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26-ORD-245

June 2, 2026

In re: William Mustage/Department of Corrections

Summary: The Department of Corrections ("the Department") did not violate the Open Records Act ("the Act") when it withheld privileged attorney-client communications under KRE 503.

Open Records Decision

William Mustage ("the Appellant"), a Department employee, submitted a request to the Department for "any email/text correspondence about [him], naming [him], or referencing" an "alleged incident that [the Appellant] reported to all [Department] Executive staff on 2/12/26," sent "to or from" seven named individuals. In a timely response, the Department provided 21 pages of records, but stated it was withholding "certain e-mails" under KRS 61.878(1)(i) as "preliminary drafts" and under KRS 61.878(1)(j) as "preliminary findings and preliminary recommendations and opinions exchanged during an internal discussion that did not form the basis of a final action by the agency." Additionally, the Department stated it was "withholding emails that are protected by the attorney-client privilege, codified at Kentucky Rule of Evidence [KRE] 503, which is incorporated into the Act by KRS 61.878(1)(k) [*sic*]," consisting of "legal advice provided to the Department by attorneys within the Department's Office of Legal Services regarding the disposition of [a] related open records request." In subsequent correspondence, the Appellant asked the Department to reconsider its position on KRS 61.878(1)(i) and (j), and the Department refused. This appeal followed.

On appeal, the Appellant states he is "not asking for a drafted version of any document," but is only seeking "messages . . . used to formulate the [Department's] decision" to demote him in connection with the reported incident. In response, the Department explains that the records it withheld under KRS 61.878(1)(i) and (j) are the same records it withheld under the attorney-client privilege, consisting of two pages of emails between a Department official and a Department attorney concerning a draft response to an open records request received from the media.

Under KRS 61.878(3), "[n]o exemption" under KRS 61.878(1) "shall be construed to deny, abridge, or impede the right of a public agency employee . . . to inspect and to copy any record including preliminary and other supporting documentation that relates to him." However, "a public employee's right of access does not extend to records that are made confidential by state law, including records protected by the attorney-client privilege." 23-ORD-234. 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) (acknowledging 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 Department identified the privileged records as "legal advice provided to the Department by attorneys within the Department's Office of Legal Services regarding the disposition of [a] related open records request." This description suffices to establish that the records withheld under the privilege were confidential communications with attorneys in their capacity of rendering professional legal services to the Department. Accordingly, the Department did not violate the Act when it withheld those communications under KRE 503.[1]

The Appellant, on appeal, claims he is "more interested in the communication from the [Justice and Public Safety] Cabinet to the Department instructing them to

[1] Because the attorney-client privilege is dispositive of the issues on appeal, it is not necessary to address the Department's alternative arguments under KRS 61.878(1)(i) and (j).

demote" him. However, the Department has stated the only responsive records it withheld are the two pages of attorney-client communications. Once a public agency states affirmatively that no further records exist, the burden shifts to the requester to make a *prima facie* case that an additional record does exist. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov't,* 172 S.W.3d 333, 341 (Ky. 2005). A requester's bare assertion that an agency must possess a requested record is insufficient to make a *prima facie* case that the agency actually possesses such a record. *See, e.g.*, 22-ORD-040. Rather, to make a *prima facie* case that the agency possesses or should possess the requested record, the requester must provide some statute, regulation, or factual support for that contention. *See, e.g.,* 21-ORD-177; 11-ORD-074.

Here, the Appellant claims a responsive communication[2] from the Cabinet "instructing [the Department] to demote" him must exist because he was "told by two staff" that this "is how it was handed down." But a requester cannot make a *prima facie* case that a record exists by merely "stat[ing] he was told of its existence by an unidentified person." 24-ORD-235. Accordingly, the Department did not violate the Act when it did not provide a record that does not exist.

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/ James M. Herrick
James M. Herrick
Assistant Attorney General

[2] The scope of the Appellant's request is limited to correspondence "to or from" seven specific people, four within the Department and three within the Cabinet. Therefore, if a communication exists, but was not sent or received by any of those individuals, it is not responsive to the request.

#376

Distributed to:

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