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24-ORD-177

August 5, 2024

In re: Ben W. Richard, Jr./Luther Luckett Correctional Complex

Summary: The Luther Luckett Correctional Complex (the "Complex") 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 Complex carried its burden of showing that the attorney-client privilege applied to certain records. The Complex did not violate the Act when it partially denied the request for records that do not contain a specific reference to the inmate requester.

Open Records Decision

Inmate Ben W. Richard, Jr. ("Appellant") submitted three requests to the Complex for records on June 5[1] and 6, 2024. The June 6 request sought a "copy of any and all email 'sent to' or 'sent by' [a specific Complex employee] relating to [the Appellant], by name or DOC number" for a specified period of time.[2] On June 14, the Complex partially granted the request and provided some responsive records. The Complex partially denied the request, stating the records are "protected by [the] attorney-client privilege and the work product rule," citing KRS 61.878(1)(l), KRS 447.154, CR 26.02, KRE 503, KRS 61.878(1)(k), and Fed. R. Evid. 501. The

[1] The Complex's response to the June 5 request is dated June 10. The Act does not require residents of the Commonwealth to appeal a public agency's denial within a certain time, but inmates must challenge a denial of a request under the Act within 20 days of the denial. Under KRS 197.025(3), "all persons confined in a penal facility shall challenge any denial of an open record [request] with the Attorney General by mailing or otherwise sending the appropriate documents to the Attorney General within twenty (20) days of the denial." Here, the Appellant filed his appeal on July 3, 2024, 23 days after the denial, as reflected by the postmark of his appeal. Thus, the appeal from the June 5 request is time-barred under KRS 197.025(3).

[2] Regarding the second June 6 request, the Appellant did not provide the Complex's response or assert he did not receive a response to that request. Thus, any issues regarding the second June 6 request are not before the Office. *See* KRS 61.880(2)(a).

Complex also withheld records that "do not contain a specific reference to" the Appellant under KRS 197.025(2). This appeal followed.

Here, the Complex's initial response failed to explain how the attorney-client privilege applied to the 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), and 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 the privilege applies. 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 v. Cincinnati Inquirer*, 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"). Here, the Complex 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 Complex's invocation of the attorney-client privilege.

On appeal, however, the Complex has corrected its initial violation by providing additional information. The Complex explains that the responsive records "consist primarily of confidential communications between [a specific employee] and the undersigned legal counsel . . . regarding the appropriate manner in which to respond

to ORRs that were the subject of Appellant's previous OR Appeal." This explanation describes the records sufficiently to establish that the withheld communications are protected by the attorney-client privilege. As a result, the Complex did not violate the Act when it withheld records that are protected by the attorney-client privilege.

Finally, the Complex partially denied the Appellant's request because the responsive records do not contain a specific reference to the Appellant. Under KRS 197.025(2), which is incorporated into the Act by KRS 61.878(1)(l), "the department shall not be required to comply with a request for any record from any inmate confined in a jail or any facility . . . unless the request is for a record which contains a specific reference to that individual." The Office has held that the phrase "specific reference to that individual" means the record must refer to the requesting inmate by name. *See, e.g.,* 23-ORD-347; 17-ORD-073. Here, the Complex states that, although the records relate to the Appellant, he is not specifically referenced by name in the withheld records. Thus, the Complex did not violate the Act when it withheld records that do not contain a specific reference to the Appellant.

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.

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/s/ Matthew Ray
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Distributed to:

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