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In re: The Cincinnati Enquirer/Boone County School District

Summary: The Boone County School District ("District") violated the Open Records Act ("the Act") because the subject documents are "public records" within the meaning of the Act and the District failed to assert that any authorized the District to deny inspection.

Open Records Decision

The Cincinnati Enquirer ("Appellant") submitted an open records request to the District for copies of, among other things, "[d]ocuments and emails between the [D]istrict's lawyer" and another lawyer representing parties adverse to the District in specific litigation. The District timely responded, denied the request, and claimed the requested records were not "public records" subject to the Act because the District's lawyer is not a "public agency" subject to the Act.[1] This appeal followed.

At issue here is whether the requested documents are "public records" within the meaning of the Act. KRS 61.870(2) defines "public record" as "all books, papers, maps, photographs, cards, tapes, discs, diskettes, recordings, software, or other documentation regardless of physical form or characteristics, which are prepared, owned, used, in the possession of or retained by a *public agency*" (emphasis added). The District's lawyer is not a "public agency" under KRS

[1] The District's lawyer is a private attorney paid by a private insurance company to defend the District in litigation. This Office understands, therefore, that there is no personal service contract expressly governing the relationship. For this reason, and because neither of the parties have relied upon KRS Chapter 45A, this Office does not consider its provisions here.

61.870(1).[2] That much is clear. And without question, the District did not prepare the communications, nor does it currently possess or retain them. Moreover, the District's lawyer is "using" the communications, not the District. Thus, the provisions of the Act do not apply to these particular communications unless the District "owns" them. KRS 61.870. Whether the District "owns" the communications is a difficult question to answer.

In using terms like "own" and "possess," the Act recognizes that traditional notions of property law determine whether a document is a "public record." KRS 61.870(2). As such, determining "ownership" under the Act can be a fact-specific inquiry. But in this case, that determination is further complicated because the Supreme Court's Rules of Professional Conduct govern the attorney-client relationship, including questions about what documents generated during the course of representation belong to the client. Only the Kentucky Supreme Court has the authority to administer the Rules of Professional Conduct. *See generally* Ky. Const. § 110. And so this Office looks the Supreme Court's application and interpretation of the Rules to determine the ownership question.

Under SCR 3.130 (1.2), "[a] lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation." In addition, when the attorney-client relationship ends, the lawyer is required to "surrender[] papers and property to which the client is entitled[.]" SCR 3.130(1.16)(d). This rule suggests that a client, not its lawyer, owns certain "papers and property." But to which "papers and property" is a client "entitled?" When considering whether a lawyer may hold a client's file because of a fee dispute, the Kentucky Bar Association (KBA) reasoned that under SCR 3.130(1.16)(d), "the lawyer must turn over the file to the client or the client's attorney except for 'work product.'" KBA Ethics Op. E-395 (Mar. 1997). And according to the KBA, the specific materials that must be returned to a client at the conclusion of the representation may include, among other things, "[c]orrespondence between [the] attorney and third part[ies]."As the Supreme Court has observed, "[v]ery simply, the client owns the file." *Kentucky Bar Ass'n v. Roberts*, 431 S.W.3d 400, 414 (Ky. 2014). For these reasons, this Office concludes that documents and emails between the District's lawyer and another lawyer representing parties adverse to the District are "public records" within the meaning of the Act because the District "owns" those documents used to carry out the representation. KRS 61.870(2).

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[2] There is no evidence that KRS 61.870(1)(h) has any application here.

Nothing in this decision should be construed as this Office opining on the Rules of Professional Conduct or the rules governing the attorney-client relationship. Instead, this decision is narrow in scope and the result should not be surprising: when a private attorney acts as an agent of a public agency in the course of representing that agency, the documents made in furtherance of that representation belong to the public agency and are thus subject to the Act. Whether the communications are subject to inspection, however, is a different question. *See* KRS 61.878(1). Here, the District did not assert that any exception permits it to withhold the records and deny inspection. Therefore, the District violated the Act in denying the request and failing to provide "a brief explanation of how the exception applies to the record[s] withheld." KRS 61.880(1).

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/ Marc Manley
Marc Manley
Assistant Attorney General

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