



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

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21-ORD-144

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In re: Holly Harrison-Hawkins/Kentucky Department of Corrections

Summary: The Kentucky Department of Corrections (the “Department”) did not violate the Open Records Act (“the Act”) when it denied inspection of records that cannot be disclosed under KRS 61.878(1)(l), KRS 439.510, and KRE 503. However, it did violate the Act when it could not sufficiently explain how KRE 503 allowed it to deny inspection of other records.

Open Records Decision

Holly Harrison-Hawkins (“Appellant”) submitted a request to the Department for a “copy of all training materials provided to Probation and Parole Officers regarding their appearance and testimony at parole violation hearings, to include all three phases[]” as well as “any available PowerPoint presentations, PDFs, handouts, and any other curriculum material.” In a timely response, the Department responded and provided “127 pages of responsive records[]” but redacted “[t]he names and identifiers . . . of specific parolees” pursuant to KRS 439.510 as well as information that is subject to the attorney-client privilege pursuant to KRS 61.878(1)(l) and KRE 503. The Appellant initiated this appeal believing the Department has not carried its burden to establish an attorney-client privilege allowed it to redact portions of the training materials.¹

¹ The Appellant does not challenge the Department’s redaction of certain offender information under KRS 439.510. Even if she had, this Office has found that such information is exempt from inspection, as having been obtained by a parole officer while engaging in the parole officer’s official capacity. *See, e.g.*, 14-ORD-150.

The Appellant claims that the Department failed to prove that the attorney-client privilege under KRE 503 applied to deny inspection of certain PowerPoint training materials. 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. Under KRE 503(b)(1), a “confidential” communication is one that 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 or those reasonably necessary for the transmission of the communication.” 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 into the Act under KRS 61.878(1)(l) which states “[p]ublic records or information the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly[.]” *See 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)). 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.”).

To carry its burden on appeal, the Department voluntarily chose to provide the unredacted PowerPoint training presentation to this Office for review. The Department explains that parts of the presentation contained confidential legal advice that its general counsel provided to Department employees for training purposes, and only Department employees and counsel were present at the trainings.

Having reviewed the contested redactions, this Office concludes that the Department redacted more information than just the rendition of legal advice. The PowerPoint in dispute contains 35 slides.² The Department redacted in its entirety slides 11 through 16. However, none of these slides contain legal advice. Slide 11 is a general checklist, and slides 12 through 16 contain pictures of publicly available forms that do not contain personally identifiable information. The slides do not contain any legal advice about these forms. The Department therefore violated the Act when it redacted these slides.

The Department also redacted slides 24, 25, and 29 through 34, in their entirety. These slides contain black text which poses hypothetical scenarios and questions, with orange text that follows and appears to be legal advice that answers the hypotheticals posed. Combined, the black and orange text represent both sides of the confidential communication. Accordingly, the Department may properly redact the client's solicitation and the responsive legal advice under KRE 503. Therefore, the Department did not violate the Act by redacting from these slides information that is protected by the attorney-client 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.

Daniel Cameron
Attorney General

/s/Matthew Ray
Matthew Ray
Assistant Attorney General

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² The Department produced two PowerPoint presentations in response to the Appellant's request. The second presentation provided training for officers using the Department's probation and parole software system. The only redactions made to this PowerPoint include offender information, which is exempt from inspection under KRS 439.150. The Appellant does not challenge the Department's reliance on KRS 439.150 to redact these portions of the second PowerPoint.

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Distributed to:

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