



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

DANIEL CAMERON
ATTORNEY GENERAL

CAPITOL BUILDING, SUITE 118
700 CAPITAL AVENUE
FRANKFORT, KENTUCKY 40601
(502) 696-5300
FAX: (502) 564-2894

21-ORD-227

November 24, 2021

In re: Michelle Nance/Woodford County Board of Education

Summary: The Woodford County Board of Education (“the Board”) did not violate the Open Records Act (“the Act”) when it denied a request to inspect a record protected by the attorney-client privilege.

Open Records Decision

On October 7, 2021, Michelle Nance (“Appellant”) requested various records from the Board, including “[a]ll attorney bills since May, 2021 pertaining to ESSER II and ESSER III funds” and “[a]ll Board Attorney communications with Chair Bradley regarding ESSER II and ESSER III funds.” In response, the Board provided the requested bills, but it denied the request for attorney communications under the attorney-client communications privilege, citing KRE 503 and KRS 61.878(1)(l). This appeal followed.

The Appellant states that, according to the billing statements, the Board’s attorney sent an e-mail to the Board Chair on May 5, 2021, concerning “[a]ssurance and scope of board approval requirement.” Although the Appellant does not dispute that this e-mail was a privileged communication when it occurred, she argues that the Board waived the privilege by referring to the e-mail during a public meeting on May 20, 2020.

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).

Here, there is no dispute that the e-mail was intended as a confidential communication between attorney and client in furtherance of the rendition of professional legal services within the meaning of KRE 503(b). The question is therefore whether the Board waived the privilege as to the contents of the e-mail by mentioning it at a public meeting. The Appellant cites no authority for the proposition that a privileged document loses its privileged status when the client refers to it in a public setting. Furthermore, the Board states that it has been able to identify only two mentions of the e-mail at the meeting in question, both made by the superintendent. First, the superintendent stated that “there may even be some question whether the Board has to approve the ESSER II, uh, all of the funding, because the, the information that was sent out by the Commissioner [of Education] that was referenced in an e-mail from [the Board’s attorney], um, that specifically was about ESSER III.”¹ The other remark was as follows: “Up until last week, uh, we weren’t told that the, the Board had to actually approve it. . . . [U]ntil I received that, that e-mail, um, it was either Thursday or Friday, uh, I did not realize and, and, and still am not certain, that ESSER II requires Board approval.”² In neither of these references did the superintendent quote, recite, or otherwise share the contents of the e-mail. Therefore, the record does not contain evidence to support the conclusion that the attorney-client privilege was waived.

Insofar as the Appellant argues that a public agency waives any exemption under KRS 61.878(1) when the exempt record is referenced or discussed in a public forum, prior decisions of this Office have rejected that argument. *See, e.g.*, 00-ORD-139; 00-ORD-195; 00-ORD-197; 08-ORD-235; 15-ORD-087. Although those prior decisions were concerned with preliminary

¹ See video recording, “WCPS Special Board Meeting 5-10-2021,” available at <https://www.youtube.com/watch?v=9LfxjvINa8> (last accessed Nov. 9, 2021), at 1:25:36.

² See video recording, “WCPS Special Board Meeting 5-10-2021,” available at <https://www.youtube.com/watch?v=9LfxjvINa8> (last accessed Nov. 9, 2021), at 1:49:59.

drafts or recommendations under KRS 61.878(1)(i) and (j), their reasoning applies equally to records protected by the attorney-client privilege, which may be waived “by the consent of the client only.” *Carter v. West*, 19 S.W. 592, 593 (Ky. 1892); *see also* KRE 509 (requiring the client to disclose a “significant part of the privilege matter” before a finding of voluntary waiver can be made). The superintendent’s reference to the existence of a privileged attorney-client communication in a public Board meeting, without describing any of the substantive content of the communication, did not waive the attorney-client privilege. KRE 509. Therefore, the Board did not violate the Act when it denied the Appellant’s request for the e-mail in question.

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 within 30 days from the date of this decision. 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. The Attorney General will accept notice of the complaint e-mailed to OAGAppeals@ky.gov.

Daniel Cameron
Attorney General

/s/ James M. Herrick

James M. Herrick
Assistant Attorney General

#332

Distribution:

Ms. Michelle Karcz Nance
Grant R. Chenoweth, Esq.
Superintendent Danny Adkins