



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

22-ORD-174

August 24, 2022

In re: Lawrence Trageser/Spencer County Board of Education

Summary: The Spencer County Board of Education did not violate the Open Records Act (“the Act”) when it denied a request for attorney work-product.

Open Records Decision

Lawrence Trageser (“Appellant”) submitted to the Board a request to inspect a report created by the Board’s legal counsel following an investigation into claims of abuse allegedly committed by a specific employee. In a timely response, the Board denied the request under the attorney-client privilege and work product doctrine, incorporated into the Act under KRS 61.878(1)(l) and KRE 503. The Board also stated that the administrative proceedings surrounding the employee’s termination had not yet concluded, and thus, the report was alternatively exempt as a preliminary memorandum under KRS 61.878(1)(j). This appeal followed.

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). 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.* Records protected by the work-product doctrine may 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.

Here, the Appellant admits that the report was discussed in executive session of a special meeting—an executive session in which legal counsel discussed the report with Board members. Following the executive session, the Board voted to terminate the employee’s employment. The Appellant also admits that legal counsel was specifically hired for the purpose of conducting this investigation. The Board confirms these points, and further explains that the report contains snippets of interviews from witnesses and the attorney’s mental impressions about the credibility of such witnesses and why those particular snippets are relevant. Thus, the report constitutes “core” work product and it was used while providing legal advice to the Board. Accordingly, the Board did not violate the Act when it denied the Appellant’s request for attorney work product.¹

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/Marc Manley
Marc Manley
Assistant Attorney General

¹ Because the Office concludes that the report constitutes attorney work product, it is unnecessary to determine whether the report remains exempt as preliminary under KRS 61.878(1)(j) until the employee’s administrative remedies have been exhausted. *But see* 99-ORD-164 (recognizing that “final action” in employee disciplinary proceedings does not occur until the conclusion of the administrative proceeding, and thus, preliminary recommendations remain preliminary under KRS 61.878(1)(j) until the exhaustion of all administrative remedies).

#253

Distribution:

Mr. Lawrence Trageser

Grant Chenoweth