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25-ORD-047

February 18, 2025

In re: Joseph Childers/University of Kentucky

Summary: The University of Kentucky ("the University") violated the Open Records Act ("the Act") when it denied a request for records under KRS 61.872(6) because it did not place an unreasonable burden on the agency. The University violated the Act when it withheld records under KRS 61.878(1)(i) and (j), to the extent they "relate[d] to" the requesting University employee within the meaning of KRS 61.878(3). However, the University did not violate the Act when it withheld privileged attorney-client communications under KRE 503(b).

Open Records Decision

On January 2, 2025, attorney Joseph Childers ("the Appellant") requested certain emails sent to or from the University's Executive Vice President/Co-Executive Vice President for Health Affairs between July 1, 2023, and June 30, 2024. Specifically, the Appellant requested all "emails (including their electronic attachments) sent from or received [by] [University] email addresses, that include the names 'DeShana, Dr. Collett, Professor Collett, Senate Council Chair Collett, SC Chair Collett' or any other variation of [his] client's name, Deshana Collett." The University denied the request as "unreasonably burdensome" under KRS 61.872(6) due to the number of responsive records and the time required to review and redact them. Alternatively, the University denied the request in part under KRS 61.878(1)(i) and (j) insofar as it encompassed preliminary records pertaining to "policy issues that involved the University Senate during the time [the Appellant's] client was Chair of that body." Additionally, the University denied the request to the extent it included attorney-client privileged communications under KRE 503. This appeal followed.

If a request for records "places an unreasonable burden in producing public records[,] the official custodian may refuse to permit inspection of the public records or mail copies thereof. However, refusal under this section shall be sustained by clear and convincing evidence." KRS 61.872(6). "When determining whether a particular request places an unreasonable burden on an agency, the Office considers the number

of records implicated, whether the records are in a physical or electronic format, and whether the records contain exempt material requiring redaction." 22-ORD-221. Of these, the number of records implicated "is the most important factor to be considered." 22-ORD-182.

Here, the University has identified 792 records that are responsive to the Appellant's request, consisting of 6,234 pages. The University estimates, at the rate of one minute per page, it would take 103.9 hours to review and redact the records. Alternatively, at the rate of four minutes per record, or approximately 30 seconds per page, the University estimates review and redaction would take 52.8 hours. Thus, an individual employee would be required to expend somewhere between 7.5 and 13 days at eight hours per day to process the Appellant's request.

In 14-ORD-109, the Office found unreasonably burdensome a request for "at least 6,200" emails exchanged between two school systems. Although that number is similar to the number of pages of emails responsive to the Appellant's request, there are significant distinguishing factors. The records in 14-ORD-109 implicated the Family Education Rights and Privacy Act, 20 U.S.C. § 1232g ("FERPA"), which carries financial consequences for educational institutions that fail to adhere to strict confidentiality. Furthermore, the review in 14-ORD-109 required review by multiple agency employees, including lower-level employees with "the personal knowledge needed for a FERPA review," supervisors, and legal counsel, "which could reasonably multiply the time and effort" involved. Additionally, the request in 14-ORD-109 would have necessitated a search beyond the 6,200 emails identified as a minimum, because some emails were stored offline so that every individual workstation of every school district employee would have to be searched for additional records. None of those factors are present here.

Nevertheless, the University argues the burden is unreasonable because it must separate exempt material or material that does not relate to the Appellant within the meaning of KRS 61.878(3). However, the Act requires public agencies to separate exempt from nonexempt material in every case. *See* KRS 61.878(4). "Thus, the obvious fact that complying with an open records request will consume both time and manpower is, standing alone, not sufficiently clear and convincing evidence of an unreasonable burden." *Commonwealth v. Chestnut,* 250 S.W.3d 655, 665 (Ky. 2008). As the Office has long recognized, "it is the legislative intent that public employees exercise patience and long-suffering in making public records available for public inspection." OAG 77-151. Under the facts in this particular appeal, the University has not shown by clear and convincing evidence that the Appellant's request imposes an "unreasonable burden" within the meaning of KRS 61.872(6).

Next, the University argues it may withhold certain records from the Appellant as "preliminary."[1] KRS 61.878(1)(i) exempts from 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," whereas KRS 61.878(1)(j) exempts "[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended." But the Appellant's client is, and was at all relevant times, an employee of the University. 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, including university employees[,] to inspect and to copy any record including preliminary and other supporting documentation that relates to him or her." Accordingly, no record may be withheld from the Appellant, as a requester on behalf of his client, to the extent it relates to her.

Records that "relate[ ] to" an employee can, in some cases, be a broader category than records that mention the employee by name. For example, in 02-ORD-168, a record that contained no specific reference to an employee nevertheless "relate[d] to him" because it had been used in determining his fitness for a promotion and he had requested the records pertaining to his assessment for that promotion. *See* 02-ORD-168 n.3. Here, however, the University advances the novel argument that it is possible for a record to mention the Appellant's client by name *without* "relat[ing] to" her. To support this argument, the University cites 23-ORD-234, in which an employee sought preliminary drafts and discussions leading to the formulation of a general workplace policy that was later applied to him in a particular situation. The Office found those records exempt under KRS 61.878(1)(i) and (j) because they did not relate to the employee. But the University's reliance on 23-ORD-234 is misplaced, because none of the preliminary records in that case were alleged to contain a specific reference to the employee. Here, by contrast, the Appellant requested *only* records containing his client's first or last name.

The University further attempts to support its argument by citing KRS 61.884, which provides that "[a]ny person shall have access to any public record relating to him or in which he is mentioned by name, upon presentation of appropriate identification, subject to the provisions of KRS 61.878." Because access under KRS 61.884 is made "subject to" all of the exceptions to the Act, that provision affords a far lesser right of access than KRS 61.878(3), which negates most of the exceptions under KRS 61.878 for records that "relate[ ] to" the requesting employee. The University claims the fact that KRS 61.884 refers separately to records "relating to" a person and to records "in which he is mentioned by name" indicates that it is possible for a record to mention a person by name without relating to that person.

[1] The University's response to this appeal incorporates by reference its response in 25-ORD-042, which involved the same parties. The arguments pertaining to KRS 61.878(1)(i) and (j) and the attorney-client privilege are therefore those presented in that appeal.

However, KRS 61.884 provides no support for this argument, because it leaves records of *either* description subject to the exemptions under KRS 61.878. The distinction is therefore one without a difference. A member of the general public *cannot* obtain an exempt preliminary record under KRS 61.884, whereas a public agency employee *can* obtain an otherwise-exempt preliminary record that "relates to him or her" under KRS 61.878(3). Furthermore, records that "relate[ ] to" an employee are a broader, not a narrower, category than records that mention the employee by name. Thus, all of the records requested by the Appellant "relate[ ] to" his client within the meaning of KRS 61.878(3).

Nevertheless, it is possible that a responsive record containing the name of the Appellant's client could be addressed to several different topics, so that it "relates to" her only in part. *See, e.g.,* 25-ORD-042 n.1. For example, an email containing his client's first or last name, and perhaps referring to her elsewhere by her title or function, would relate to her to the extent the discussion pertained to her directly, but it would not relate to her insofar as it discussed other individuals or matters not directly concerning her. In such cases, the University has the duty to redact the record instead of withholding it entirely. *See* KRS 61.878(4) ("If any public record contains material which is not excepted under this section, the public agency shall separate the excepted and make the nonexcepted material available for examination."). Thus, the University violated the Act when it entirely withheld preliminary records under KRS 61.878(1)(i) and (j), instead of redacting those portions that do not "relate[ ] to" the Appellant's client within the meaning of KRS 61.878(3) and providing the remainder.

Finally, the University claims some of the requested records are exempt communications with legal counsel. 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 v. Cincinnati Enquirer,* 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 University characterized the emails in question as communications with University attorneys "seeking professional services from the attorneys, including requests for advice and providing information necessary for the attorneys to formulate legal advice." While minimal, this description is sufficient to sustain that the withheld communications are protected by the attorney-client privilege. *See, e.g.,* 25-ORD-038. Furthermore, a public agency employee is not entitled to obtain attorney-client privileged communications under KRS 61.878(3). *See, e.g.,* 23-ORD-234; 21-ORD-260. Therefore, the University did not violate the Act when it withheld those communications.

In sum, the University violated the Act when it denied the Appellant's request in its entirety as an "unreasonable burden" under KRS 61.872(6). The University also violated the Act when it entirely withheld records mentioning the Appellant's client by name under KRS 61.878(1)(i) or (j), although it may redact portions of those records that do not relate to her within the meaning of KRS 61.878(3). However, the University did not violate the Act when it withheld attorney-client privileged communications under KRE 503(b).

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