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25-ORD-038

February 12, 2025

In re: Barbara Dickens/Office of the Ombudsman

Summary: The Office of the Ombudsman ("the Agency") did not violate the Open Records Act ("the Act") when it withheld complaints, pursuant to KRS 61.878(1)(i), until the Agency's investigation concludes and final action is taken. The Agency met its burden to withhold privileged communications pursuant to the attorney-client privilege.

Open Records Decision

On October 31, 2024, Barbara Dickens ("Appellant") submitted a request to the Agency seeking, in relevant part, six categories of records: (1) "all policies and procedures" of the Agency; (2) "all complaints the [Agency] has received . . . regarding children in foster care, as administered by the Cabinet for Health and Family Services," including complaints "mentioning or referencing foster children and teenagers sleeping in office buildings"; (3) "all communications or other records" received by the Agency or its employees from the Auditor of Public Accounts ("the Auditor") or its employees "directing the [Agency] to take action on any matter, including but not limited to investigating a matter or complaint"; (4) "all communications or other records" received by the Agency or its employees from the Auditor or its employees "related to foster care"; (5) "all complaints sent by the Auditor" or its employees to the Agency or its employees; and (6) "all organization charts for the Auditor."[1] The Agency provided records responsive to subparts 1 and 6, advised that no records exist as to subpart 3, and denied subparts 2, 4, and 5. This appeal, challenging the denial of subparts 2, 4, and 5, followed.[2]

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1 Each request was limited to records from January 1, 2024, to the date of the request.

2 The Appellant submitted a similar request to the Auditor. The Auditor's response has also been appealed by the Appellant. Although both appeals present identical issues regarding the agencies' responses to similar requests, the Office considers both appeals separately because they concern the acts of two different agencies. *See, e.g.*, 23-ORD-087 (consolidating multiple appeals that concerned the same issue and the same parties).

To start, the Agency denied subparts 2 and 5 of the request because the complaints are exempt under KRS 61.878(1)(i) as "correspondence with private individuals" and under KRS 61.878(1)(a) because their disclosure would "constitute a clearly unwarranted invasion of personal privacy."

The Act exempts from inspection any "[p]reliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency." KRS 61.878(1)(i). The Agency asserts that the complaints were all submitted by private individuals and therefore constitute correspondence with private individuals. However, while the Agency's explanation complied with its requirements under KRS 61.880(1) to provide a "brief explanation of how the exception applies to the records withheld," the Office cannot determine from the record on appeal that all the responsive complaints truly are "correspondence" with private individuals. On appeal, the Agency states that "almost all of the complaints the [Agency] has received have been made verbally." Thus, it is not clear whether the responsive complaints are "correspondence with private individuals" or records created by the agency documenting a verbal conversation. However, the Office need not make that determination.

Regardless of whether the complaints are "correspondence with private individuals," it is undisputed that they are complaints. Kentucky courts have long held that complaints giving rise to a formal investigation of a public employee may be withheld from inspection under KRS 61.878(1)(i) and (j), but only until the investigation is completed and final action is taken. *See Ky. Bd. of Med. Licensure v. Courier–Journal & Louisville Times Co.*, 663 S.W.2d 953, 956 (Ky. App. 1983) (holding that "once final action is taken by the [agency], the initial complaints must be subject to public scrutiny"); *Palmer v. Driggers*, 60 S.W.3d 591, 595–97 (Ky. App. 2001) (holding that an employee's resignation before the agency's investigation concluded constituted "final action" such that the initiating complaint lost its preliminary status). Here, the Agency says the investigation related to the complaints is ongoing. Accordingly, the Agency properly relied on KRS 61.878(1)(i) to deny the Appellant's request for complaints.[3]

Next, the Agency denied subpart 4 of the request citing, among other exemptions, the attorney-client privilege. The Appellant asserts that the Agency's initial citation of those did not sufficiently explain how the exceptions on which it relied support its denial. 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

[3] The Agency also asserts that the complaints are exempt under KRS 61.878(1)(a). Because the Office has determined that the complaints are currently exempt under KRS 61.878(1)(i) and (j), the Office need not determine whether KRS 61.878(1)(a) would be applicable on a hypothetical future date when the investigation is complete and final action taken.

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).

However, the Agency's invocation of the attorney-client privilege was more detailed. An agency's duty to explain how an exception applies extends to any claim of attorney-client privilege, which 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 any "person having authority to obtain professional legal services, or to act on advice thereby rendered on behalf of the client." KRS 503(a)(2)(A).

KRS 61.878(1)(l) operates in tandem with KRE 503 to exclude from inspection public records that are 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.

Here, the initial written response explained that the communications involved "interpretations of law, requests for legal counsel, and confidential legal advice provided with respect to [Agency] matters." The Agency's description of the emails is sufficient to carry its burden of showing that the attorney-client privilege applies. Specifically, the Agency explained how the exempt communications sought legal advice related to Agency functions. Accordingly, the Agency did not violate the Act by withholding its privileged communications.[4]

At bottom, the Agency properly relied on KRS 61.878(1)(i) to deny the Appellant's request for complaints in subpart 2 and 5. Further, the Agency properly invoked the attorney-client privilege to withhold privileged communications in response to subpart 4 of the request. Accordingly, the Office finds that the Agency did not violate the Act.[5]

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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Assistant Attorney General

#482

Distributed to:

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[4] Because the Attorney-client privilege is dispositive of the issues on appeal related to subpart 4 of the request, it is not necessary to address the Agency's alternative arguments that the request was too imprecise, and that the exclusions under KRS 61.878(1)(i), (j), and KRS 325.440 also apply.

[5] For the first time on appeal, the Agency cited KRS 61.872(6) as a bases to deny the Appellant's entire request. However, because specific exemptions authorized the denials of subparts 2, 4, and 5 of the appellant's request, it is not necessary to address that new argument on appeal.