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21-ORD-180

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In re: Chris Dixon/Board of Nursing

Summary: The Board of Nursing ("Board") violated the Open Records Act ("the Act") when it denied a request for records without explaining how the cited exemptions applied to the records it withheld. On appeal, the Board failed to carry its burden that KRS 61.878(1)(i) and KRS 61.878(1)(j) applied to deny a former public agency employee inspection of records related to him. *See* KRS 61.878(3). However, the Board did carry its burden on appeal that the attorney-client privilege applied to withhold records, and that KRS 61.878(1)(a) applied to redact personal contact information.

Open Records Decision

On June 24, 2021, Chris Dixon ("Appellant"), requested all records relating to his employment with the Board, the termination of his employment, the "authority cited for [his] termination," or "the decision-making process that concluded with [his] termination." In its response to the request, the Board withheld or redacted several e-mails under KRS 61.878(i) and (j) as "preliminary documents, including drafts, notes, correspondence with private individuals, recommendations, and memoranda in which opinions are expressed or policies formulated," and certain other e-mails under KRE 503 as "records that are privileged communications with counsel." The Board identified the withheld e-mails only by date, number of pages, and the applicable exemption from the Act. With regard to the redacted e-mails, the Board did not assert a specific basis for each redaction. This appeal followed.

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. 1996). "The agency's explanation must be detailed enough to permit [a reviewing] court to assess its claim and the opposing party to challenge it." *Kentucky New Era, Inc. v. City of Hopkinsville,* 415 S.W.3d 76, 81 (Ky. 2013). Here, the Board merely paraphrased the language of KRS 61.878(1)(i) and (j), without explaining how those exceptions applied to the particular e-mails it withheld or redacted. Thus, the Board violated the Act.

The Board's initial response likewise failed to explain how the attorney-client privilege applied to the particular e-mails 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).

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). However, when a party invokes the attorney-client privilege 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). 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 initial 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 invocation of the attorney-client privilege.

On appeal, the Board has corrected its initial violation by providing additional information. Specifically, it provides a list of the withheld e-mails, which identifies each by subject line, date, and the particular provision of law under which it is withheld. The Board has also listed its redactions and stated the basis for each.

With regard to the records withheld under KRE 503, the Board makes a general statement that each e-mail "was an attorney-client privileged communication between Morgan Ransdell, General Counsel for the Kentucky Board of Nursing, and members of Board staff." That statement merely asserts that the Board's attorney was a party to the communications and restates the claim of privilege, without describing the contents or purpose of the communications. In its itemized list of the withheld e-mails, however, the Board describes each communication, with some slight variations in wording, as "attorney-client email discussion of draft of preliminary recommendations and preliminary memoranda in which opinions are expressed or policies formulated or recommended." This description, while minimal, suffices to establish that the Board's attorney was acting in his capacity of rendering professional legal services to the Board. Accordingly, the Board did not violate the Act when it withheld these disputed e-mails under KRE 503.

The Board also withheld certain e-mails and attachments under KRS 61.878(1)(i) and (j) because they were preliminary drafts or recommendations containing opinions. KRS 61.878(1)(i) exempts from the Act "[p]reliminary drafts, notes, [and] correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency[.]" This Office has described a preliminary draft as "a tentative version, sketch, or outline of a formal and final written product." *See* 05-ORD-179. Preliminary drafts, as such, are a category of records "separately and distinctly exempt under KRS 61.878(1)(i)." *See* 20-ORD-095. And under KRS 61.878(1)(j), "[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended" are exempt from inspection. But the Board's reliance on these two exceptions was misplaced.

The Appellant is a former employee of the Board, and was therefore a "public agency employee" under KRS 61.878(3). Under this provision, "[n]o exemption" under KRS 61.878(1) "shall be construed to deny, abridge, or

impede the right of a public agency employee . . . to inspect and to copy any record *including preliminary and other supporting documentation* that relates to him." *Id.* (emphasis added). And although the Appellant was actually a "former" public agency employee at the time of his request, this Office has consistently held that KRS 61.878(3) applies to former public agency employees. *See, e.g.*, 97-ORD-140; 97-ORD-161; 00-ORD-159; 01-ORD-126; 03-ORD-043; 05-ORD-099; 06-ORD-236; 07-ORD-236; 08-ORD-013 n.6; 09-ORD-116; 09-ORD-117; 09-ORD-224; 14-ORD-130 n.9; 15-ORD-158. In holding that KRS 61.878(3) applies to former public agency employees, this Office recognized that KRS 61.878(3) permits applicants for public agency employment to inspect public records that relate to them, and it would be "inconceivable" to allow a greater right of inspection to a mere applicant than a former public agency employee who has provided services to the Commonwealth. 97-ORD-087.

Because the Appellant is a former public agency employee, the Board may not rely on KRS 61.878(1)(i) or (j) to deny inspection of records that relate to his "work plans, job performance, demotions, evaluations, promotions, compensation, classification, reallocation, transfers, layoffs, disciplinary actions, examination scores, and preliminary and other supporting documentation." KRS 61.878(3). Therefore, the Board violated the Act when it withheld the requested records from a former public agency employee.[1]

The Board did not produce certain other e-mails and attachments because they were duplicates or were not responsive to the Appellant's request. In doing so, the Board did not violate the Act. Likewise, the Board properly redacted certain material from some e-mails that was not responsive to the request.

Finally, the Board redacted from one e-mail the personal contact information of the sender on grounds of personal privacy under KRS 61.878(1)(a). While this type of categorical redaction is permissible under *Kentucky New Era, Inc.,* 415 S.W.3d at 89, the Board violated the Act when it

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[1] Although KRS 61.878(3) is an exception to the exception, there is an exception to KRS 61.878(3) as well. A public agency *may* deny a former public employee inspection of records that relate to him if any of the documents relate "to ongoing criminal or administrative investigations by an agency." KRS 61.878(3). But there is no evidence in this record that any law enforcement or administrative proceedings are pending against the Appellant, who has already been terminated.

failed to assert this basis for this redaction in its initial response to the Appellant's request. KRS 61.880(1).[2]

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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[2] The Board also redacted a second e-mail under KRS 61.878(1)(j), but provided the unredacted e-mail to the Appellant after this appeal was initiated. Accordingly, that redaction is now moot. Furthermore, the Board has provided certain records to the Appellant that it previously withheld. Any issues relating to those documents are likewise moot. *See* 40 KAR 1:030 § 6.