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21-ORD-087

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In re: Brian Beckham/Board of Alcohol and Drug Counselors

Summary: The Board of Alcohol and Drug Counselors ("Board") violated the Open Records Act ("the Act") when it denied a request to inspect records that it claimed protected by the attorney-client or work product privilege without sufficiently describing the records it withheld. On appeal, however, the Board provided the necessary description to justify its reliance on the attorney-client and work product privileges applied to withhold the records. The Board did not violate the Act when it withheld records that were part of an ongoing administrative investigation. The Board is not required under the Act to provide information or to provide records that do not exist.

Open Records Decision

On February 26, 2021, Brian Beckham ("Appellant"), a licensed alcohol and drug counselor, asked to inspect certain records relating to two complaints filed against him and the records related to the Board's pending investigation of those complaints. In a timely written response, the Board granted some portions of the request and denied other portions. This appeal followed.

In his first request, the Appellant's sought "[a]ny and all evidence in regards to the complaint(s)." In support of its denial of this portion of the request, the Board cited the attorney-client privilege under KRE 503 and the work product doctrine under CR 26.02, which are incorporated into the Act under KRS 61.878(1)(l). The Board also denied the request under KRS 61.878(1)(h), because the records were compiled as part of an administrative adjudication of alleged statutory and regulatory violations. However, the

Board did not identify any specific records or types of records that it was withholding under these exceptions.

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).

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 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 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 to 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 an index or privilege log when it claims that the applicable exception is the attorney-client privilege or work-product privilege. *See* 21-ORD-035.

The index or privilege log need not be sophisticated. 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) (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."). Here, the Board violated the Act when its written response failed to provide a description of the records with enough specificity to permit the Appellant to assess the propriety of the Board's actions.

On appeal, however, the Board has identified e-mails between the Board and its attorney, e-mails between the Board's attorney and the investigator, and e-mails between the Board's attorney and other entities regarding information requested for the investigation. This description is sufficient for this Office to determine whether the attorney-client or work-product privilege applies, as shown below.

Communications between the Board and its attorney "for the purposes of facilitating the rendition of professional legal services" in regard to the pending investigation are clearly privileged under KRE 503(b)(1). Furthermore, for purposes of the pending investigation, the investigator is a representative of the Board. Therefore, communications between the Board's attorney and the investigator relating to the investigation "for the purposes of facilitating the rendition of professional legal services to" the Board fall under the attorney-client privilege. KRE 503(b)(1).

The remaining records embraced by the Appellant's request for "evidence in regards to the complaint(s)" are identified as "research" compiled by the Board's investigator in the course of the investigation. The Board's attorney similarly conducted "research" by communicating with "other entities

[and] requesting information pertinent to the investigation" from them. Because these records were properly denied under KRS 61.878(1)(h), this Office need not decide whether the records are protected by the attorney work product doctrine.

In relevant part, KRS 61.878(1)(h) creates an exemption from the Act for "[r]ecords of . . . agencies involved in administrative adjudication that were compiled in the process of detecting and investigating statutory or regulatory violations if the disclosure of the information would harm the agency by revealing the identity of informants not otherwise known or by premature release of information to be used in a prospective . . . administrative adjudication." Under KRS 309.086(2), the Board is authorized to engage in administrative adjudication by holding a hearing pursuant to KRS Chapter 13B before taking administrative action against a licensee. Furthermore, it is clear from the scope of the request that the disputed records were compiled in the process of investigating allegations of statutory or regulatory violations by the Appellant.

To rely on KRS 61.878(1)(h), the Board must also show that disclosure would cause harm by revealing the identity of informants or by premature release of information to be used in a prospective hearing. In this case, it is undisputed that the Board's investigation is ongoing and, therefore, a hearing remains prospective. On appeal, the Board states that public release of the information compiled thus far in the investigation "would harm the Board's ability to conduct a full and fair investigation by interfering with the Board's ability to interview witnesses and obtain uncorrupted and unbiased information." Additionally, the Board states that "premature release of the identity of persons with information regarding the issues that form the basis of the complaint may have a chilling effect on their willingness to cooperate." In light of the fact that the investigation is not yet complete, the Board has met its burden to show that release of the investigative records would cause harm by identifying "informants not otherwise known" or by "premature release of information to be used" at a hearing.[1] Therefore, the Board did not violate the Act when it withheld these records.

In his second request, the Appellant sought "[a] copy of any and all emails, memos, and any other correspondence including but not limited to

[1] It is important to note that the Board has not yet notified the Appellant that it intends to take disciplinary action against him, but only that complaints have been received. The Board's showing of harm is sufficient under these facts because its investigation is not yet complete.

phone logs" from the Board, the Public Protection Cabinet ("Cabinet"), or the Board's investigator and her investigation company concerning the Appellant and his company. The Board denied this request under KRS 61.878(1)(h), stating that the disclosure of these records would harm the Board by premature of release of information to be used in a prospective administrative adjudication.[2]

As stated previously, the Board has already made a showing that harm would result from the disclosure of its investigative records at this early stage in an administrative process that is likely to lead to an adjudication. The same risks of harm, in regard to the Board's ability to obtain unbiased information and to secure the cooperation of witnesses, apply to these communications related to the pending investigation. Therefore, the Board properly denied these records under KRS 61.878(1)(h).

The Appellant also requested communications exchanged between the Board and "membership associations, educational institutions, and media." To the extent that the Board or its agents may have contacted any such entities in the course of obtaining information for its investigation, the same concerns apply with regard to the integrity of the Board's investigation and the cooperation of witnesses while the investigation remains ongoing. At this stage in the process, the Board has explained the harm that would occur to its investigation if the records are prematurely released. Therefore, it has met its burden to sustain its denial of the Appellant's request under KRS 61.878(1)(h).

The Appellant also requested a "list of any and all persons and parties" that have been contacted by the Board, the Cabinet and its employees or agents, or the Board's investigator or her investigation company. The Board responded that no such list exists. Once a public agency 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 record does exist. *Bowling v. Lexington-Fayette Urb. Cty. Gov't,* 172 S.W.3d 333, 341 (Ky. 2005). Here, the Appellant has not made a *prima facie* case that any such list exists or should exist. Therefore, the Board did not violate the Act when it did not produce the requested list.

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[2] The Board also denied the request under the attorney-client privilege and work product doctrines. However, because the Board properly relied on KRS 61.878(1)(h), this Office need not decide whether the records are exempt attorney-client communications or protected work product.

Finally, the Appellant requested "[i]nformation to [*sic*] the nature of any phone or like conversation" about the Appellant or his company by the Board, the Cabinet, or the Board's investigator or her investigation company. The Board responded that it was not required to grant a request for information. Indeed, the Act does not require public agencies to fulfill requests for information, but only requests for records. KRS 61.872; *Dept. of Revenue v. Eifler,* 436 S.W.3d 530, 534 (Ky. App. 2013) ("The ORA does not dictate that public agencies must gather and supply information not regularly kept as part of its records."). Here, the Appellant's request was one for "information." Moreover, the Appellant has not made a *prima facie* case that the Board or its agents took notes of any phone conversations it had regarding the Appellant or his company. The Act does not require public agencies to make written records of their phone conversations. Accordingly, the Board did not violate the Act when it denied this portion of the request.

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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