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24-ORD-153

June 26, 2024

In re: *Lexington Herald–Leader*/University of Kentucky

Summary: The University of Kentucky ("the University") violated the Open Records Act ("the Act") when it partially denied a request for records without explaining how the cited exemptions applied to the records it withheld. On appeal, the University carried its burden of showing that KRS 61.878(1)(i) and KRS 61.878(1)(j) applied to withhold preliminary drafts and preliminary memoranda. The University also met its burden to show that the attorney-client privilege applied to certain disputed communications. However, the University violated the Act when it withheld a "Statement of Work" that was neither a preliminary draft nor a preliminary memorandum.

Open Records Decision

On March 4, 2024, the *Lexington Herald–Leader* ("Appellant") requested certain records relating to Deloitte Consulting ("Deloitte"), a firm contracted by the University, in its support role for a planning initiative known as "Project Accelerate" and associated work groups made up of students, faculty, staff, senior administrators, and members of the University President's cabinet. The request was particularly focused on "Work Group 5," which related to the governing structure and regulatory processes of the University. Specifically, the Appellant requested the contract between the University and Deloitte "for all work with Project Accelerate Work Group 5," "[a]ll reports compiled by Deloitte and/or [the University] related to findings or interviews done in work on Project Accelerate," and a "list of all parties interviewed by Deloitte and/or Work Group 5, including their position at the university."

In response, the University first stated no specific contract existed for Project Accelerate, but it provided the Appellant a copy of its general contract with Deloitte. The University further stated "many of the records" requested were not public records under the Act because they belonged to Deloitte and were not "prepared, owned, used, in the possession of or retained by" the University. Next, the University claimed the remainder of the requested records were "considered preliminary records under

KRS 61.878(1)(i) & (j)" and therefore "exempt from disclosure." Finally, the University asserted "many" of the requested records were "considered attorney-client privileged and, thus, exempt from disclosure." The University provided no further explanation.

The Appellant made an additional request on March 5, 2024, for "[a]ll emails and communications between [Deloitte] and the [University] Board of Trustees related to the Project Accelerate presentation on Feb. 23, 2024," and "[a]ny documents, surveys, interview questions, responses or other records related to Deloitte's research at [the University] as part of Project Accelerate." In response, the University first stated that "there are no communications between [Deloitte] and [the] Board of trustees related to the Project Accelerate presentations on February 23, 2024." Similar to its previous response, the University also claimed "many of the records" belonged to Deloitte and thus were not public records, the remainder of the records were "preliminary" and exempt under KRS 61.878(1)(i) and (j), and "many" of the records were attorney-client privileged. This appeal of both responses followed. Although the Appellant does not question the responses insofar as they indicate certain records do not exist, the Appellant does object to the University's other reasons for denying the request.

Regarding the University's assertion that some of the requested records are not "public records," the Appellant argues the University cannot make public records exempt from disclosure by contract. *See, e.g.,* 03-ORD-065. That argument, however, presumes the records in question were public records in the first place. The Act defines "public record" as "all books, papers, maps, photographs, cards, tapes, discs, diskettes, recordings, software, or other documentation regardless of physical form or characteristics, which are prepared, owned, used, in the possession of or retained by a public agency." KRS 61.870(2). Here, the University asserts that most of "Deloitte's internal working papers, analysis, communications, or presentation drafts" have not been prepared, owned, used, in the possession of, retained, or even seen by the University.[1] In the absence of any evidence to the contrary, such materials are not "public records" and are not subject to the Act. Indeed, they could not be provided to the Appellant because they are not the University's to provide. Accordingly, the University did not violate the Act when it denied requests for Deloitte's internal records that do not fit the definition of "public records."

Regarding the remaining records requested, the Appellant argues the University's responses did not sufficiently explain the exceptions to the Act on which they relied. 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

[1] This includes the identities of the persons interviewed by Deloitte for Work Group 5, as mentioned in the Appellant's first request.

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." *Ky. New Era, Inc. v. City of Hopkinsville,* 415 S.W.3d 76, 81 (Ky. 2013). An agency is not "obliged in all cases to justify non-disclosure on a line-by-line or document-by-document basis." *City of Ft. Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 851 (Ky. 2013). Rather, "with respect to voluminous [open records] requests . . . it is enough if the agency identifies the particular kinds of records it holds and explains how [an exemption applies to] the release of each assertedly exempt category." *Id*. (discussing the "law enforcement exception" under KRS 61.878(1)(h)). Of course, "if the agency adopts this generic approach it must itself identify and review its responsive records, release any that are not exempt, and assign the remainder to meaningful categories. A category is meaningful if it allows the court to trace a rational link between the nature of the document and the alleged" exemption. *Id*. (quotation omitted). Here, the University merely cited KRS 61.878(1)(i) and (j) without explaining the types of records to which they applied or how each exception applied to the particular records withheld. Thus, the University violated the Act.

The University's initial response likewise failed to explain how the attorney-client privilege applied to the particular records it withheld. 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). "Representative of the client" is defined broadly to include a "person having authority to obtain professional legal services, or to act on advice thereby rendered on behalf of the client." KRE 503(a)(2)(A).

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. Gen. 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,* 406 S.W.3d at 848–49 (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 University 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 University's invocation of the attorney-client privilege.

On appeal, however, the University has corrected its initial violations by providing additional information. Regarding the records withheld under KRS 61.878(1)(i) and (j), the University identifies "early drafts of Deloitte's presentations," "communications between Deloitte employees and university officials," and "internal communications between university officials concerning Deloitte's work." KRS 61.878(1)(i) exempts from public disclosure "[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." The "early drafts" of any documents are within the scope of KRS 61.878(1)(i).

As for the University's internal communications and its communications with Deloitte, KRS 61.878(1)(j) exempts from public disclosure "[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended." However, if a public agency adopts such opinions or recommendations as the basis of final action, the exempt status of the record is lost. *See Univ. of Ky. v. Courier–Journal & Louisville Times Co.,* 830 S.W.2d 373, 378 (Ky. 1992); *Univ. of Ky. v. Lexington H–L Services, Inc.,* 579 S.W.3d 858, 863 (Ky. App. 2018). KRS 61.878(1)(j) is "intended to protect the integrity of the agency's decision-making process by encouraging the free exchange of opinions and ideas, and to promote informed and frank discussions of matters of concern to the agency." 00-ORD-139. Here, the University characterizes the communications in question as "discussions about the financial, policy, public relations, internal political, and external political considerations" of proposed actions and asserts those discussions were not adopted as the basis of final agency action. While minimal, this description of the withheld records is sufficient to sustain the University's reliance on KRS 61.878(1)(j) as to most of the records withheld under that subsection.

There is, however, one exception. Under KRS 61.880(2)(c), the Office requested that the University provide for review a copy of the written communication in which the University described to Deloitte "the tasks, or scope of work, the University expected Deloitte to perform" with respect to Work Group 5 under its existing general contract. In response, the University produced a "Statement of Work" dated November 21, 2023, which expressly incorporates the general contract between the University and Deloitte and spells out the specific expectations for Deloitte's consulting services with respect to Work Group 5. Formally, the document bears all the appearances of a rider or amendment to the contract, including specific

expectations, a fee schedule, provisions for change orders, and blanks for signatures by representatives of the University and Deloitte. The "Statement of Work" is thus essentially the Work Group 5 "contract" requested by the Appellant.

Information in a public contract must be disclosed unless it is subject to an exception under KRS 61.878(1). *See, e.g.,* 03-ORD-065. Furthermore, exceptions to the Act must "be strictly construed." KRS 61.871. According to any reasonable construction, the Statement of Work is not a "preliminary recommendation" or a "preliminary memorand[um] in which opinions are expressed or policies formulated or recommended" under KRS 61.878(1)(j), nor is it a preliminary draft, a note, or correspondence under KRS 61.878(1)(i).[2] Rather, a contract is itself a final agency action, even when performance of the contract is to occur in the future. *See, e.g.,* 19-ORD-098 (finding a public agency's execution of a settlement agreement and an installment payment agreement were final actions). "The public is entitled to know the details of how efficiently, or inefficiently, [a private entity] has administered a public contract." 24-ORD-115. This cannot be known without public access to the document specifying the details of the work to be performed, whether it is referred to as a "contract" or by some other title. Accordingly, the University violated the Act when it withheld the Statement of Work in reliance on KRS 61.878(1)(i) and (j).

Regarding the records withheld under KRE 503, as incorporated into the Act under KRS 61.878(1)(l), the University describes these records as confidential "communications between the university's attorneys, other university officials, and Deloitte seeking professional legal services from the University's attorneys, including requests for advice and providing information necessary for the University attorneys to formulate legal advice." Inasmuch as Deloitte evidently had authority to seek legal advice from the University's attorneys on matters within the scope of its contract, this description suffices to establish that the withheld communications are protected by the attorney-client privilege. Accordingly, the University properly withheld these records under KRE 503. Thus, the University did not violate the Act when it withheld the disputed records, except for the Statement of Work.[3]

A party aggrieved by this decision may appeal it by initiating an action in the appropriate circuit court under KRS 61.880(5) and KRS 61.882 within 30 days from the date of this decision. Under 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

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[2] Nor is the Statement of Work an attorney-client privileged communication, as the document repeatedly asserts that Deloitte's consulting services do not constitute legal advice.

[3] The University points out that some portions of the Statement of Work do not relate to Work Group 5, but pertain to Deloitte's analysis of legislation. The Office has identified six specific references to the legislation, which appear on page 1 of the document under "Services" and on pages 8 and 9 under "Appendix A." Those references are not responsive to the Appellant's request.

any subsequent proceedings. The Attorney General will accept notice of the complaint emailed to OAGAppeals@ky.gov.

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/s/ James M. Herrick
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