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21-ORD-140

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In re: Kenneth Handmaker/Department of Alcoholic Beverage Control

Summary: The Department of Alcoholic Beverage Control ("Department") violated the Open Records Act ("the Act") when it failed to respond to portions of a request for which no records existed. The Department also violated the Act when it denied requests that it claimed were imprecise. However, the Department did not violate the Act when it gave a sufficient description of records to support its assertion of attorney-client and work-product privilege.

Open Records Decision

On May 24, 2021, attorney Kenneth Handmaker ("Appellant") submitted a 37-part request to the Department for copies of records relating to an investigation and administrative proceeding by the Department concerning the Appellant's client. The Department denied four parts of the Appellant's request under KRS 61.872(3)(b) for failure to precisely describe the records sought. Additionally, the Department withheld certain records under the attorney-client and work-product privileges; redacted certain information on the grounds of personal privacy; and withheld preliminary drafts and notes under KRS 61.878(1)(i) and (j). This appeal followed.

On appeal, the Appellant complains that the Department failed to provide records in response to some of his requests without affirmatively stating that no records exist. The Appellant further asserts that the Department violated the Act by denying his requests under KRS 61.872(3)(b) and by asserting privileges without specifically identifying the privileged records.

Under KRS 61.880(1), upon receipt of an open records request, a public agency must "determine . . . whether to comply with the request [and] notify in writing the person making the request . . . of its decision." On appeal, the Department advises that no responsive records exist for five of the Appellant's requests. However, the Department failed to advise the Appellant of the nonexistence of those records when it responded to the request. Therefore, the Department violated the Act. *See, e.g.,* 21-ORD-090 (finding that an agency violated the Act by failing to respond to portions of a request).

Next, the Appellant argues that the Department improperly denied his requests numbered 33 through 36 for lacking a precise description of the records. KRS 61.872(3)(b) requires a public agency to mail copies of records only "after [the requester] precisely describes the public records which are readily available within the public agency." A description is precise "if it describes the records in definite, specific, and unequivocal terms." *See* 98-ORD-17.

In request 33 the Appellant requested, for the time period beginning March 6, 2020, "such documents as identify, by licensee name, licensee address, license number(s) and Administrative Case No., each licensee" cited by the Department or any other law enforcement agency for violating the Governor's "Healthy at Work" Covid-19 guidelines and executive orders. Similarly, in request 35, the Appellant requested "such documents as identify, by licensee name, licensee address and license numbers, each Licensee who was investigated by the Department . . . but not cited" for similar violations. The Department asserts that these requests are ambiguous because it is unclear whether the term "and" is used conjunctively, so as to limit the request to records that contain all of the listed identifiers, or disjunctively, so as to encompass records that contain any of the identifiers.

This single ambiguity in the requests, however, does not make the requests imprecise. Under these circumstances, the Department could have fulfilled the requests by choosing either of the two permissible constructions, or by seeking a clarification from the Appellant regarding the meaning of "and" as used in his request. In all other respects, the Appellant precisely described the records he seeks to inspect – all records relating to licensees who have been cited for, or investigated for, violations of the Governor's Healthy-at-Work directives. Because the description of the records was otherwise precise under KRS 61.872(3)(b), the Department violated the Act when it denied requests 33 and 35 as imprecise.

The Department also asserts that requests 34 and 36 were imprecise, but for a different reason. In request 34, the Appellant requested "such documents [that] relate, refer to, describe or constitute evidence of the Administrative Case proceedings against each such licensee . . . as described in Request No. 33 and such documents as relate, refer to, describe or constitute evidence of the final disposition of the Administrative Case proceedings[.]" Similarly, in request 36, the Appellant requested "such documents [that] relate, refer to or describe or constitute evidence of the investigative file for alleged violation(s)" by licensees identified in request 35. The Department argues that these two requests are so vague that it cannot identify which documents they encompass.

It may be true that the Appellant could have worded his request more precisely, but these requests are not so vague that the Department is incapable of understanding what records the Appellant seeks. Recall that in request 33 the Appellant sought records that would identify licensees who had been charged for violations of the Healthy-at-Work guidelines, and in request 35 he sought the same information as it relates to licensees who were investigated for such violations but whose cases were dismissed. Requests 34 and 36 simply follow these requests, and seek all records related to the administrative proceedings identified in requests 33 and 35, such as notices of violation, investigative reports, settlement documents, and final orders. At a minimum, the Department could have identified and provided those records. When all four requests, 33, 34, 35, and 36, are read together in context, they are not so vague that the Department would be unable to identify and provide records responsive to the Appellant's requests. Therefore, the Department violated the Act.

Finally, the Appellant argues that the Department improperly asserted the attorney-client privilege and the work-product doctrine without providing a privilege log of the records it withheld or redacted. 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 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,* 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).

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 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.").

In its response to the Appellant's request, the Department described the withheld records as "email communications and related attachments between Department personnel and attorneys, and discussions among the Department's attorneys and legal staff regarding the investigations and related proceedings for Salesforce cases #13212, #16290, and #17155." This description is sufficient for this Office to determine whether the privilege applies.[1]

[1] While a more complete response would affirmatively state that the advice was given for the purpose of rendering legal services, the Department has identified three specific legal

Communications between Department personnel and their attorneys "for the purpose of facilitating the rendition of professional legal services to" the Department fall under the attorney-client privilege. KRE 503(b)(1). Thus, e-mails between agency staff and counsel pertaining to specific investigations and proceedings of the Department were made in furtherance of rendering legal services to the Department, and the Department properly withheld or redacted such material under KRE 503.[2]

As for communications between Department attorneys and legal staff regarding the specific investigations and proceedings, these communications could be withheld or redacted to the extent that they include the mental impressions of the attorneys working on the matters in litigation or in contemplation of litigation. Thus, this material is protected under the attorney work-product doctrine. *See Morrow v. Brown, Todd & Heyburn*, 957 S.W.2d 722, 725 (Ky. 1997) (finding that the attorney work-product "rule refers to information generated and impressions gained in preparation for litigating the case"). Therefore, the Department did not violate the Act by partially denying the Appellant's requests in reliance on the attorney-client or work-product 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.

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/s/ James M. Herrick
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proceedings, and stated that the communications in dispute were between Department attorneys and other staff related to those proceedings. This is sufficient for this Office to find that the communications were made for the purpose of rendering legal services in connection with three legal proceedings.

[2] Where the e-mails contain both privileged and non-privileged material, the Department must redact the privileged content and produce the rest of the e-mails, as required under KRS 61.878(4).

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