Robert Hawkins
11872 Holland Rd.
Scottsville, KY. 42164

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APR 16 2013
PUBLIC SERVICE
COMMISSION

Mr. Jeff Derouen
Executive Director
Public Service Commission
POB 615
Frankfort, KY. 40602

RE: case number 2013-00017
Robert Hawkins v Fountain Run Water Sewer District

Sir,
Enclosed you will find the response from The Attorney General of the state of Kentucky in regards top the opens records request case I submitted against FRWSD.
I would like to include this as part of the ongoing PSC case file as I believe this further proves the negligence and malfeasance orchestrated by the office manager at FRWSD. I would like for you to look closely at Item #3 on my request and to review the official response from FRWSD and note that I have through personal investigation found at least 3 other people who have had water accounts shut off and then subsequently were billed a base rate sewer in likeness to my situation. I point this out because FRWSD has claimed no others exist.
The people are as follows; Greg Jones, Jim Jordan and Mitchell Jackson all whom have confirmed or I have confirmed the billing practice I have reported exists. I would like to highlight Mr. Jackson who is currently in nursing home and disclose that his son is an employee of FRWSD and was present at the Nov. 2012 meeting where Mrs. Veach used the existence of that account as rational for my billing. Mr. Jackson son was reluctant to speak about this as he expressed fear of job security at FRWSD.

I Plan to forward this information to the assistant Attorney Generals office and have requested the other billed parties do the same in an effort to further illuminate the need for the removal of the office manger and all the board members of FRWSD.

Thank You for your attention to this matter
Robert Hawkins

case#2013-00017

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PUBLIC SERVICE COMMISSION

COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

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13-ORD-052

April 9, 2013

In re: Robert Hawkins/Fountain Run Water District

Summary: Fountain Run Water District violated the Open Records Act in failing to either properly invoke KRS 61.872(5) if appropriate, or provide requester with timely access to documents requested in compliance with KRS 61.880(1), but ultimately provided requester with all existing responsive documents in response to his appeal with exception of those withheld on basis of attorney-client privilege. Although District is entitled to withhold any records that satisfy all three elements of KRE 503, the agency has not satisfied its burden of proving that KRE 503 applies yet.

Open Records Decision

The question presented in this appeal is whether the Fountain Run Water District violated the Kentucky Open Records Act in the disposition of Robert Hawkins's December 19, 2012, request for the following:

1. A complete roster of Board members and all employees of FRWSD.
2. A complete payroll for FRWSD monthly or yearly.
3. A complete list of every FRWSD user who has or is being billed for sewer even though water is disconnected since 2000.

4. A copy of the original contract signed by the original owners of 212 [M]ain [S]t. Fountain Run at the time sewer was originally installed.
5. A complete billing history of 212 [M]ain [S]t. from time septic/sewer was installed.
6. A copy of all correspondence on the matter of Crossroads [C]afe' sewer billing. Please include any legal submissions to Wes Stephens and FRWSD council.
7. A copy of the minutes for the November 2012 and December 18, 2012 FRWSD Board meetings.
8. A written explanation and rationale for the [s]ewer billing.

Mr. Hawkins also requested that the District provide a "written explanation" of the reason(s) if any records were not provided. Having received no written response of any kind, Mr. Hawkins initiated this appeal by undated letter received in this office on March 8, 2013.

Upon receiving notification of Mr. Hawkins's appeal from this office, Monroe County Attorney Wes Stephens responded on behalf of the District. He advised that documents responsive to all items of the request were included with his March 22, 2013, letter with the exceptions of Item 3, in response to which Mr. Stephens explained that "[t]here are no customers who are being billed for sewer who had [their] water disconnected since 2000," and Item 6, to which Mr. Stephens denied access because "[a]ny response would violate the attorney-client privilege." Any issues regarding items 1, 4, 5, 7, and 8 were rendered moot upon the agency's disclosure of all existing responsive documents; accordingly, this office respectfully declines to render a decision relative to same per 40 KAR 1:030, Section 6. See 03-ORD-087; 04-ORD-046. In addition, the District cannot produce that which it does not have nor is the agency required to "prove a negative" in order to refute a claim that certain records exist in the absence of a *prima facie* showing by the requester. *See Bowling v. Lexington Fayette Urban County Government*, 172 S.W.3d 333, 340-341 (Ky. 2005); 07-ORD-188; 07-ORD-190. The record on appeal is devoid of any showing.

The right to inspect records only attaches if the records being sought are "prepared, owned, used, in the possession of or retained by a public agency." KRS 61.870(2); 02-ORD-120, p. 10; 04-ORD-205. A public agency's response violates KRS 61.880(1), "if it fails to advise the requesting party whether the requested record exists," with the necessary implication being that a public agency discharges its duty under the Open Records Act in affirmatively indicating that no such records exist, or advising that it lacks possession and explaining why, as the District ultimately did here. On many occasions, the Attorney General has expressly so held. 04-ORD-205, p. 4; 99-ORD-98; 09-ORD-029; 11-ORD-069. Under the circumstances presented, our duty is not "to conduct an investigation in order to locate records whose existence or custody is in dispute." 01-ORD-36, p. 2. KRS 61.880(2)(a) narrowly defines our scope of review.

However, in order to ensure that the Open Records Act is not "construed in such a way that [it] become[s] meaningless or ineffective," *Bowling* at 341, this office has recognized that "the existence of a statute, regulation, or case law directing the creation of the requested record" creates a rebuttable presumption of the record's existence at the administrative level, which a public agency can overcome "by explaining why the 'hoped-for record' does not exist." 11-ORD-074, p. 4; 12-ORD-038. No such authority has been cited or independently located here. Assuming the District made "a good faith effort to conduct a search using methods which [could] reasonably be expected to produce the record(s) requested," it complied with the Act, regardless of whether the search yielded any results, in affirmatively indicating that no records were located. 05-ORD-109, p. 3; 01-ORD-38; OAG 91-101. See 11-ORD-091 (appellant did not cite, nor was the Attorney General aware of, "any legal authority requiring agency to create or maintain" the records being sought from which their existence could be presumed under 11-ORD-074); see also 11-ORD-118. Only item 6 remains at issue.

The courts and this office have recognized that public records may be withheld from disclosure under the work-product doctrine[1] and/or attorney-

[1] Records which are the work product of an attorney prepared or collected in anticipation of litigation or when advising a client are not discoverable under CR 26.02 and, therefore, may be withheld under the Open Records Act. This doctrine, authority for which is derived from KRS 447.154, is codified at CR 26.02(3). See 07-ORD-147, pp. 8-10, a copy of which is attached hereto and incorporated by reference, for application of the work product doctrine in the context of an Open Records dispute generally.

client privilege[2] in the context of an Open Records dispute *if,* as in *Hahn v. University of Louisville,* 80 S.W.3d 771 (Ky. App. 2001), all of the elements of the privileges are present. See 01-ORD-246; 02-ORD-161; 10-ORD-177. However, this office has also recognized that a public agency "'cannot withhold every document that relates to a particular matter under KRS 61.878(1)[(l)] and the attorney-client [privilege or] work product doctrine simply because it is represented by an attorney in the matter.'" 01-ORD-246, p. 17, quoting OAG 91-109. In 03-ORD-015, this office reminded the agency that there is no "litigation" or "residual" exception that can be invoked by a public agency solely because it is engaged in litigation, or threatened litigation, emphasizing that the attorney-client privilege and work product doctrine could not "be invoked absent a showing that each of the elements of KRE 503 or CR 26.02 [is present.]" Id., p. 6. More recently, the Kentucky Supreme Court recognized that 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." *Cabinet for Health and Family Services v. Scorsone,* 251 S.W.3d 328, 329 (Ky. 2008).

In sum, KRE 503(b) *only* applies when a public agency can establish that *all* three of the following elements are present: 1) relationship of attorney and client; 2) communication by or to the client relating to the subject matter upon which professional advice is sought; and 3) the confidentiality of the expression for which the protection is claimed. 97-ORD-127, p. 1(citation omitted).[3] The

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[2] The attorney-client privilege extends to confidential communications:

(1) Between the client or a representative of the client and the client's lawyer or a representative of the lawyer.
(2) Between the lawyer and a representative of the lawyer;
(3) By the client or a representative of the client or the client's lawyer or a representative of the lawyer representing another party in a pending action and concerning a matter of common interest therein;
(4) Between representatives of the client or between the client and a representative of the client; or
(5) Among lawyers and their representatives representing the same client.

See 06-ORD-125, pp. 3-10, for application of the attorney-client privilege in the context of an Open Records dispute generally.

[3] This office has recognized, consistent with KRE 503(b), that the attorney-client privilege "extends to representatives of the attorney when those representatives are employed by the attorney to facilitate the rendition of legal services and the identity of purpose that underlies the privilege." 10-ORD-030, p. 5.

District did not cite KRE 503, nor has it attempted to make a showing that each of the required elements can be satisfied as to all of the documents withheld. A "bare assertion relative to the basis for denial . . . does not satisfy the burden of proof. . . ." 00-ORD-10, p. 11. The District is authorized to withhold those records that are privileged "only if it can articulate, in writing, the reasons for withholding a record, or group of records, with sufficient particularity and detail to enable the public to assess the propriety of its actions." 05-ORD-136, p. 8; 03-ORD-042; 06-ORD-166. In so holding, this office is not implying that the District cannot successfully build a case for withholding some, if not all, of the documents responsive to Item 6 on the basis of KRE 503 (and/or CR 26.02), *only* that it has failed to provide sufficiently detailed information to substantiate its position thus far. This office is also compelled to note that in failing to issue a timely written response to Mr. Hawkins's request, the District violated the Act from a procedural standpoint.

In relevant part, KRS 61.880(1) provides:

> Each public agency, upon any request for records made under KRS 61.870 to 61.884, shall determine within three (3) days, excepting Saturdays, Sundays, and legal holidays, after the receipt of any such request whether to comply with the request and shall notify in writing the person making the request, within the three (3) day period of its decision. An agency response denying, in whole or in part, inspection of any record shall include a statement of the specific exception authorizing the withholding of the record and a brief explanation of how the exception applies to the record withheld.

In applying this provision, the Attorney General has consistently observed:

> "The value of information is partly a function of time." *Fiduccia v. U.S. Department of Justice*, 185 F.3d 1035, 1041 (9th Cir. 1999). This is a fundamental premise of the Open Records Act, underscored by the three day agency response time codified at KRS 61.880(1). Contrary to [the agency's] apparent belief, *the Act contemplates records production on the third business day after receipt of the request,* and *not* simply notification that the agency will comply. In

> support, we note that KRS 61.872(5), the only provision in the Act that authorizes postponement of access to public records beyond three business days, expressly states:
>
> > *If the public record is in active use, in storage or not otherwise available,* the official custodian shall *immediately notify the applicant and shall designate a place, time, and date for inspection of the public records not to exceed three (3) days from receipt of the application, unless a detailed explanation* of the cause is given for further delay *and* the place, time, and earliest date on which the public record will be available for inspection.
>
> Additionally, we note that in OAG 92-117 . . . this office made abundantly clear that the Act "normally requires the agency to notify the requester *and designate an inspection date not to exceed three days from agency receipt of the request.*" OAG 92-117, p. 3. Only if the parameters of a request are broad, and the records implicated contain a mixture of exempt and nonexempt information, and are difficult to locate and retrieve, will a determination of what is a "reasonable time for inspection turn on the particular facts presented." OAG 92-117, p. 4. In all other instances, "timely access" to public records is defined as *"any time less than three days from agency receipt of the request."* OAG 82-300, p. 3; see also 93-ORD-134 and authorities cited therein.

01-ORD-140, pp. 3-4 (emphasis added).

As in 01-ORD-140, and 07-ORD-179, 10-ORD-199, and 11-ORD-035, to name a few, this office must conclude that in failing to issue a written response of any kind to a request made under the Open Records Act within three business days of receipt, *and* provide any *existing* responsive documents, the agency violated KRS 61.880(1) as it did not invoke KRS 61.872(5). In the absence of a legitimate detailed explanation of the cause for delaying access until this appeal was initiated, the Attorney General finds that Mr. Hawkins did not receive "timely access" to the records eventually provided. Noticeably absent from the agency's belated response is any reference to KRS 61.872(5); also lacking is a detailed explanation of which permissible reason for delay applied here, if any. On appeal the agency does not address either deficiency. Based upon the foregoing, this office finds the agency's ultimate disposition of the request both procedurally and substantively deficient.

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 proceeding.

Jack Conway
Attorney General

Michelle D. Harrison

Michelle D. Harrison
Assistant Attorney General

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Distributed to:

Robert Hawkins
Louise Veach
Ina Elmore
Wes Stephens