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21-ORD-111

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In re: Brandon Voelker/Cabinet for Health and Family Services

Summary: The Cabinet for Health and Family Services ("Cabinet") did not violate the Open Records Act ("the Act") when it denied a request to inspect records protected by the attorney-client privilege.

Open Records Decision

On February 11, 2021, attorney Brandon Voelker ("Appellant") requested a copy of all e-mails in the state government account of Cabinet attorney Jason Reed "which are unrelated to his job with the Cabinet." In responding to the request, the Cabinet withheld certain e-mails under various exceptions to the Act. The Appellant does not challenge the Cabinet's reliance on those exceptions. However, the Cabinet withheld eight e-mails relating to Mr. Reed's representation of the Campbell County Board of Education ("Board"). The Cabinet claimed that these eight e-mails were exempt from inspection under the attorney-client communications privilege and attorney work product doctrine.[1] The Appellant, who represents a party adverse to the Board in ongoing litigation, appeals the Cabinet's denial of his request to inspect these eight e-mails.

The attorney-client communications privilege under KRE 503 and the work product doctrine under CR 26.02 are incorporated into the Act under KRS 61.878(1)(l). The attorney-client privilege protects from disclosure "confidential

[1] The Cabinet also withheld these e-mails under KRS 61.878(1)(i) and (j). However, because the e-mails are protected by the attorney-client privilege, the Office declines to consider whether such records are also exempt under KRS 61.878(1)(i) and (j).

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 Lexington H-L Services,* 579 S.W.3d at 864-65.

Here, in its response to the request, the Cabinet provided the Appellant with a privilege log, which described the eight e-mails as "communications or creation of work product for outside legal work of Mr. Reed" that "further work for the [Board]." Because Mr. Reed's "creation of work product" is contained in his e-mail communications to his client, it is not necessary here to consider the work product doctrine separately from the attorney-client privilege. *See, e.g., Phoenix Ins. Co. v. Wintersmith,* 98 S.W. 987 (Ky. 1907) (holding that an attorney's drafting and delivery of a document to a client is privileged matter). Rather, the work product documents at issue here are part and parcel of the communications that Mr. Reed sent to his client.

The Appellant does not dispute that the e-mails were intended as confidential communications between Mr. Reed and the Board in furtherance of the rendition of professional legal services, within the meaning of KRE 503(b), or that the e-mails contain documents that were prepared in anticipation of litigation or for trial, under CR 26.02. Instead, the Appellant

claims that any privilege is lost because the communications are located on a state government computer. The Appellant argues that because the Cabinet is not Mr. Reed's client in the litigation involving the Board, Mr. Reed waived the privilege by communicating with the Board using an e-mail account and computer to which the Cabinet has access.

It is elementary that the attorney-client privilege exists "for the benefit of the client and not the attorney." *Mahaffey v. McMahon*, 630 S.W.2d 68, 69 (Ky. 1982). Kentucky courts have long held that only the client may waive the privilege. *See Carter v. West*, 19 S.W. 592, 593 (Ky. 1892) ("[I]f the communication be to one who is at the time professionally employed, and occupies the attitude of a legal adviser, it is privileged, and the seal of silence is upon it, subject to be broken by the consent of the client only."). And under KRE 503(a)(5), a communication is confidential if it is "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." There is no evidence in the record to support the conclusion that the Board intended its communications with Mr. Reed to be disclosed to third parties.[2] There being no disagreement that the communication are privileged, this Office declines to find any waiver, a determination more appropriately made by the court in which the underlying matter is pending.

The Appellant claims that the Cabinet has no authority to assert the attorney-client privilege on behalf of the Board. But the record reflects that it is Mr. Reed, not the Cabinet, who is claiming the privilege on behalf of his client. After identifying responsive e-mails on his hard drive, the Cabinet allowed Mr. Reed to review the e-mails to identify attorney-client communications that may be privileged.[3] After he did so, the Cabinet accepted his claims of privilege.

The purpose of the attorney-client privilege is to protect client confidences because "sound legal advice and advocacy depend upon a guarantee of confidentiality between attorney and client." *Hahn*, 80 S.W.3d at

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[2] To the extent the Appellant is claiming that the Board implicitly waived the privilege by repeatedly communicating with Mr. Reed using an e-mail account to which a third party, the Cabinet, had access, this Office declines to make such a finding. While it is, at a minimum, unwise to communicate with private clients using a state e-mail account, the attorney-client privilege is the oldest privilege under the common law. *Hahn*, 80 S.W.3d at 775. Whether to expand the waiver doctrine of such a privilege in a way that the Appellant urges is better left to the courts.

[3] It is not apparent from this record whether the Cabinet viewed the e-mails, or simply identified them as potentially responsive and asked Mr. Reed to conduct the review.

775. The purpose of the Act, however, "focuses on the citizens' right to be informed as to what their government is doing." *Zink v. Com., Dep't of Workers' Claims, Labor Cabinet,* 902 S.W.2d 825, 829 (Ky. App. 1994). Here, the e-mails on the Cabinet's computer relating to Mr. Reed's representation of the Board would reveal nothing about the Cabinet's own conduct. To allow the Appellant to use the Act as a means of circumventing the attorney-client privilege would serve neither the purpose of the privilege nor the purpose of the Act.[4] Therefore, the Cabinet did not violate the Act when it denied the Appellant's request for e-mails that are privileged under 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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/s/ James M. Herrick

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[4] Furthermore, it is significant that the Appellant represents an opposing party in pending litigation against the Board. In a civil action, "[p]arties may obtain discovery regarding any matter, *not privileged,* which is relevant to the subject matter involved in the pending action[.]" CR 26.02(1) (emphasis added). Accordingly, to the extent that privileged materials relate to the pending litigation, they likely would not be discoverable in such litigation under the civil rules. Of course, any such determination is properly left to the court having jurisdiction over the pending litigation.