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22-ORD-186

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In re: Iris Skidmore/Office of the Attorney General

Summary: The Office of the Attorney General ("the Office") did not violate the Open Records Act ("the Act") when it withheld from inspection records exempt under the attorney-client privilege.

Open Records Decision

Iris Skidmore ("the Appellant") submitted a request to the Office asking for copies of records related to the Office's legal representation of the Department of Agriculture ("the Department") in a specific civil action in Franklin Circuit Court. The Appellant sought "[a]ll written communications, including hand written notes, letters, memoranda, texts, and emails, between" the Office and the Department, including documents related to the "[h]iring or retaining or otherwise engaging the Office[ ] for legal representation" as well as documents related to "the scope" of the representation and "billing" records "or lack thereof." The Appellant also asked for a copy of any Office policy "regarding payment to and billing by the Office[ ] for providing legal services to state agencies."

In a timely response, the Office advised that it does not possess a policy relating the billing of state agencies for legal representation. However, the Office did possess 41 documents responsive to the first part of the Appellant's request. The Office withheld those documents from the Appellant's inspection because they constitute privileged attorney-client communications under KRE 503, and because the records were preliminary drafts, notes, or memoranda expressing recommendations, KRS 61.878(1)(i) and (j). This appeal followed.

On appeal, the Appellant specifies that she did not intend to request communications protected by the attorney-client privilege. She states that she sought only billing records and any contracts between the Office and the Department

pertaining to legal services. The Office states that the 41 records it withheld were responsive to the Appellant's request for communications related to the "scope" of the Office's representation. The Office notes that it interpreted the Appellant's request broadly to ensure a complete search for potentially responsive records. Now that the Appellant has specified that she seeks only billing records or contracts (*i.e.*, retainer agreements), the Office states it possesses no responsive records. The Office explains on appeal that it did not bill the Department for legal services provided in connection with the civil action at issue, and it did not enter into a retainer agreement with the Department. Nevertheless, the Office stands by its decision to withhold the 41 documents it determined were responsive to the Appellant's request because they are privileged attorney-client communications.

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 communications between the client's representatives, 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").

On appeal, the Office itemized each of the withheld communications and explained the nature and substance of the communications. The Office has also produced the withheld records for confidential review to confirm the privileged nature of the documents. As explained by the Office on appeal, all of these communications involve discussions about litigation strategy and tactics and, in some instances,

discussions about proposed work product. Having reviewed the records, none of the communications involve billing the Department and none could be construed as a contract or a retainer agreement. Although all the communications discuss tactics, strategies, and counsel's mental impressions at various stages during the litigation, and would be considered privileged communications, none of the communications are responsive to the Appellant's request. Thus, the Office did not violate the Act by withholding these communications.

To the extent the Appellant disputes the Office's claim that no billing records, retainer agreements, or policies related to billing or not billing agencies for legal representation exist, she has failed to present a *prima facie* case calling into question the adequacy of the Office's search. Once a public agency states affirmatively that it does not possess responsive records, the burden shifts to the requester to present a *prima facie* case that requested records do exist in the possession of the public agency. *See Bowling v. Lexington-Fayette Urb. Cnty. Gov't*, 172 S.W.3d 333, 341 (Ky. 2005). If the requester is able to make a *prima facie* case that the records do or should exist, then the public agency "may also be called upon to prove that its search was adequate." *City of Fort Thomas*, 406 S.W.3d at 848 n.3 (citing *Bowling*, 172 S.W.3d at 341).

Here, the Appellant does not point to a statute, regulation, or other evidence that requires the Office to bill a state agency for providing legal representation to that state agency.[1] Accordingly, she has failed to make a *prima facie* case that the Office possesses billing records or a retainer agreement with the Department. Thus, the Office did not violate the Act when it did not provide records that do not exist.

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.

[1] At most, the Appellant mentions that she received billing records from the Office related to a different civil action in which the Office represented the Department. However, the Office did not bill the Department for services rendered in *this* matter, and the Appellant provides no authority *requiring* the Office to bill a state agency for providing legal services. The fact the Office billed the Department in a different civil action is irrelevant to whether the Office billed the Department in this civil action.

Daniel Cameron
Attorney General

s/Marc Manley
Marc Manley
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Distributed to:

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