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

21-ORD-035

March 1, 2021

In re: Christopher Wiest/Department of Alcoholic Beverage Control

Summary: The Department of Alcoholic Beverage Control ("Department") violated the Open Records Act ("the Act") when it failed to explain how the statutory exceptions applied to the particular records it withheld, as required under KRS 61.880(1). The Department did not meet its burden of proof on appeal to sustain its decision to withhold timesheets reflecting attorney work.

Open Records Decision

On January 14, 2021, attorney Christopher Wiest ("Appellant") requested copies of all Department records related to "the license suspension, revocation, reinstatement, or any hearing" concerning his client, Dean's Diner LLC d/b/a Brewed ("Brewed"), including any related communications between the Department and any other governmental body. The Appellant also requested all records reflecting communications between the Department and any other governmental body "concerning policies or procedures for . . . license revocation or suspensions regarding businesses that fail to comply with directives of the Governor or [the Cabinet for Health and Family Services] concerning any regulations or executive orders that in any way relate to COVID-19."

In a timely response, the Department provided the requested records from within both the Department itself and the Public Protection Cabinet

("Cabinet"), with some exceptions and redactions.[1] Citing KRS 61.878(1)(a), the Department stated that it had redacted "personal information[,] including personal address information." Next, the Department stated that "some records" were redacted or excluded from production under KRS 61.878(1)(i) and (j). The Department quoted the text of those two exceptions, but it did not explain how the exception applied to the records it redacted or excluded. Additionally, citing KRS 61.878(1)(h), the Department stated that it had excluded or redacted records that would harm the Department's administrative proceeding against Brewed if prematurely released. Among the records that the Department withheld under KRS 61.878(1)(h) were "communications between Department investigators that reference communications to them from Department attorneys, which [would reveal] the manner in which the Department may present [its] case." Finally, the Department stated that it had redacted or excluded records containing "communications or information protected under the attorney-client and work product privileges." This appeal followed.

The Appellant first contends that the Department failed to explain what records it withheld, or what redactions it made, under each of the exceptions the Department invoked. When denying a request for public records, a public agency must give "a brief explanation of how the exception applies to the record withheld." KRS 61.880(1). *See also Edmondson v. Alig,* 926 S.W.2d 856, 858 (Ky. App. 1996) (holding that KRS 61.880(1) "requires the custodian of records to provide particular and detailed information" when denying a request). The "explanation must be detailed enough to permit the court to assess its claim and the opposing party to challenge it." *Kentucky New Era, Inc. v. City of Hopkinsville,* 415 S.W.3d 76, 81 (Ky. 2013). This requirement is not met when an agency fails to explain what it withheld or redacted under the exception. *See, e.g.*, 18-ORD-062; 17-ORD-120. Thus, the Department violated the Act.

The Appellant also argues that the Department failed to provide phone recordings, photographs, and text messages responsive to his request. The Department, however, asserts that no such records exist. Once a public agency

---

[1] Under KRS 12.020(II)(4)(e), the Department is an agency within the Cabinet. Furthermore, under KRS 12.020(II)(4)(a)2.c, the Alcoholic Beverage Control Legal Division is part of the Cabinet's Office of Legal Services.

states affirmatively that it does not possess any responsive records, the burden shifts to the requester to present a *prima facie* case that the requested records do exist. *Bowling v. Lexington-Fayette Urb. Cty. Gov't,* 172 S.W.3d 333, 341 (Ky. 2005). Here, the Appellant alleges that "[p]hone recordings, photographs, and other recordings are referenced," but he does not explain where or by whom they are "referenced." Because the Appellant has not presented a *prima facie* case that any such records exist or should exist, the Department did not violate the Act when it did not produce phone recordings, photographs, or text messages.

Next, the Appellant asserts that under KRS 61.884 the Department cannot withhold or redact any records relating to Brewed because the Appellant requested the records in his capacity as the attorney representing Brewed. But KRS 61.884 merely provides that "[a]ny person shall have access to any public record relating to him or in which he is mentioned by name, upon presentation of appropriate identification, subject to the provisions of KRS 61.878." Thus, even if KRS 61.884 applies to this request, the Department may redact or withhold records if an exception under KRS 61.878 applies.

The Appellant also argues that KRS 61.878(1)(i) and (j) do not apply to any of the Department's records related to Brewed because the Department has taken "public action" against Brewed by issuing a Notice of Violation against it. Under KRS 61.878(1)(j), an agency may withhold "[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended." But Kentucky courts have held that such records may lose their preliminary status, and may no longer qualify for the exception, if the recommendations are adopted by the public agency as part of some final action. *See City of Louisville v. Courier-Journal & Louisville Times Co.,* 637 S.W.2d 658, 659-60 (Ky. App. 1982).

On appeal, the Department states that the only record it withheld under this exception is a "memorandum concerning COVID-19 enforcement strategy" for licensees, in which policies were formulated and opinions were expressed. The Department claims that it has not yet adopted a final strategy or policy on the subject, and in particular, this specific policy memorandum has not been adopted. Therefore, because the recommendations and opinions in the memorandum have not been adopted as part of final agency action, the

Department did not violate the Act when it withheld that document under KRS 61.878(1)(j).[2]

Finally, the Appellant argues that the Department improperly relied on KRS 61.878(1)(h) to withhold documents because the Department had not shown that "the disclosure of the information would harm the agency," as the statute requires. On appeal, however, the Department claims that the only records it withheld under KRS 61.878(1)(h) are e-mails between Department and Cabinet staff "discussing with counsel strategy regarding the investigation and prosecution of [the] administrative adjudication." The Department thus shifts gears on appeal to claim that the attorney-client privilege permits it to withhold or redact the e-mails. The Department also claims that the attorney work-product doctrine applies to other e-mails, as well as weekly legal activity reports to the Governor's Office, which "include the mental impressions of the attorneys working on the individual cases." The Department also withheld attorney timesheets that "discuss work that they have performed preparing for the adjudicative proceeding against Brewed[.]"

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, KRS 503(b)(1), as well as between representatives of the client, KRE 503(b)(4).

The attorney work-product doctrine, on the other hand, "affords a qualified privilege from discovery for documents 'prepared in anticipation of litigation or for trial' by that party's representative, which includes an attorney." *Univ. of Kentucky v. Lexington H-L Services,* 579 S.W.3d 858, 864 Ky. App. 2018). "[D]ocuments which are primarily factual, non-opinion work

---

[2] The Department identifies no other records it withheld under KRS 61.878(1)(j). Furthermore, because the Department did not withhold any "[p]reliminary drafts, notes, [or] correspondence with private individuals," it is unnecessary to address KRS 61.878(1)(i).

product are subject to lesser protection than 'core' work product, which includes the mental impressions, conclusions, opinions, or legal theories of an attorney." *Id.*

KRS 61.878(1)(l) operates in tandem with KRE 503 to exclude from public inspection public records protected by the attorney-client privilege. *Hahn v. Univ. of Louisville,* 80 S.W.3d 771 (Ky. App. 2001). Records protected by the work-product doctrine may likewise be withheld from public inspection under KRS 61.878(1)(l) and CR 26.02(3). *See Univ. of Kentucky v. Lexington H-L Services,* 579 S.W.3d at 864-65. However, when a party invokes the attorney-client privilege or the work-product doctrine 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. General Motors Corp.*, 891 S.W.2d 398, 402 (Ky. 1995).

The Kentucky Supreme Court has identified at least three ways by which a party may prove that the privileges apply. The records can be produced for the court's *in camera* inspection, the party asserting the privilege may make an offer of proof, or proffer, describing the documents, or the party may provide a privilege log. *Collins v. Braden*, 384 S.W.3d 154, 164 (Ky. 2012). Of course, the first two of those options are unavailable to a public agency when responding to a request for records under KRS 61.880(1). Because neither a court nor this Office would be involved at that stage, there would be no party able to conduct an *in camera* review or accept a proffer. Therefore, to provide the "brief explanation of how the exception applies to the record withheld" that KRS 61.880(1) requires when an agency denies a request, the agency should provide something similar to a privilege log when it claims that the applicable exception is the attorney-client privilege or work-product privilege.[3]

[3] The Department claims that the term "privilege log" appears nowhere in KRS 61.870 *et seq.* That is true. KRS 61.870 *et seq.* also does not contain the phrase "attorney-client privilege." Rather, the privilege is incorporated under KRS 61.878(1)(l), including all of the case law that interprets and applies the privilege.

The privilege log need not be sophisticated. So long as the public agency provides a sufficient description of the records being withheld under the privilege to allow the requester to judge 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) (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."). Take the Department's description of the records on appeal. The Department has identified weekly litigation reports, timesheets reflecting attorney work, and e-mail communications between Department staff and attorneys in which litigation strategy was discussed. These descriptions provide much more insight into the nature of the documents than the Department's original description of "some records," which it claimed were privileged. In fact, the Department's description of the records on appeal is sufficient for this Office to determine whether the attorney-client or work-product privilege applies, as shown below.

The Department is part of the Cabinet and shares legal representation in common with the Cabinet. Communications between the two entities "for the purpose of facilitating the rendition of professional legal services to" the Department fall under the attorney-client privilege. KRE 503(b)(4). Thus, the e-mails which the Department describes as communications between Department and Cabinet staff "discussing with counsel strategy regarding the investigation and prosecution of [the] administrative adjudication" were made in furtherance of rendering legal services to the Department, and the Department could redact those e-mails under KRE 503.[4]

The Department also withheld "[w]eekly reports to the Governor's Office of all legal activities in the Public Protection Cabinet" under the attorney work-product doctrine because those reports "include the mental impressions of the attorneys working on the individual cases." To the extent those reports discuss other litigation matters, they are not responsive to the Appellant's request. To

[4] Where the e-mails contained both privileged and non-privileged material, the Department redacted the privileged content and produced the rest of the e-mails, as required under KRS 61.878(4).

the extent those weekly reports discuss any ongoing litigation regarding the Appellant's client, the reports contain the mental impressions of the attorneys and are protected under the attorney work-product doctrine. *See Morrow v. Brown, Todd & Heyburn*, 957 S.W.2d 722, 725 (Ky. 1997) ("the rule refers to information generated and impressions gained in preparation for litigating the case").

However, the Department's timesheets reflecting the work that its attorneys have performed are different from weekly litigation reports. Attorney billing statements, in general, are not protected by the attorney-client privilege or work-product doctrine. *See Commonwealth, Cabinet for Health and Hum. Servs. v. Scorsone*, 251 S.W.3d 328, 330 (Ky. 2008) (rejecting, in an Open Records Act appeal, an agency's "blanket redaction of all descriptive portions of the disclosed billing records without particularized demonstration that each description is privileged"). Only those portions of the billing statements that discuss "substantive matters" of the representation may be redacted. *Id*. But the Department has withheld the timesheets in their entirety, without distinguishing between descriptions of "substantive matters" and non-substantive matters. The Department carries the burden of proof not only because it is a public agency, KRS 61.880(2)(c), but also because it is asserting the privilege, *Haney*, 40 S.W.3d at 355. Yet the Department has not carried its burden that the timesheets are wholly privileged and may be withheld in their entirety. Under *Scorsone*, the Department violated the Act by withholding the timesheets.

Finally, the Department has clarified that it redacted from certain records personally identifiable information under KRS 61.878(1)(a). KRS 61.878(1)(a) excludes from inspection "[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." To determine whether an agency may apply this exception requires a "comparative weighing of the antagonistic interests" between an identified privacy interest and the public interest in disclosure. *Ky. Bd. of Examiners of Psychologists v. Courier-Journal & Louisville Times Co.,* 826 S.W.2d 324, 327 (Ky. 1992). But some information, such as private addresses, dates of birth, and Social Security numbers, may be redacted as a matter of course. *See Kentucky New Era, Inc. v. City of Hopkinsville,* 415 S.W.3d 76, 89 (Ky. 2013). Because the Department's

redactions under KRS 61.878(1)(a) were limited to personal identifiers of this nature, the Department did not violate the Act in making those redactions.

In sum, the Department violated the Act when it failed to explain what records it withheld and what information it redacted under the applicable exceptions to the Act, as KRS 61.880(1) requires. On appeal, the Department has provided that explanation and met its burden to sustain its disposition of the request under KRS 61.880(2)(c) for all the disputed records except the timesheets, which must be produced in redacted form pursuant to *Commonwealth, Cabinet for Health and Hum. Servs. v. Scorsone*, 251 S.W.3d 328, 330 (Ky. 2008).

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/ James M. Herrick

James M. Herrick
Assistant Attorney General

#35

Distribution:

Christopher Wiest, Esq.
Joshua Newton, Esq.