



COMMONWEALTH OF KENTUCKY  
OFFICE OF THE ATTORNEY GENERAL

DANIEL CAMERON  
ATTORNEY GENERAL

CAPITOL BUILDING, SUITE 118  
700 CAPITAL AVENUE  
FRANKFORT, KENTUCKY 40601  
(502) 696-5300  
FAX: (502) 564-2894

20-ORD-091

June 22, 2020

In re: L. Christopher Hunt/Kentucky Labor Cabinet

*Summary:* The Kentucky Labor Cabinet (“Cabinet”) violated the Open Records Act (“Act”) in withholding the names of private individuals who submitted complaints, either telephonically or electronically, to the KY-SAFER Hotline. However, the Cabinet did not violate the Act in withholding other personal information about the complainants, including home addresses, telephone numbers, and personal e-mail addresses, under KRS 61.878(1)(a). The Cabinet properly relied upon the attorney-client privilege to deny access to confidential communications between attorneys charged with assessing the complaints and recommending the additional action.

*Open Records Decision*

L. Christopher Hunt (“Appellant”) requested a copy of the following public records from the Cabinet:

- Any document related to any complaint made against Fuller Physical Therapy, or Phillip Embry, from March 1, 2020, through April 7, 2020, including the written correspondence or notes taken in response to a verbal or telephonic complaint[;]
- Any document related to any survey, evaluation, assessment, review, or other activity performed by your agency with

respect to Fuller Physical Therapy, or Phillip Embry, from March 1, 2020, through April 7, 2020, whether or not such action was made in response to a complaint[;]

- Any document related to any report or complaint made to the COVID-19 Reporting Hotline, including but not limited to those made via the 1-833-597-2337 hotline or [kysafer.ky.gov](http://kysafer.ky.gov) webpage.

In a timely written response, the Cabinet acknowledged possessing documents responsive to his request. The Cabinet stated that records attached to its correspondence were “extracted from a larger database. Those records have been exported to an Excel spreadsheet, which is attached both as a PDF and in Excel.” The Cabinet searched two different databases, “KY-SAFER all center records and KY-SAFER web complaints,” but it could locate only one complaint associated with the subject business. The Cabinet then provided some records related to the complaint, but redacted the complainant’s name, address, and contact information. The Cabinet also denied Appellant access to some responsive records based on the attorney-client privilege. Appellant now appeals the Cabinet’s redactions under KRS 61.878(1)(a) and its denial of certain records based on the attorney-client privilege.

As for Appellant’s first issue on appeal, this Office has already resolved the question of whether the Cabinet can properly withhold the names of complainants on the basis of KRS 61.878(1)(a) in this context. *See* 20-ORD-089. That decision is hereby incorporated by reference, and a copy has been included for the parties. One of the factors weighing in favor of disclosing complainants’ names, provided in 20-ORD-089, was the fact that business owners were at risk of suffering real consequences without any articulated procedural safeguards to contest or challenge those consequences. Here, the Cabinet ordered Appellant to close his business, only for the Cabinet to subsequently retract that order and leave Appellant without any information regarding the basis for that action or its rescission. For this reason, and the reasons outlined in 20-ORD-089, the public interest weighs strongly in favor of disclosure of the complainant’s name and outweighs the complainant’s privacy interest.

The remaining question is whether the Cabinet properly relied upon the attorney-client privilege to justify its denial of the request as to records pertaining to the Cabinet attorneys' assessment of complaints. 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).

In Appellant's view, if the attorneys were assessing the validity of complaints and making the actual determinations of whether to issue orders, then those attorneys were acting as final decision makers for the Cabinet and not providing legal advice subject to the privilege. However, the Cabinet explained on appeal that all existing responsive documents consist of confidential communications between attorneys that were "assigned to the Cabinet for KY-SAFER review and the Department of Workplace Standards ["DWS"] within the Cabinet." According to the Cabinet, these attorneys review complaints to determine whether the facts presented establish a potential violation of the Governor's executive orders. Following that review, the attorneys refer those complaints that may require additional investigation and action. Such action could consist "of a telephone call, an inspection, or the issuance of a closure order." Therefore, according to the Cabinet, these attorneys were not acting as final decision makers. Rather, their role was a legal one: to review complaints and provide legal advice to the Cabinet about which complaints adequately allege violations of the Governor's executive orders so that the Cabinet may allocate its investigative resources based on that review.

This Office agrees that any legal analysis undertaken by the attorneys reviewing the complaints, their determinations regarding the merits of the complaints, and their related communications to the Cabinet regarding that analysis, constitute "quintessential attorney-client advice" that is protected from disclosure under KRE 503. *See* 18-ORD-102 (holding that a city did not violate the

Act in withholding a memorandum “consisting of advice from city attorney to clients on a legal issue, as well as other documents and notes confidentially exchanged between city attorney and representatives of the city, as privileged communications under KRE 503 and KRS 61.878(1)(l)”. Therefore, the Cabinet did not violate the Act in withholding these records based upon the attorney-client privilege.

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.

Daniel Cameron  
Attorney General

/s/ Michelle D. Harrison

Michelle D. Harrison  
Assistant Attorney General

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Distributed to:

L. Christopher Hunt  
Amy D. Cabbage