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16-ORD-193

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In re: Lexington Herald-Leader/University of Kentucky

Summary: In refusing to provide records for *in camera* inspection, the University of Kentucky did not meet its burden to establish its asserted exemptions, and violated the Open Records Act.

Open Records Decision

The question presented in this appeal is whether the University of Kentucky ("UK") violated the Open Records Act in withholding documents under the exemptions of attorney-client privilege, attorney work product, preliminary documents, executive privilege, and the Health Insurance Portability and Accountability Act ("HIPAA"). We find that since UK refused to produce any of the disputed records for *in camera* inspection, UK did not meet its burden to establish its asserted exemptions, and violated the Open Records Act.

The Lexington Herald-Leader ("Herald-Leader") submitted an open records request to UK on May 16, 2016. The Herald-Leader requested:

A copy of the presentation made to the UK Board of Trustees on Monday, May 2 by attorney David Douglass on the topic of the Hazard cardiology practice acquired by UK, then sold back.

Copies of all expenses and fees paid by UK or KMSF to David Douglass or his firm Sheppard Mullin, since 2013.

UK responded to the request on May 19, 2016. Regarding the presentation, UK stated that "the presentation made to the UK Board of Trustees is exempt from disclosure pursuant to KRE 503, as it is considered attorney-client/work product privileged information." UK also asserted that the presentation is exempt under the preliminary documents exceptions of KRS 61.878(1)(i) and (j). Regarding the copies of expenses and fees paid to Douglass or his firm, UK provided the invoices, but noted that "certain pages have been redacted and are considered exempt from disclosure pursuant to KRE 503, as they are considered attorney-client privileged information." UK provided several invoice summaries dated June 29, 2015 through April 15, 2016 from Sheppard Mullin, but the content of all supporting documentation was redacted.

The Herald-Leader also submitted a request to UK on May 31, 2016, requesting "copies of any audits of the Appalachian Heart Center in Hazard, KY done by UK, either prior to partnering with the practice or since 2013." UK responded to that request on June 3, 2016, claiming that the audits were exempt under the preliminary documents exceptions of KRS 61.878(1)(i) and (j), under KRE 503 as attorney-client privileged/work product privileged, and under HIPAA.¹

The Herald-Leader initiated this appeal on June 7, 2016. It generally argued that "'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.'" (quoting KRS 61.878(4)). Regarding the claim of attorney-client privilege for the PowerPoint presentation by Douglass, it argued that "there is no indication that the presentation was

¹ The Herald-Leader also submitted another open records request to UK on May 31, 2016, requesting "a copy of the minutes made at the May 2 dinner meeting of the UK Board of Trustees as required by KRS 61.835." UK responded to that request on June 3, 2016, stating that:

Any minutes from the May committee and full Board meetings are preliminary until the Board and the various committees adopt the minutes at the June meetings. However, the Board traditionally does not have minutes for its Dinner or Luncheon meetings as no official action is taken at those meetings and discussions are often informal.

The Herald-Leader raised the issue of the minutes of the dinner meeting in a separate open meetings appeal, and did not maintain it in the context of this open records appeal. Accordingly, we do not consider that request here, and address it in the context of the open meetings appeal.

made for the purpose of facilitating legal advice.” It further argued that “the Board elected to receive the presentation during an open meeting, and only now seeks to cloak those documents with the privilege. ‘When there is no expectation that communications between a client and his attorney remain confidential, the privilege is absent.’” (quoting *U.S. ex rel. Burns v. A.D. Roe Co.*, 904 F. Supp. 592, 594 (W.D. Ky. 1995)). The Herald-Leader argued concerning UK’s claim of work-product privilege for the presentation that “it applies only to documents ‘prepared in anticipation of litigation or for trial’ and only insofar as the documents disclose ‘the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.’” Regarding UK’s claim that the presentation was preliminary, the Herald-Leader argued that “the presentation is over. The documents making up the presentation, therefore, are no longer ‘tentative.’ . . . There is no longer anything ‘preliminary’ about the University’s . . . acquisition of the Clinic . . . , the termination of that relationship, and the resolution of billing problems uncovered in the University’s audit.”

Regarding the audits, the Herald-Leader similarly argued that they were no longer preliminary, as “the audits concern an issue as to which the decision-making process has been completed,” and that “the University invokes the attorney-client privilege with regard to the audits without establishing – or even articulating – any of the required elements.” Regarding the invoices, the Herald-Leader cited to *Commonwealth, Cabinet for Health & Family Servs. v. Scorsone*, 251 S.W.3d 328 (Ky. Ct. App. 2008) for the proposition that an agency cannot “invoke a blanket claim of attorney-client privilege in order to produce invoices in which the ‘services rendered’ descriptions had been entirely redacted.”²

UK responded to the appeal on June 24, 2016. UK claimed the audit of the clinic was “preliminary information and materials for the University’s senior leaders, information on which the General Counsel and those attorneys would formulate advice, and were prepared in anticipation of litigation.” UK then reiterated its claims of attorney-client privilege, work product, preliminary documents, and HIPAA exemptions. In addition, UK also asserted executive/deliberative process privilege.

² The Herald-Leader addressed the issue of the minutes of the dinner meeting in a separate open meetings appeal. Accordingly, we address it in the context of that appeal, and do not consider it as part of this open records appeal.

Regarding attorney-client privilege, UK argued that the privilege protects “the giving of information to the lawyer to enable him to give sound and informed advice,” and “communications between attorney and client that ‘tend directly or indirectly to reveal the substance of a client confidence.’” UK further stated that “the opinions and recommendations in the records at issue are so intertwined with the supporting factual information addressed therein that to disclose . . . ‘just the facts’ would invariably reveal, either directly or indirectly, the very opinions and recommendations that KRE 503 and KRS 61.878(1)(l) are meant to protect.” Regarding the redacted portions of the invoices, UK argued that “the lawyer’s narrative description of his services is a confidential, attorney-to-client communication, which is therefore privileged.”

Regarding UK’s claim of attorney work product, it stated that “all records at issue prepared after the University discovered a potential problem in Spring 2014, and many that were prepared before, were in anticipation of litigation on various fronts.” Regarding its assertion of the preliminary documents exceptions, UK argued that “records that fall within the preliminary exemption remain within the exemption *even after the agency renders a final decision*,” and that “the Supreme Court of Kentucky has created a *judicial* exception to the preliminary exemption” that “has no basis in the statutory text.” UK also claimed executive/deliberative process privilege, and that it “extends beyond the Governor to other officials and agencies within the executive branch, including state universities.” Finally, UK claimed that to the extent the records contain individually identifiable health information, they are exempt from disclosure under HIPAA, 42 U.S.C. § 1320d-2 and 45 C.F.R. § 164.502(a).³

On July 6, 2016, this office requested to view the records in dispute under KRS 61.880(2)(c). UK responded to that request on July 11, 2016, arguing that while “sometimes the Attorney General must review records . . . other times, however, the law prevents the University from providing records to the Attorney General for *in camera* review notwithstanding the provisions of KRS 61.880(2)(c).” UK then asserted that it could not produce the records because it “cannot

³ UK also included a preemptive argument that this office does not have the authority to request records that are privileged for *in camera* review.

produce records that are privileged without substantial risk that doing so will waive privilege or violate federal law.”

Having summarized the lengthy arguments by both parties, given that UK refused to produce any of the disputed records for *in camera* review, we can only find that UK failed to meet its burden to establish any of its claims of exemptions.⁴ KRS 61.880(2)(c) provides that “the burden of proof in sustaining the action shall rest with the agency, and the Attorney General may request additional documentation from the agency for substantiation. The Attorney General may also request a copy of the records involved but they shall not be disclosed.” Referring to KRS 61.880(2)(c) and 40 KAR 1:030 § 3, we have stated that “the General Assembly has twice vested the Attorney General with the authority to require production of public records, for which a claim of exemption

⁴ We note that regarding UK’s assertion that the alleged audit was not actually an audit, since we cannot review the document itself, we cannot resolve this issue. However, we note generally that “‘an audit is a systematic inspection of accounting records and merely reflects income and expenses of operation.’ ‘Final audit reports are public documents, and must be made available for public inspection.’” 14-ORD-181 (citations omitted).

Regarding UK’s claim that the presentation was attorney-client privileged, it was presented in a regularly scheduled open meeting, available to the public. “When there is no expectation that communications between a client and his attorney remain confidential, the privilege is absent.” *U.S. ex rel. Burns v. A.D. Roe Co.*, 904 F. Supp. 592, 594 (W.D. Ky. 1995).

Regarding UK’s blanket redactions of the itemized invoices from Sheppard Mullin, *see Commonwealth, Cabinet for Health & Family Servs. v. Scorsone*, 251 S.W.3d 328, 330 (Ky. Ct. App. 2008) (“The Attorney General and the circuit court are both correct in rejecting the Administration’s blanket redaction of all descriptive portions of the disclosed billing records without particularized demonstration that each description is privileged.”).

Regarding UK’s assertion that preliminary documents retain their preliminary status even after final agency action is taken, “once such notes or recommendations are adopted by the Board as part of its action, the preliminary characterization is lost, as is the exempt status.” *Ky. State Bd. Med. Licensure v. Courier-Journal & Louisville Times Co.*, 663 S.W.2d 953, 956 (Ky. Ct. App. 1983).

Regarding UK’s assertion of executive/deliberative process privilege to avoid *in camera* inspection, *see generally Commonwealth Revenue Cabinet By & on Behalf of Gillis v. Graham*, 710 S.W.2d 227 (Ky. 1986) (rejecting an assertion of executive privilege to avoid *in camera* review by a circuit court); 05-ORD-185 (Office of the Governor failed to meet its burden of proof for assertion of executive privilege by refusing to produce records for *in camera* inspection.).

Regarding UK’s refusal to produce records containing information protected under HIPAA, we note that “a covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law.” 45 C.F.R. § 164.512(a)(1). *See also id.* § 164.512(e) (covered entity may disclose protected health information as part of an administrative proceeding).

has been made, for in camera review. . . . We are not prepared to accept, without independent confirmation, that all of the responsive documents are shielded from public inspection." 10-ORD-079. When an agency refuses to produce documents that it claims are exempt for *in camera* inspection, we have found that "the agencies whose denials were challenged had not met their burden of proof in sustaining those denials under KRS 61.880(2)(c)." *Id*; see also 05-ORD-185; 95-ORD-61. An agency "cannot benefit from intentionally frustrating the Attorney General's review of an open records request; such result would subvert the General Assembly's intent behind providing review by the Attorney General." *Cabinet for Health & Family Servs. v. Todd Cnty. Standard, Inc.*, No. 2012-CA-000336-MR, 2015 WL 8488911, at *6 (Ky. Ct. App. Dec. 11, 2015). Accordingly, in refusing to produce documents for which exemptions were claimed for *in camera* inspection by the Attorney General, UK has not met its burden of proof to substantiate withholding records, and has violated the Open Records Act.

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court pursuant to KRS 61.880(5) and KRS 61.882. Pursuant to KRS 61.880(3), the Attorney General should be notified of any action in circuit court, but should not be named as a party in that action or in any subsequent proceedings.

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