

## 18-ORD-113

June 13, 2018

In re: Andrew Henderson/Western Kentucky University

*Summary:* Western Kentucky University violated the Open Records Act in redacting hours worked, fees, and in making blanket redactions of attorney billing records.

### *Open Records Decision*

The question presented in this appeal is whether Western Kentucky University (“WKU”) violated the Open Records Act in redacting attorney billing records. We find that WKU violated the Open Records Act in redacting hours worked, fees, and in making blanket redactions from attorney billing records.

### **Background**

Andrew Henderson, editor-in-chief of the College Heights Herald, submitted an open records request to WKU on March 2, 2018. Henderson requested “any payments, including amounts and services rendered, paid by WKU to the Kerrick Bachert law firm from November 1, 2016 to the present. We also request copies of the bills submitted.” WKU responded on March 7, 2018, stating that it would need additional time, and expected to have the records ready on or before March 30, 2018.

On March 29, 2018, WKU provided its response to the request. WKU provided copies of the requested invoices, stating that it “has redacted information which discloses substantive information and/or matters protected by the attorney-client privilege.” WKU further stated:

. . . WKU's insurer requires specific information be included in legal billings, including a "description of the work" performed for the specific time billed. As a result, the content of the legal invoices for matters in litigation includes descriptive information that is both substantive and specific, relating to the assessment and defense of the particular claim.

. . . .

Expenses billed for defense of each matter currently in litigation has also been redacted. However, the total expenses paid for all such matters is provided to you in aggregate.

Finally, you will note that the information on invoices related to Civil Action No. 17-CI-0023 has been redacted entirely, not only because this is pending litigation, but also because the Herald is a party to this litigation. Expenses paid by WKU related to this case are included in the aggregate total.

Henderson initiated this appeal on March 30, 2018, stating, "WKU's response . . . contained records that I believe are redacted in such a way that violates the Kentucky Open Records Act. . . . WKU must disclose amounts billed, time spent by the attorneys on litigation, and hourly rates." WKU responded to the appeal on April 10, 2018, requesting an extension of time to April 23, 2018 on several grounds. First, WKU argued that the College Heights Herald was a party to ongoing litigation with WKU.<sup>1</sup> Second, WKU argued that the Attorney General was also an intervening party in that litigation,<sup>2</sup> "and thus a conflict of interest exists that would prevent review of this appeal by the Attorney General's office." Third, WKU argued that Henderson "did not provide a complete copy of the University's response to its request as part of its appeal letter," apparently on the grounds that "WKU readily disclosed the amount of University funds used to pay legal expenses during the time period requested,

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<sup>1</sup> The case is *W. Ky. Univ. v. College Heights Herald*, No. 17-CI-00233 (Warren Cir. Ct. filed Feb. 24, 2017).

<sup>2</sup> The Attorney General intervened in that litigation for the purpose of upholding the Attorney General's authority to request records for *in camera* review under KRS 61.880(2)(c). See Intervening Compl. Decl. Rights & Permanent Inj., *W. Ky. Univ. v. College Heights Herald*, No. 17-CI-00233 (Warren Cir. Ct. Apr. 10, 2017).

broken out by matters in litigation and general matters not in litigation.” WKU attached a copy of its response to the request and the documents provided. The documents were heavily redacted. At most, the documents contained a date and descriptions such as, “email exchange with Deborah Wilkins, WKU’s General Counsel,” “research specific,” “start,” “finalize,” “continue draft of letter to Deborah Wilkins,” “prepare,” “conduct,” “telephone conference with client/defendant George Dordon,” and redacting everything else, including hours worked and amounts paid. In other documents, everything but the date of services was redacted. This office granted the extension request.

WKU then provided its full response on April 23, 2018. First, WKU argued that Henderson did not comply with KRS 61.880(2) and 40 KAR 1:030 § 1 in not providing a complete copy of the response to its appeal. WKU argued:

The Herald’s failure to include the financial information provided by the University as part of the University’s response to the Herald’s request should be noted in so far as it implied, wrongfully, that the University withheld/denied access to *any and all information related to payment of legal expenses* in its response, which it did not. WKU readily disclosed the amount of University funds used to pay legal expenses during the time period requested .

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Second, WKU argued that it properly redacted the billing invoices on the grounds of attorney-client privilege and attorney work-product. WKU cited to its insurer’s guidelines for billing, which provide that “each invoice must contain a detailed description of each task performed that complies with the section of these guidelines entitled ‘Adequate Descriptions.’”<sup>33</sup> WKU stated that “the

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<sup>33</sup> The section entitled “Adequate Descriptions” required:

Each activity for which time is billed must be described adequately so that a person unfamiliar with the case may determine what activity is being performed. Adequate descriptions *include, but are not limited to:*

1. For all verbal and written communication (e.g. telephone calls, correspondence, and meetings) the identity of the other party/participant and the subject matter of the communication
2. The purpose of the court hearing/conference and who attended
3. The identity of each deponent/interviewee
4. The purpose of review of deposition or trial transcript

invoices prepared by the firm and submitted to the University for payment reflect specific information regarding the nature of the work . . . virtually a 'who, what, when, where and how' the rendition of legal services occurs . . . which is protected privileged information." WKU argued that:

While the invoices provided to the Herald redacted *detailed information* concerning the nature of services rendered . . . , the specific date on which the services were rendered, and the time period it took to render those services, the Herald was provided with invoices showing proof of billings received . . . and the amount of funds spent for payment of all legal expenses by the university for the requested time period.

Third, WKU argued that revealing the details of the invoices would not serve the public good, in that "the attorney client privileged information and/or attorney work product information masked/redacted by the University from legal invoices would not provide the public with information regarding whether the University is executing its statutory functions or whether its employees are serving the public." WKU contended that "the records produced by the University contained information sufficient to respond to the request of the Herald, and to conform to the spirit of the Open Records Law."

Fourth, WKU argued that "attorney client privilege *serves* the *public* interest," arguing that "while there is a right of the public to know, or have access to public records, that right is *not unrestricted*, and in fact *subservient* to the need for governmental *confidentiality*." WKU further argued that "the University is [sic] best position to determine which portion of the records should be masked, and should be afforded considerable latitude in doing so."

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5. The specific legal issue researched
  6. The specific non-deposition discovery worked on and the nature of the work performed
  7. The specific trial preparation or deposition preparation performed
  8. The specific motion worked on and the nature of the work performed
  9. The identity of the material or documents reviewed, and the purpose of the review
  10. For travel time: the time spent traveling, the purpose and destination.

Fifth, WKU noted that “the Attorney General has stated parties to litigation should not use the provisions of the Open Records Act as a substitute for discovery requests.”

Sixth, WKU reiterated its argument that as “Attorney General Andy Beshear is an intervening party” in pending litigation between the College Heights Herald and WKU, “that a conflict of interest exists that would prevent review of this appeal by the Attorney General’s Office.”

### Analysis

**1. Potential Conflict of Interest.** We begin by analyzing whether this office has a conflict of interest that would prevent us from adjudicating this appeal. The Attorney General currently is an intervening party in an appeal from an open records decision involving the College Heights Herald and WKU. However, “the attorney general's unique status as the state legal officer, who is required [to] represent the various and sometimes conflicting interests of numerous government agencies in civil proceedings, requires accommodation, though not exemption, under the rules of professional conduct.” 7A C.J.S. *Attorney General* § 46. “The attorney general engages in impermissible dual representation by undertaking the representation of two opposing state agencies in a civil action when both agencies are party to the action . . .” *Id.*

However, in this case, no such dual or conflicting representation is taking place. KRS 61.880(2)(a) provides that “if a complaining party wishes the Attorney General to review a public agency's denial of a request to inspect a public record . . . the Attorney General shall review the request and denial . . . and issue . . . a written decision.” In the open records context, the Attorney General functions as an administrative agency, authorized to hear and decide open records appeals.” 15-ORD-214 (citing *Commonwealth v. Chestnut*, 250 S.W.3d 655, 660-63 (Ky. 2008)). The Attorney General is merely a party in a case, and is functioning as an administrative agency in deciding this open records appeal; there is no conflicting representation. As such, there is no direct conflict of interest.

Further, “where a conflict does exist, it may be possible to disqualify only certain persons from acting in connection with a particular matter, rather than disqualification of the attorney general's entire office.” 7 Am. Jur. 2d *Attorney*

*General* § 19. To avoid any impropriety, all attorneys in this office who are attorneys of record in the litigation between the College Heights Herald and WKU have been screened off from participation or decision in this appeal. Accordingly, any perceived conflict of interest by WKU is insufficient for this office to recuse from its statutory duties to decide open records appeals.

**2. Providing a Copy of the Agency's Response.** Next, we address WKU's argument that Henderson did not comply with KRS 61.880(2)(a) and 40 KAR 1:030 § 1. KRS 61.880(2)(a) provides that "the complaining party shall forward to the Attorney General a copy of the written request and a copy of the written response denying inspection." 40 KAR 1:030 § 1 provides that "the Attorney General shall not consider a complaint that fails to conform to . . . KRS 61.880(2), requiring the submission of a written request to the public agency and the public agency's written denial, if the agency provided a denial." WKU argues that Henderson failed to comply with these provisions in so far as it "implied, wrongfully, that the University withheld/denied access to *any and all information related to payment of legal expenses* in its response, which it did not. WKU readily disclosed the amount of University funds used to pay legal expenses during the time period requested . . . ." WKU appears to be arguing that Henderson's response was somehow deficient because it misrepresented what WKU provided. However, Henderson provided a copy of his written request and WKU's written response. KRS 61.880(2)(a) does not require an appellant to include all of the documents provided as part of the appeal, for obvious reasons. It makes no provision for any "implications," but only requires the written request and written response, if there is one. Henderson provided a copy of his request and WKU's response; no more is required by KRS 61.880(2)(a).

**3. Redactions of Billing Records.** Turning to the merits of the appeal, KRS 61.878(1)(l) exempts from the Open Records Act "public records or information the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly." "The protections generally afforded by the attorney-client privilege have been recognized and incorporated into the statute by the Kentucky General Assembly." *Hahn v. Univ. of Louisville*, 80 S.W.3d 771, 774 (Ky. App. 2001). However, "the attorney-client privilege does not apply to all communications between an attorney and a client. Indeed, to fall under the attorney-client privilege, a communication must be confidential, relate to the rendition of legal services, and not fall under certain exceptions." *Commonwealth*,

*Cabinet for Health and Family Servs. v. Scorsone*, 251 S.W.3d 328, 330 (Ky. 2008). KRS 61.880(2)(c) provides that “the burden of proof in sustaining the action shall rest with the agency.” KRS 61.878(4) also provides 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.”

In *Scorsone*, 251 S.W.3d 328, State Senator Ernesto Scorsone sought:

all attorney billing statements from non-government lawyers retained by the Administration in connection with the Attorney General's recent investigation of the Fletcher Administration's hiring practices. Senator Scorsone's request sought “the date of each service performed, *a description of the service*, the identity of the attorney performing such service, the hourly rate charged for that attorney, the time spent by that attorney on that service, any reimbursable expenses, total amounts incurred and total amounts due for their services.”

*Id.* at 329. “The Fletcher Administration partially complied with Senator Scorsone's request by tendering its attorney billing statements relating to the investigation, *but redacting from them the descriptions of the particular services rendered* on the grounds that they are protected by attorney-client privilege.” *Id.* This office held that “blanket redaction of descriptions of particular services rendered from the billing statements was improper. . . . Redaction is only proper where a particular description of a service rendered would disclose privileged matters.” *Id.* The circuit court “generally agreed with the Attorney General’s opinion.” *Id.*

In considering the appeal, the *Scorsone* court held:

we cannot imagine that each and every description of services rendered contained in billing statements prepared by non-government lawyers during the Attorney General's investigation falls under the attorney-client privilege.

Thus, we find that 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.

*Id.* The *Scorsone* court thus expressly rejected blanket redaction of billing statements.

Following *Scorsone*, this office has repeatedly held that blanket redactions of attorney billing statements are impermissible. *See, e.g.*, 10-ORD-142; 09-ORD-075. We have held, following our precedents prior to *Scorsone*, that a public agency “need only permit inspection of records which describe, in general terms, the nature of the services rendered as, for example, ‘research,’ ‘witness interviews,’ ‘discussion with client.’” 09-ORD-055. *See also* 05-ORD-029; 01-ORD-56. However, “the general rule is well established that information regarding a client's fees is not protected by the attorney/client privilege because the payment of fees is not a confidential communication between the attorney and client.” OAG 92-92 (citing cases). *See also* 09-ORD-055; 05-ORD-049; 01-ORD-56 (“Information regarding fees is not generally protected by the attorney-client privilege . . .”).<sup>4</sup>

In this case, in some documents, WKU redacted everything except descriptions like “research specific,” “start,” “finalize,” “continue draft of letter to Deborah Wilkins,” “prepare,” “conduct,” including redacting hours worked and amounts paid. Our precedents permit redaction of such records to general descriptions. However, they do not permit redaction of hours or money spent; as these are not substantive matters protected by the attorney-client privilege. In other documents, WKU, by its own admission, has redacted everything except the date of such services. These are blanket redactions in clear violation of *Scorsone*.

WKU argues that it nonetheless complied with the Open Records Act in that “while the invoices provided to the Herald redacted detailed information

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<sup>4</sup> *See also* 98 C.J.S. *Witnesses* § 359 (“Generally, attorney's fees arrangements with clients are not confidential communications protected by the attorney-client privilege.”); 81 Am. Jur. 2d *Witnesses* § 379 (“Absent special circumstances, fee information is not protected by the attorney-client privilege.”).



concerning the nature of services rendered . . . , the Herald was provided with invoices showing proof of billings received.” WKU appears to be arguing that since it provided a summary of aggregate billing information rather than the records themselves, this complies with the Open Records Act. It does not. “The Attorney General has long recognized that ‘the purpose of the Open Records Law is not to provide information but to provide access to public records which are not exempt by law.’” 99-ORD-121 (quoting OAG 79-547). “It is not adequate for [a public agency] to summarize or paraphrase ‘information’ appearing in public records as a purported substitute for providing access to the documents.” 09-ORD-107. *See also* 09-ORD-002 (“It is the Authority’s position that the public’s interest in monitoring the expenditure of public funds for contract legal services is adequately served by disclosure of the invoices upon which payment is made and not by disclosure of the underlying work detail. We disagree.”). WKU has a duty under the Open Records Act to produce records in response to a request, and summaries of information contained in them are not an adequate substitute.

WKU also makes public policy arguments that the public good would not be served by the disclosure of the attorney-client information, that governmental confidentiality better serves the public good, and that WKU is in the best position to determine which portions of the records to redact. We have noted that an agency may “exercise its discretion in redacting any portion of its records which disclose substantive matters and litigation strategy. This resolution of the issue . . . subserves both the agency’s interest in protecting privileged information and the public’s interest in monitoring the city’s activities to [e]nsure that it is properly executing its statutory function and pursuing the public good.” 09-ORD-055. However, WKU’s redactions in this case go beyond redactions of substantive matters and litigation strategy, and WKU is not free to exercise its discretion to redact matters that are not properly attorney-client privileged, or to make blanket redactions of attorney billing records.

**4. Open Records Request during Litigation.** Finally, WKU also argues that “parties to litigation should not use the provisions of the Open Records Act as a substitute for discovery requests.” However, “requests under Open Records provisions, to inspect records held by public agencies, are founded upon a statutory basis independent of the rules of discovery.” 16-ORD-084. “Thus, although the Attorney General has recognized the potential pitfalls of using the Open Records Act as a discovery tool, he has not recognized the right of a public

agency to deny access to public records on these grounds." *Id.* See also 03-ORD-226. Accordingly, the existence of litigation in related matters is not an independent reason for denying an open records request.

### **Conclusion**

In summary, although WKU is permitted to redact substantive matters from attorney billing records as protected by the attorney-client privilege, leaving general descriptions of the work performed, it is not permitted to redact hours worked or fee information, or to engage in blanket redactions. In redacting hours spent and fees paid from attorney billing records, and in making blanket redactions, WKU 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. 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.

Andy Beshear  
Attorney General

Gordon Slone  
Assistant Attorney General

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Distributed to:

Andrew Henderson  
Deborah T. Wilkins