Council did not violate the Act in redacting those parts of the documents provided.

Next, the Appellant complains that the Council redacted what it described as "scheduling notes," or "emails between [the] Council and the vendor discussing possible meeting times and locations and arrangements," under KRS 61.878(1)(i) and (j). Communications concerning "strategies used to plan [a] meeting, including discussions relating to the invitation and agenda, are preliminary to resolution of the ultimate issue" and thus are exempt under KRS 61.878(1)(j) because "the meeting is merely a step along the road to deciding the ultimate issue." *Univ. of Louisville v. Sharp,* 416 S.W.3d 313, 316 (Ky. App. 2016). Accordingly, such records remain preliminary unless they are adopted as the basis of final agency action. *Id.* at 315. Thus, the Council did not violate the Act when it redacted those communications.

The Appellant complains of other redactions under KRS 61.878(1)(j), which the Council described as "opinions and recommendations from the vendor conveyed during consulting." Specifically, the Appellant claims "no finalized forms or documentation were provided" with respect to those opinions and recommendations. An opinion or recommendation that is not adopted as the basis of final agency action does not necessarily result in "finalized forms or documentation." However, the Council explains that the "Engagement Objectives and Deliverables" document is the only "final action" resulting from any preliminary recommendations or statements of opinion. Therefore, the Council did not violate the Act when it redacted opinions and preliminary recommendations under KRS 61.878(1)(j).

Next, the Appellant objects to the redaction of six pages of emails, which the Council explained as follows: "Pages 19–21 are a string of exempt attorney-client privileged email communications between the Jefferson County Attorney's Office and the Acorn Group on behalf of JCAO's Metro Council business office client. Pursuant to Kentucky Rule of Evidence 503, confidential communications made on behalf of a client when rendering legal services are exempt from the [Act] via KRS 61.878(1)(l). That communication also contains responses from Acorn Group which are exempt as

preliminary recommendations not adopted into final action pursuant to KRS 61.878(1)(j).” According to the Appellant, communications between the Jefferson County Attorney’s Office and a vendor that “relate to the expenditure of public funds” are not privileged.

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).

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, 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 Council explains that the Jefferson County Attorney is its legal counsel under KRS 67C.115(5) (“The county attorney shall serve as the legal advisor and representative to the consolidated local government”) and KRS 69.210 (“The county attorney shall give legal advice to the fiscal court or consolidated local government and the several county or consolidated local government officers in all matters concerning any county or consolidated local government business within their jurisdiction.”). Thus, an attorney-client relationship exists between the Council and the County Attorney’s Office. The Council further explains an Assistant County Attorney “provided legal advice to [the] Council on personnel issues and the selection of human resource consultants.”

The Council states the withheld communications consist of "two email threads from April 29, 2025." The first discussion was between an agent of the Council, identified as "Mr. Ernest," and an Assistant County Attorney "regarding proposed payment terms" for the services of Acorn. As no third parties were included in this discussion and it pertained to a matter on which the Assistant County Attorney was providing legal advice, it constitutes a confidential communication within the attorney-client relationship. Accordingly, this discussion was properly withheld as a privileged communication under KRE 503.

The second discussion, however, occurred among Mr. Ernest, the Assistant County Attorney, and a party identified as "Maryanne Elliott from the Acorn Group," concerning questions about "the timing of events under the proposed terms." Here, although the Council's attorney was a party to the discussion, a third party was also included. Because the proposed payment terms for Acorn's prospective services to the Council were still under discussion, it is not apparent how Acorn's representative could be considered a "representative of the client" in the context of these communications. Therefore, the discussions on April 29, 2025, to which Acorn was a party, were not confidential communications subject to the attorney-client privilege.

But the Council also characterized the discussion with Acorn's representative as "preliminary recommendations not adopted into final action pursuant to KRS 61.878(1)(j)." On appeal, the Council further notes that the approval of the final payment terms is contained in an email dated May 6, 2025, which it provided to the Appellant. Thus, the communications with Acorn on April 29, 2025, were properly withheld under KRS 61.878(1)(j).

Finally, the Appellant claims the Council wrongly invoked KRS 61.878(1)(a) when it redacted information it described as "the names, email signatures, and personally identifying details about individual employees who engaged with the Acorn Group." KRS 61.878(1)(a) exempts from disclosure "[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." This exception requires a "comparative weighing of the antagonistic interests" between privacy and the public interest in disclosure. *Ky. Bd. of Exam'rs of Psychologists v. Courier-Journal & Louisville Times Co.,* 826 S.W.2d 324, 327 (Ky. 1992). Here, the Council states individual employees have a substantial privacy interest in "personally identifying details" which would disclose the fact that they received "diagnostic coaching . . . focused on eliminating 'disparaging language' and establishing 'healthy' professional boundaries." Quoting language from *Lexington–Fayette Urb. Cnty. Gov't v. Lexington Herald-Leader Co.,* 941 S.W.2d 469, 472 (Ky. 1997), the Council argues that "[b]eing identified as individuals in need of such coaching is 'the type of information about which the public would have little or no legitimate interest but which would likely cause serious personal embarrassment or humiliation.'"

The Appellant claims the public has an interest in knowing whether an agency's "disciplinary practices" are implemented with "consistency and fairness," and thus whether some disciplined employees are given "remedial training . . . while similarly situated employees face termination." However, the Council explains "that the coaching performed for its employees was a matter of diagnostic coaching and professional development, not discipline." The Council further argues that "[s]upervisors have discretion in determining how to develop working environments, and if diagnostic coaching were given the same level of scrutiny as discipline, then full and frank discussion of improvements would be chilled. While public dollars were certainly spent on coaching, many more public dollars are potentially lost if supervisors do not explore tools to improve performance short of discipline or termination."

While the Office has not previously analyzed the application of KRS 61.878(1)(a) to diagnostic coaching, the closest analogy to the "full and frank discussion of improvements" described by the Council is the information contained in an employee's performance evaluation. Kentucky courts have recognized that "the performance of an ordinary employee or even one of comparatively high rank is not of such significant public interest that it should be subject to disclosure." *Cape Publ'ns v. City of Louisville,* 191 S.W.3d 10, 13 (Ky. App. 2006). On the other hand, public employees maintain a significant privacy interest in their performance evaluations.

> The confidentiality of performance evaluations allows evaluators to speak more frankly about an employee than they might if the evaluations were known to be open to public disclosure. In addition, performance evaluations certainly can contain a great deal of personal information, and should not be subject to disclosure without the most pressing of public needs.

Id. One example of a "pressing public need" is when the public employee is charged with "committing a criminal act made possible by his position at a public agency." *Id.* at 14. In *Cape Publications*, the public employee was charged with such an offense, which also led to the administrative suspension and eventual resignation of his supervisor. *Id.* Therefore, the Court found that the employee had "to some extent forfeited his privacy interest" by engaging in criminal activity, and that both his evaluation and that of his supervisor were subject to partial disclosure. *Id.*

Here, there is no suggestion of criminal conduct on the part of any of the employees who received diagnostic coaching about "disparaging language" or "professional boundaries." Indeed, the subject of the coaching is merely analogous to the accusations of "'unprofessional behavior' and being 'verbally abusive' to a coworker" that did not warrant the disclosure of an employee's performance

evaluations in 25-ORD-106. Thus, the fact that certain employee received non-disciplinary coaching on such matters is subject to a privacy interest that is not outweighed by a corresponding public interest in the disclosure of information that would identify him or her.[2] As is the case with performance evaluations, when diagnostic coaching "is understood to afford privacy[,] efficiency [in] government is promoted, the public gaining by that privacy in the end." OAG 80-58. Accordingly, the Council did not violate the Act when it redacted information identifying individual employees who received coaching services from Acorn.

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.

Russell Coleman
Attorney General

/s/ Zachary M. Zimmerer
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[2] As described by the Council, this information consists of employee names, "the employees' Metro Government email addresses, which are comprised of an employee's first name and last name before the domain," and "job titles and details on the number of persons with that job title [where] those details would effectively identify those individual employees."