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20-ORD-088

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In re: Uriah Pasha/Little Sandy Correctional Complex

Summary: Little Sandy Correctional Complex ("Complex") violated KRS 61.880(1) when it failed to cite the applicable statutory exception and explain how it applied to a record it withheld until after this appeal was filed. However, on appeal, the Complex ultimately satisfied its burden of justifying withholding the requested e-mail.

Open Records Decision

Between April 17, 2020, and May 4, 2020, inmate Uriah Pasha ("Appellant") submitted three separate open records requests to the Complex. Appellant challenged the Complex's disposition of each request in three[1] separate appeals. This Office now consolidates those appeals and finds that the Complex's initial responses violated the Open Records Act (the "Act").

Appellant initially asked for a copy of "any and all correspondence, [Extraordinary Occurrence Reports ("EOR")], Incident Reports, Accident Reports, Disciplinary Reports, Recordings (audio and visual), Photocopies, and test results

[1] Appellant submitted his first appeal (Log Number 202000116) before the Complex's time to respond had expired. That premature appeal was dismissed. When the Complex issued a timely response denying the request, Appellant separately appealed the Complex's denial (Log Number 202000122). In summary, Appellant submitted four appeals, but is only disputing the disposition of three requests.

generated in connection with [his] placement in RHU-C-11 [on] April 16, 2020." In response, the Complex provided Appellant with a copy of his "disciplinary violations," but denied access to a portion of the file "held in the internal affairs office [and] referenced in the disciplinary violation[.]" The Complex cited KRS 61.878(1)(l) and KRS 197.025(1) as the basis for its denial, but did not explain how those exceptions applied.

For his second request, Appellant asked for a copy of an e-mail "that Internal Affairs Captain Josh Montgomery received from Department of Corrections ("DOC") Staff Attorney Richard D. Lilly on April 16, 2020," which was referenced in the records the Complex provided in response to his first request. The Complex denied the second request by stating, "Richard Lily has not sent [Captain Montgomery] any emails."

For his final request, Appellant sought a copy of "the e-mail sent to the Warden" concerning Appellant, which resulted in the Complex charging Appellant with a disciplinary violation. The Complex stated in response that a copy of Part I of the Disciplinary Report Form was enclosed, but that Part II did not currently exist. The Complex further stated that a redacted copy of the requested e-mail was enclosed, but the Complex again cited KRS 61.878(1)(l) and 197.025(1) without explanation of how these exceptions authorized the redactions.

First, Appellant argued that the Complex failed to timely respond to his requests. KRS 197.025(7) requires a correctional facility to respond to an inmate's open record request within five business days of receipt. However, the record on appeal confirms that the Complex responded within five business days of receiving each request in accordance with KRS 197.025(7). Thus, the Complex did not violate the Act in this regard.

On the other hand, the Complex's initial responses violated the Act by relying on KRS 197.025(1) to either deny, or partially deny, Appellant's first and third requests, because those responses did not include a "brief explanation of how the exception applied," as required by KRS 61.880(1). Moreover, on appeal, the Complex abandoned its reliance upon KRS 197.025(1) and, for the first time, invoked other exceptions. Because the Complex's initial responses failed to cite the statutory exception upon which it ultimately relied, or to explain how that exception applied, it violated the Act, specifically KRS 61.880(1).

On appeal, the Complex asserted that it withheld the content of one e-mail based on the attorney-client privilege.[2] The attorney-client privilege applies to communications between a client and a lawyer "made for the purpose of facilitating the rendition of professional legal services to the client[.]" KRE 503(b). The privilege also protects communications between lawyers and representatives of their clients. KRE 503(b)(1). For the privilege to apply, the communication must be confidential, *i.e.* "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 is incorporated into the Act by KRS 61.878(1)(l). *Hahn v. Univ. of Louisville*, 80 S.W.3d 771, 774 (Ky. App. 2001).

Here, this Office is satisfied that the record is protected from disclosure by the attorney-client privilege.[3] The email included the mental impressions and advice of a DOC staff attorney, and he directed the e-mail to the Warden, a representative of the Complex, his client. Accordingly, the Complex properly withheld the subject e-mail pursuant to KRS 61.878(1)(l) and KRE 503(b).

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court pursuant to KRS 61.880(5) and KRS 61.882. 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.

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[2] The Complex further asserted, for the first time, that it withheld the subject e-mail as "preliminary" under the exemptions provided in KRS 61.878(1)(i) and (j). However, because this Office finds that the Complex properly relied upon the attorney-client privilege to withhold the e-mail, this Office declines to address the Complex's reliance on KRS 61.878(1)(i) and (j).

[3] The Office reviewed the subject email under authority of KRS 61.880(2)(c) and 40 KAR 1:030 § 3.

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#116, 120, 122, & 125

Distributed to:

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