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24-ORD-157

July 2, 2024

In re: Davy Jones/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) applied to withhold preliminary drafts. However, the University violated the Act when it withheld a "Statement of Work" that was neither a preliminary draft under KRS 61.878(1)(i) nor a preliminary memorandum under KRS 61.878(1)(j).

Open Records Decision

On April 2, 2024, Davy Jones ("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 preliminary notes and memoranda," "other preliminary record(s)," and "records constituting final [University] actions" that describe the "activities of 'support' that Deloitte was to perform for [the University] by or after early December 2023."[1] He requested all responsive records in the University's possession, regardless of whether they were "provided to Deloitte by or before" December 2023.

In response, the University stated the requested public records were "considered preliminary pursuant to KRS 61.878(1)(i) & (j) as there are no final actions." The University further asserted "many" of the requested records "would also

[1] The Appellant's request included exhibits specifically referring to Deloitte's activity of "benchmarking," *i.e.,* comparing the University's governing structure and regulatory processes to those of 14 other academic institutions.

be protected as they are considered attorney-client privileged communications." The University provided no further explanation.[2]

On April 12, 2024, the Appellant submitted a rephrased request for "the records, or parts of records, possessed by [the University] on or before early December 2023, including but not limited to those provided to [Deloitte,] that describe [the University's] expectations for activities [of Deloitte] identified to the Board Executive Committee (02/23/2024) by [Deloitte] as 'support' activities for Work Group 5 [and] were support activities of 'benchmarking.'" The University denied the request and cited the same exceptions it asserted in its original response. This appeal followed.

The Appellant argues the University's response did not sufficiently explain the exceptions to the Act on which it 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 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 Fort 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 [*sic*] 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

[2] The Appellant claims the University's response to his first request did not constitute an express denial. However, when a public agency does not provide records and asserts they are exempt from disclosure, a denial of the request may be inferred.

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, the University claims the records withheld under KRS 61.878(1)(i) and (j) fall into three categories: "early drafts of Deloitte's presentations," "communications between Deloitte employees and university officials," and "internal communications between university officials concerning Deloitte's work." The Appellant, however, asserts he did not intend to request any preliminary drafts of Deloitte's presentations. Therefore, it is unnecessary to address this first category of records.

As the Appellant reiterates on appeal, he requested "records, or parts of records, that show the University's expectation[s] of Deloitte in 'support activities' in 'benchmarking,'" which culminated in Deloitte's presentation to the University's Board of Trustees ("the Board") on February 23, 2024, and the Board's subsequent vote to take action on Deloitte's recommendations.[3] Under both versions of the request, the Appellant sought these records regardless of whether they were internal communications within the University or were communicated to Deloitte.

[3] The University acknowledges it took final action at the Board's meeting on February 23, 2024, with respect to Deloitte's recommendations regarding Work Group 5.

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 a contract for Deloitte's services pertaining to Work Group 5. *See* 24-ORD-153.

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).[4] 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).

Nevertheless, the remainder of the records, as described in the requests, are "preliminary" communications regarding the University's expectations for Deloitte's work, which were finally embodied in the formal Statement of Work dated December 1, 2023. Communications of this nature would necessarily constitute tentative versions of the Statement of 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." Records that "represent a tentative version, sketch, or outline of a formal and final written product" are preliminary drafts. 05-ORD-179. Furthermore, communications containing edits or suggested changes to a preliminary draft are likewise within the scope of the "preliminary drafts" exception under

[4] 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.

KRS 61.878(1)(i). *See, e.g.,* 24-ORD-035; 22-ORD-204; 21-ORD-089; 16-ORD-180. Therefore, any responsive records prior to the execution of the Statement of Work are exempt from disclosure.

Regarding communications after the Statement of Work, the document itself specifies a formal process by which a "Change Order" agreed between the parties may alter the scope of services. However, the Appellant requested only records possessed by the University "on or before early December 2023." Therefore, if a Change Order exists, it would only be responsive to the Appellant's request if it was executed in early December 2023. A Change Order amending the Statement of Work, like the Statement of Work itself, would be a final action subject to disclosure. On the other hand, any preliminary communications leading up to a Change Order would be preliminary drafts and thus exempt under KRS 61.878(1)(i).[5]

In sum, the University violated the Act when it failed to explain, in its initial responses, how the asserted exceptions to the Act applied to the records withheld. The University also violated the Act when it withheld the Statement of Work for Deloitte's consulting services with Work Group 5, but it did not violate the Act when it withheld communications that constituted tentative versions or suggestions for the Statement of Work as "preliminary drafts" under KRS 61.878(1)(i).[6]

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

Russell Coleman
Attorney General

/s/ James M. Herrick
James M. Herrick
Assistant Attorney General

[5] Presumably, the University would have provided any relevant Change Orders along with the Statement of Work in response to the Office's request for the document defining the scope of Deloitte's services. Because no Change Orders were provided to the Office, it is assumed that none exist.

[6] Because preliminary communications formulating the Statement of Work are "preliminary drafts," it is unnecessary to decide whether the attorney-client privilege applies to any of those communications.

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