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21-ORD-142

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In re: Scott Horn/Jefferson County Property Valuation Administrator

Summary: The Jefferson County Property Valuation Administrator ("Administrator") violated the Open Records Act ("the Act") when it failed to carry its burden that certain emails were exempt from inspection as preliminary opinions under KRS 61.878(1)(j). However, the Administrator did not violate the Act when it denied inspection of certain emails protected by the attorney-client privilege.

Open Records Decision

Scott Horn ("Appellant") submitted electronically two requests for records to the Administrator. In his request that is the subject of this appeal, the Appellant sought correspondence sent or received by agency employees that included the Appellant's name, in any form, since a specific date. The Appellant specified that the scope of his request included "letters, slack, and text messages[.]" In a timely response, the Administrator provided some records, but partially denied inspection of other responsive records pursuant to KRS 61.878(1)(l), the attorney-client privilege under KRE 503, and KRS 61.878(1)(j).

The Appellant seeks review of the partial denial of his request for three reasons. First, he claims that the Administrator's response failed to adequately explain how the exceptions she relies on apply to the withheld records. Second, he believes that the records should no longer be characterized as preliminary under KRS 61.878(1)(j).Third, he claims that that the Administrator subverted the intent of the Act under KRS 61.880(4) because the Administrator's actions caused him to "escalate this request through an appeal[.]"

First, when a public agency denies a request under the Act, it must give "a brief explanation of how the exception applies to the record withheld." KRS 61.880(1). The agency's explanation must "provide particular and detailed information," not merely a "limited and perfunctory response." *Edmondson v. Alig*, 926 S.W.2d 856, 858 (Ky. App. 1996). A public agency does not carry its burden under the Act when it merely quotes the language from a statutory exemption. *See Kentucky New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76, 82 (Ky. 2013) ("The agency's explanation must be detailed enough to permit the court to assess its claim and the opposing party to challenge it.").

Here, in its initial response to the Appellant, the Administrator's stated reason for denial was that "[c]onfidential email communications with the Jefferson County Attorney's Office, made for the purpose of facilitating the rendition of professional legal advice on how to comply with the Kentucky Open Records Act, have been withheld pursuant to the Kentucky Rules of Evidence, Rule 503, as incorporated into the Act via KRS 61.878(1)(l)."

Under KRE 503(b), "confidential communication[s] made for the purpose of facilitating the rendition of professional legal services to [a] client[]" is protected from disclosure. "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).

KRE 503 is incorporated by the Act under KRS 61.878(1)(l) to allow a public agency to deny inspection of public records that are protected by the attorney-client privilege. *Hahn v. Univ. of Louisville*, 80 S.W.3d 771 (Ky. App. 2001). However, if a public agency uses the attorney-client privilege to deny inspection of records, it carries the burden of proof. *See*, KRS 61.880(2)(c). Kentucky courts have held that "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). In 21-ORD-087, this Office found that an agency did not carry its burden that the attorney-client privilege applied when the agency failed to "identify any specific records or types of records that it was withholding under" KRE 503.

Unlike in 21-ORD-087, here, the Administrator has described the records withheld – they are emails. Moreover, the emails were exchanged between the Administrator and the County Attorney with the purpose of facilitating the County Attorney's rendition of legal advice related to the Open Records Act and the Administrator's obligations under the Act. The Administrator has not asserted a blanket claim of attorney-client privilege, but has instead established that specific emails were withheld because they contain legal advice about a specific and ascertainable topic –the Administrator's duties under the Act. Therefore, the Administrator adequately explained how the attorney-client privilege applied to deny the Appellant's inspection of these emails.

The Appellant also argues that the Administrator failed to adequately explain how certain records were preliminary and exempt from inspection under KRS 61.878(1)(j). A public agency may deny inspection of public records that are "[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended[.]" KRS 61.878(1)(j). Kentucky courts have held that records containing preliminary recommendations or opinions can lose their exempt status once a public agency adopts them as part of their final action. *See Univ. of Ky. v. Courier-Journal & Louisville Times Co.*, 830 S.W.2d 373, 378 (Ky. 1992); *Ky. Bd. of Med. Licensure v. The Courier-Journal and Louisville Times Co.,* 663 S.W.2d 953, 956 (Ky. App. 1983). In *Kentucky Board of Medical Licensure*, the Court of Appeals held that complaints against licensees, and "internal preliminary investigative materials" regarding those complaints, were exempt from inspection under KRS 61.878(1)(j), unless "such notes or recommendations are adopted by the Board as part of its action[.]" *Id.* Once the records are adopted as part of an agency's final action "the preliminary characterization is lost, as is the exempt status." *Id.* In *University of Kentucky*, the Supreme Court affirmed this rationale, and held that the University took final action when it adopted its final response to an NCAA investigation. 830 S.W.2d at 378. As such, the final response was no longer preliminary, and KRS 61.878(1)(j) no longer applied to deny inspection of the record. *Id.*

In its initial response, the Administrator denied inspection of "[e]mail communications among [the Administrator's] staff containing preliminary recommendations and expressing opinions regarding compliance with the Open Records Act" under KRS 61.878(1)(j). Such a response did not "provide particular and detailed information" to permit the Appellant to determine whether the exception properly applied. *See Edmondson*, 926 S.W.2d at 858. Therefore, the Administrator's initial response violated the Act.

On appeal, the Administrator provides additional information in support of its reliance on KRS 61.878(1)(j). The Administrator explains that, while drafting a response to an earlier request to inspect records the Appellant had submitted, employees "questioned whether some information in the draft was beyond the scope of that request. It was determined that the information was nonresponsive to the request, so the draft remains preliminary." Thus there appears to have been two drafts proposed in response to one of the Appellant's earlier requests. In one such draft, the Administrator had included additional information that employees later opined contained unresponsive information. That draft response, therefore, was not accepted as the agency's final action, and a different draft was sent to the Appellant which constituted the Administrator's final action in responding to that earlier request to inspect records. Thus, the emails and the first draft contained preliminary recommendations which did not constitute final agency action and those records remain exempt under KRS 61.878(1)(j). Accordingly, the Administrator did not violate the Act by withholding these emails.

Finally, the Appellant claims that the Administrator's conduct subverted the intent of the Act. Under 61.880(4), a person may appeal to this Office if they believe the intent of the Act "is being subverted by an agency short of a denial of inspection, including but not limited to the imposition of excessive fees, delay past the five (5) day period[], excessive extensions of time, or the misdirection of the applicant."

Here, the Appellant argues that "[b]y requiring me to escalate this request through an appeal, [the Administrator] has subverted the intent of the [Act]." Such conduct, however, does not amount to subversion under the Act. As explained, the Administrator properly relied on the attorney-client privilege to deny the Appellant's inspection of certain emails. Moreover, the Administrator has provided the Appellant with other "non-exempt responsive records." There is no basis to conclude that the Administrator subverted the intent of the Act, within the meaning of KRS 61.880(4).

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
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/s/Matthew Ray
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Distributed to:

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