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24-ORD-270

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In re: Joshua Zeller/Kentucky Department of Education

Summary: The Kentucky Department of Education ("the Department") did not violate the Open Records Act ("the Act") when it denied a request for records exempt under KRE 503 and the attorney work product doctrine. The Department failed to carry its burden to show the withheld records were education records exempt under FERPA or that KRS 61.878(1)(a) permitted withholding the records.

Open Records Decision

Joshua Zeller ("Appellant") submitted a request to the Department seeking the "complete case file including investigatory records not previously provided regarding" an Education Professional Standards Board ("EPSB") matter involving him that was dismissed without a hearing after an investigation by EPSB's attorney. In a timely response, the Department denied the request pursuant to the attorney-client privilege, the work product doctrine, KRS 61.878(1)(a), and the Family Educational Rights and Privacy Act ("FERPA"). This appeal followed.

On appeal, the Appellant challenged the Department's withholding of "notes, correspondence, and memoranda between agency staff and representatives"; "notes, correspondence, and memoranda drafted by the attorney"; and "student records." The Department maintains that the first two categories of records are exempt under the attorney-client privilege and work product doctrine. Further, the Department also maintains that the "student records" are exempt under FERPA.

To start, the Appellant argues the Department's response did not sufficiently explain how the attorney-client privilege and the work product doctrine applied to the records withheld. 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," and 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 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).

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 those between the lawyer and a representative of the lawyer, KRE 503(b)(2). "Representative of the lawyer" is defined broadly to include a "person employed by the lawyer to assist the lawyer in rendering professional services." 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, 774 (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 Ky. v. Lexington H-L Servs.*, 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 Ky.*, 579 S.W.3d at 864–65.

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 under the Act. *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, in its original response, the Department grouped the withheld records into two categories: "notes, correspondence, and memoranda between agency staff and representatives" and "notes, correspondence, and memoranda drafted by the attorney." Regarding the first group, the Department explained "the records contain core attorney work product including the attorney's conclusion, opinions and legal theories, legal advice to clients, and confidential information related to legal services." Regarding the second group, the Department explained "the records contain core attorney work product, legal advice to clients, and confidential communications related to legal services," as well as "mental impressions of the attorney regarding the case." These descriptions of the withheld records were sufficient to permit the Appellant to assess the University's invocation of the attorney-client privilege and work product doctrine. Thus, the Department's initial response did not violate the Act.

On appeal, the Department adds more detail to its denials. Regarding the "notes, correspondence, and memoranda between agency staff and representatives," the Department states this category includes "emails between the agency's investigator and the attorney for [EPSB] . . . regarding who should be interviewed, what questions should be asked, and any follow-up questions for a witness, as well as the investigator's memorandum to the attorney."[1] The Department further explains that reports, notes, and memoranda created by the investigator were under the direction and control of EPSB's attorney to prepare him or her "for a potential [EPSB] hearing." "A document need not be created by a party's attorney to be work-product. The policy of protecting counsel's work product prior to litigation applies with equal force to the work product of the party's other representatives, including private investigators." *Duffy v. Wilson*, 289 S.W.3d 555, 559 (Ky. 2009). Here, the Department has demonstrated that the withheld records are either exempt under the attorney-client privilege as communications between EPSB's attorney and investigator or as core work product created by the investigator to assist EPSB's attorney in preparation for a potential hearing. Accordingly, the Department properly withheld these records under attorney-client privilege and work product doctrine.

[1] The Department explains that EPSB's attorney may "conduct his/her own investigation, or contract with an investigator to investigate the matter consistent with directions provided by [EPSB's] legal counsel.

Regarding, "notes, correspondence, and memoranda drafted by the attorney," the Department explains responsive records include a memorandum drafted by EPSB's attorney and sent to the investigator, the attorney's notes from conversations with the investigator, and correspondence from the attorney to EPSB "in furtherance of the rendition of legal services" to it. These descriptions suffice to establish the records were properly withheld under the attorney-client privilege as exempt communications or the work-product doctrine.

The Appellant asserts that the attorney-client privilege and work product doctrine do not exempt these records because they relate to him as a school district employee. Under KRS 61.878(3), "[n]o exemption in this section shall be construed to deny, abridge, or impede the right of a public agency employee . . . to inspect and to copy any record including preliminary and other supporting documentation that relates to him or her."

The Office has consistently recognized that a public employee's right of access does not extend to records that are made confidential by state law, including records protected by the attorney-client privilege or the work product doctrine. *See, e.g.*, 23-ORD-234; 21-ORD-260; 10-ORD-177; 08-ORD-065; 04-ORD-045; 02-ORD-168; 98-ORD-124; 96-ORD-40. Accordingly, the Appellant does not have a right under KRS 61.878(3) to obtain work product or privileged communications exchanged between an attorney and client to facilitate the rendering of legal services, even if those records relate to him. Thus, the Department did not violate the Act when it withheld records subject to the attorney-client privilege or work product doctrine.

Finally, regarding its withholding of student records under FERPA and KRS 61.878(1)(a), the Department states only that the withheld records are "student records" that contain "information that may lead to the identify of specific students." FERPA, 20 U.S.C. § 1232g, is incorporated into the Act under KRS 61.878(1)(k). Under 20 U.S.C. § 1232g(b)(1), "[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information . . .) of students without the written consent of their parents to any individual, agency, or organization," excepting certain individuals not relevant here. FERPA precludes the disclosure of education records containing personally identifiable student information to third parties without prior parental written consent.

Further, under KRS 61.878(1)(a), a public agency may withhold "information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." This exception requires a "comparative weighing of the competitive interests" between personal privacy and the public

interest in disclosure. *Ky. Bd. of Exam'rs of Psychologists v. Courier-Journal & Louisville Times Co.*, 826 S.W.2d 324, 327 (Ky. 1992). However, when the public agency fails to articulate a privacy interest, "the balance is decisively in favor of disclosure." 10-ORD-082; *see also* 20-ORD-033; 19-ORD-227.

The burden of proof rests with the public agency to sustain its denial of a request to inspect records. KRS 61.880(2)(c). Here, the Department describes the withheld records only as "student records," and states that "a more detailed description of the education records in [the Department's] possession would implicate FERPA and the student's privacy rights" by "enabl[ing] the requestor to discern protected information about the identifiable student." Education records include "documents with information about academic performance, financial aid, or disciplinary matters," but "records relating to employee misconduct do not constitute student educational records." *Univ. of Ky. v. Kernel Press, Inc.* 620 S.W.3d 43, 56–57 (Ky. 2021). The only records described in detail in this appeal appear more like that latter category of record. But the Department has not described the "student" records with sufficient detail to allow the Office to determine whether they are education records or not. The Office fails to see how describing the "student records" with sufficient detail to determine whether they are more like documents containing "information about academic performance, financial aid, or disciplinary matters" or "records relating to employee misconduct" necessarily would disclose "protected information about the identifiable student." Simply put, merely labeling records as "student records" fails to demonstrate that they are *education records* properly withheld under FERPA.

Similarly, the Department has not identified the privacy interest that would be implicated by the "student records," nor has it explained how that privacy interest would be implicated or what information would be revealed by the release of the records. By merely citing KRS 61.878(1)(a) without articulating a significant personal privacy interest at stake, the Department failed to meet its burden to sustain its denial.

Accordingly, the Department violated the Act when it failed to meet its burden to explain how FERPA and KRS 61.878(1)(a) applied to the withheld "student records."

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/ Zachary M. Zimmerer
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Distributed to:

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