

**C COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 21-CI-00619**

GLENN A. COHEN

PLAINTIFF

v.

OPINION AND ORDER

KENTUCKY PUBLIC PENSION AUTHORITY

DEFENDANT

This matter is before the Court on cross-motions for summary judgment from Plaintiff Glenn A. Cohen and Defendant Kentucky Public Pension Authority. This is an original action under the Kentucky Open Records Act (“KORA”), seeking public disclosure of documents created by New York law firm Calcaterra Pollack LLP (“CP LLP”) to detail and evaluate KPPA/KRS’s dealings with certain investment advisors during 2011-2017 (the “KPPA/KRS Investigation”). This Report was paid for by taxpayer dollars and was commissioned by the Kentucky Retirement Systems (“KRS”) and Kentucky Public Pension Authority (“KPPA”) (collectively, “KPPA/KRS”).¹ All parties fully briefed the merits of the case, oral argument was held on February 1, 2022, and thereafter the Court took the matter under submission. After full review of the record, and being otherwise sufficiently advised, this Court hereby **GRANTS** Plaintiff’s motion and **DENIES** Defendant’s motions.

¹ For much of the time period at issue in this case, Kentucky Retirement Systems (“KRS”), through its Board of Trustees (the “KRS Board”) and Investment Committee (the “KRS Investment Committee”), was responsible for investing employer/employee contributions made into the state and county employee retirement plans. However, as of April 1, 2021, both KRS and the County Employees Retirement System are overseen by KPPA. *See* KRS 61.505. Given these changes, KPPA is the party named as the Defendant in this action even though KRS—its statutory predecessor---was the relevant administrative decisionmaker through March 31, 2021.

INTRODUCTION

When the Kentucky General Assembly enacted the KORA in 1976, it declared that the law's underlying policy was the public's interest in "free and open examination of public records" even though such examination could "cause inconvenience or embarrassment to public officials or others."² The KORA's transparency mandate is particularly relevant in the public pension arena where agencies act in the role of trustee for amounts directly earned by employees, withheld from their wages, and invested on their behalf. Indeed, in 2017 the General Assembly unanimously passed investment transparency rules,³ which impose additional transparency requirements on KPPA/KRS. A 2019 special audit by Kentucky Auditor of Public Accounts Mike Harmon found that KPPA/KRS was not fully compliant with these rules.⁴

It is with this backdrop that the Court must now rule on Plaintiff's KORA request for documents that describe and evaluate historical KPPA/KRS investment activities and relationships. The Court's review of the parties' briefs, publicly available records, and documents provided for *in camera* review reveal that, after representing to this Court that the public would have access to a \$1.2 million, taxpayer-funded investigation report, created by New York law firm Calcaterra Pollack LLP ("CP LLP") to detail and evaluate KPPA/KRS's dealings with certain investment advisors during 2011-2017 (the "KPPA/KRS Investigation"), it was ultimately withheld from the taxpaying public. Now, the Court must weigh the competing interests inherent in any KORA request and determine whether KPPA/KRS has carried its burden to show these documents are exempt from public disclosure. Because the taxpayers have

² See KRS 61.871; *University of Kentucky v. The Kernel Press*, 620 S.W.3d 43, 52 (Ky. 2021).

³ As relevant here, Senate Bill 2 involved amendments to KRS 61.645 and 61.650.

⁴ Examination of Certain Policies, Procedures, Controls, and Transparency Compliance Activities of Retirement Systems in Kentucky, August 27, 2019. Six of APA Harmon's ten findings addressed KPPA/KRS, including the finding that "KRS has abdicated its responsibility to abide by the Open Records Act."

paid \$1.2 million for this Report, the KPPA carries an especially difficult burden to demonstrate why the Report should be hidden from public scrutiny.

FACTUAL BACKGROUND

A. Attorney General Seeks to File Amended Complaint (January 2021-May 2021)

This Court was first made aware of the KPPA/KRS Investigation in early 2021 during hearings on motions filed in the related ongoing civil action (the “Underlying Action”).⁵ Through these motions, the Office of the Attorney General (“OAG”) sought to file an amended intervening complaint.⁶ The OAG, following the Kentucky Supreme Court’s ruling directing the dismissal of the original litigation styled as *Mayberry et al v. KKR, et al* (Franklin Circuit Court No. 17-CI-1348), intervened in that action and sought to assert, on behalf of the Commonwealth of Kentucky (including its agencies, employees and retirees). similar claims regarding alleged breaches of fiduciary duties by certain investment advisors of the KPPA. The OAG represented to the Court that it intended to rely on the Report of the KPPA/KRS Investigation—the documents at issue in this Open Records case--in preparing its amended intervening complaint. In other words, the Court was advised that this Report would be shared with the Attorney General, and the Attorney General planned to use it as a basis for his Amended Complaint. KPPA never objected or asserted that the Report was confidential or covered by attorney client privilege. The Court relied on these representations, and KPPA’s failure to object, in granting the motion for extension of time for the OAG to file its Amended Complaint.

⁵ *Commonwealth v. KKR & Co. LLP, et. al.*, Franklin Cir. Ct., Division 1, 17-CI-01348, December 27, 2017 (formerly *Mayberry, et. al. v. KKR & Co. LLP, et. al.*) (alleging, *inter alia*, that KPPA/KRS, through trustees, officers, and others engaged in breaches of fiduciary duties relating to certain investments).

⁶ On July 9, 2020, the Kentucky Supreme Court ruled that the original Plaintiffs lacked standing to pursue the case. Subsequently, on July 20, 2020, the OAG filed a Motion to Intervene to assert any claims against the defendants, which this Court granted on December 28, 2020. Compl. ¶ 14-17.

1. 2018: KPPA/KRS Investigation by Independent Special Litigation Committee and Agency Action

Before delving into a chronology of events in 2021, background information on KPPA/KRS actions in 2018 in the Underlying Action provide helpful context. On April 19, 2018, the original Plaintiffs (“*Mayberry* Plaintiffs”) and KPPA/KRS⁷ filed a Joint Notice to the Court and Parties (“*KRS/Mayberry* Joint Notice”) notifying the Court that KPPA/KRS had established an “independent special litigation committee of the Board of Trustees” which was tasked with “investigat[ing] and consider[ing] the claims asserted in the [Underlying Action], and determin[ing] what role KPPA/KRS should take in this litigation.”⁸ Based on the work of this committee, KPPA/KRS determined that it would not pursue the claims asserted by the *Mayberry* Plaintiffs⁹ and, moreover, “would not have been in a position to pursue those claims had they been brought to KPPA/KRS prior to the filing of the Complaint or the Amended Complaint,” clarifying that KPPA/KRS “decline[d], at this time, to seek realignment as a plaintiff in this action.”¹⁰

2. January 2021: OAG Seeks to File Amended Intervening Complaint, Then Seeks Extension

The Court originally directed the OAG to file its amended intervening complaint by February 1, 2021.¹¹ However, on January 29, 2021 the OAG sought an extension of time to file the amended intervening complaint (“OAG’s First Motion for Extension”) because, *inter alia*, KPPA/KRS had entered into a contract with outside counsel to “investigate specific investment activities conducted by the Kentucky Retirement Systems to determine if there are any improper

⁷ KPPA/KRS was originally named as a “Nominal Defendant” in the Underlying Action.

⁸ Plaintiffs’ and Kentucky Retirement Systems’ Joint Notice to the Court and Parties, April 19, 2018, 1.

⁹ This rationale was based on the notion that “[t]he nature of the claims . . . is not typical of litigation a corporate board or state agency could easily authorize at this stage or pursue. Litigation of the nature and scope brought by Named Plaintiffs and their Counsel is expensive and time consuming . . . [and] it would be extremely onerous for KRS to maintain these claims by itself.” Joint Notice at 2.

¹⁰ KPPA/KRS did note that “in the event that the Underlying Action was dismissed because Plaintiffs lacked standing, KPPA/KRS “reserve[d] all rights which then might be available to it.” *Id.* at 4.

¹¹ Franklin Circuit Court, Division 1, 17-CI-01348, Order, January 12, 2021.

or illegal activities on the part of the parties involved and produce a detailed report documenting their investigation and findings”.¹² The OAG asked for an extension until ten days after the earlier of (1) KPPA/KRS “mak[ing] public any part of the investigation for which it has contracted”; or, (2) April 16, 2021.¹³

At the hearing on OAG’s First Motion for Extension, the OAG represented that the investigation report would be “important and highly relevant to the filing that we ultimately make.”¹⁴ The OAG also clarified that “[i]t’s not clear that the actual report provided to the KRS board will be public, but the contract does provide for the preparation of a public summary of the report, and we would anticipate receiving that when that report is made available.” *Id.*

During the same hearing, counsel for KPPA/KRS clarified that it had revisited its 2018 decision reflected in the KRS/*Mayberry* Joint Notice because now there were “different plaintiffs, different claims.”¹⁵ As such, KPPA/KRS had “put out an RFP for investigation for any potential claims that may exist.” At no time during the hearing did KPPA/KRS counsel lodge any objections to supplying the investigation report to the OAG raise claims of privilege relating to the contents of the report. In fact, it was very clear that the OAG would be given access to the Report, and that the OAG anticipated basing its proposed Amended Complaint on the contents of the Report.

The Court extended the due date for filing the amended intervening complaint to April 12, 2021.¹⁶ That extension was based on the explicit representations, both express and implied, by both the OAG and KPPA that this Report would be made available to the OAG for use in preparation of its Amended Complaint.

¹² OAG’s Motion for Extension of Time, 17-CI-1348, January 29, 2021, 2.

¹³ *Id.* at 3.

¹⁴ Complaint, Exhibit G (Transcript of February 8, 2021 Hearing), 3.

¹⁵ *Id.* at 12.

¹⁶ Franklin Circuit Court, Division 1, Order, 17-CI-1348, February 18, 2021. The Court explained in its order that the OAG “should be permitted to submit its Amended Complaint following completion of the Retirement Systems’ investigation so as to allow the Amended Complaint to be more fully developed.”

3. April 2021: OAG Seeks a Second Extension for Filing the Amended Intervening Complaint

On April 1, 2021, the OAG moved for a second extension of time (“OAG’s Second Motion for Extension”), representing that neither KPPA/KRS nor the OAG had received the report and repeating the assertion that access to the investigation would allow the AOG “to more fully develop its amended intervening complaint.”¹⁷

When the Second Motion for Extension was heard on April 7, 2021, the Court asked KPPA/KRS counsel about timing “in terms of the report being made available” and he responded: “I’m not going to be able to give you a date certain at this time as to when the final report or the report that’s going to be disseminated to the public will be in final form”; however, a preliminary draft “will be hopefully final this week” and then “the KPPA board [will] review that preliminary draft and then ultimately have the result in a final draft that will be disseminated to the public.”¹⁸ As with the February 8 hearing, at no time did KPPA/KRS counsel lodge any objections to providing the investigation report to the OAG or raise claims of privilege relating to the contents of the report. Again, it was represented to the Court that the “final draft .. will be disseminated to the public.”

In its Order, the Court extended the deadline for the OAG to file the amended intervening complaint to April 30 and directed KPPA/KRS “to make the contents of the outside review available to the Attorney General on an expedited basis . . . subject to any confidentiality requirement that may apply prior to the report being finalized.”¹⁹ No objection was made by

¹⁷ OAG’s Motion for Extension of Time, April 1, 2021, 2.

¹⁸ Transcript of April 7, 2021 Hearing (Plaintiff’s Response in Opposition to KPPA’s Motion for Summary Judgment and Reply in Support of His Motion for Summary Judgment (“Plaintiff’s Reply”), Exhibit C), 4-5.

¹⁹ Franklin Circuit Court, Division 1, 17-CI-1348, Order, April 8, 2021. The Court’s reference in its April 8 Order to “any confidentiality requirement that may apply prior to the report being finalized” was intended to address any

KPPA to this Order. The Court was not imposing a requirement for KPPA to share the Report with the OAG, it was merely setting deadline on the actions that OAG and KPPA had previously promised the Court.

4. April/May 2021: KPPA/KRS Files Emergency Motion for Extension of Time

On April 19, 2021, KPPA/KRS filed an Emergency Motion for Extension of Time (“KPPA/KRS Emergency Motion”). KPPA/KRS asserted that, while it had “received preliminary draft reports from Calcaterra Pollack, KPPA has not yet received Calcaterra Pollack’s report in its final form.”²⁰ KPPA/KRS sought an additional 30-day extension so that it could make the report available to the OAG “in its final form” and asserted that “the report should be finalized and reviewed before KPPA provides it to the Attorney General” so that the “KPPA and its Board of Trustees” had time to “review, digest, analyze and discuss the report.”²¹ Absent from the KPPA/KRS Emergency Motion were any objections to providing the KPPA/KRS Investigation to the OAG or any claims of privilege relating to the contents of the report.

At a hearing on KPPA’s motion, the OAG again “reaffirmed that the investigative report will be of immense help to the Attorney General in crafting the forthcoming intervening complaint.”²² Just as in the three previous hearings in which the KPPA/KRS report was raised, at no time did KPPA/KRS counsel lodge any objections to providing the investigation report to the OAG or raise claims of privilege relating to the contents of the report.

preliminary versions of the KPPA/KRS Investigation for purposes of the KORA not any claims or assertions of any privilege that KPPA/KRS had made to the Court.

²⁰ KPPA/KRS Emergency Motion, 4.

²¹ *Id.* at 2–3.

²² Franklin Circuit Court, Division 1, 17-CI-1348, Order, April 22, 2021.

The Court granted KPPA's motion, giving it until May 17, 2021 to submit the investigative report to the OAG.²³ On May 13, 2021, KPPA certified to the Court that it had produced the Report to the OAG.

5. OAG Files Amended Intervening Complaint

The OAG, after receiving the Report, filed its First Amended Intervening Complaint ("OAG Amended Complaint") on May 24, 2021. The OAG Amended Complaint neither referenced the KPPA/KRS Investigation nor appeared to include any substantive changes that could have been based on the KPPA/KRS Investigation.

6. KPPA/KRS Investigation Is Not Released to the Public

KPPA/KRS Counsel represented that (1) the CP LLP provided a summary oral report concerning the preliminary results of its investigation on April 2, 2021; (2) CP LLP provided a written preliminary draft report on April 10, 2021; and, (3) CP LLP provided its final report on April 28, 2021.²⁴ To date, no portion of the KPPA/KRS Investigation has been made public. During the oral argument for this case, KPPA/KRS counsel explained:

After review of the detailed report, the board elected not to have a public report created. I cannot go into any more detail as to why or what lies behind that.²⁵

B. Plaintiff Requests KPPA/KRS Investigation

On July 1, 2021, Plaintiff submitted a request to KPPA/KRS under the KORA seeking:

1. Any and all records concerning the contract for "investigative services" entered into by and between KPPA/KRS and Calcaterra and the services performed by Calcaterra. This request seeks, but is not limited to, Calcaterra's "detailed report documenting their investigation and findings" any summary report or excerpts of the report, any and all drafts of any detailed report or summary report, and

²³ *Id.* at 3.

²⁴ KPPA/KRS'S Response in Opposition to Plaintiff's Motion for Summary Judgment and Memorandum of Law in Support of Its Cross-Motion for Summary Judgment ("KPPA/KRS Motion"), December 17, 2021, 3.

²⁵ *Jordan White v. KPPA*, 22-CI-00016, Plaintiff's Response in Opposition to Defendant's Cross-Motion for Summary Judgment and Reply in Support of Plaintiff's Motion for Summary Judgment, Exhibit 7 (Transcript of February 1, 2022 Hearing), 34.

- any other record relating to Calcaterra's engagement and all services performed by Calcaterra, including Calcaterra's investigation of "specific investment activities" by KRS.
2. Any and all communications between KPPA/KRS and any other party concerning the contract for "investigative services" entered into by and between KPPA/KRS and Calcaterra, the services performed by Calcaterra, and any determinations or conclusions reached by Calcaterra and/or KPPA/KRS regarding the "specific investment activities" investigated.
 3. Any documents or other information considered by the KPPA/CERS/KRS board in declining to pursue claims in the *Mayberry* Action as announced on May 26, 2021.²⁶

On July 9, 2021, KPPA denied section (1) of Plaintiff's request, asserting that "the records requested are subject to the attorney-client privilege and the work product doctrine and are, therefore exempt from" the KORA.²⁷ With regard to section (2) of Plaintiff's request, KPPA responded that it had "completed a comprehensive search through its correspondence and electronic mail systems to identify all responsive records." It further reported that it was in the process of "determining which records are not exempt from disclosure and whether redactions are needed." KPPA's response to section (3) of Plaintiff's request was "there are no responsive records."

Plaintiff subsequently filed the Complaint in this action, seeking access to the KPPA/KRS Investigation, reimbursement for reasonable attorney's fees and expenses, and statutory damages permitted under the KORA.

C. The Court's *In Camera* Review of the KPPA/KRS Investigation and Related Correspondence

In a February 1, 2022 Order, the Court directed KPPA/KRS to produce the KPPA/KRS Investigation for *in camera* review in this case. In addition, the Court requested "all

²⁶ Complaint, Exhibit A.

²⁷ Complaint, Exhibit B.

correspondence, emails or other communications between KPPA and Calcaterra Pollock that are related to the scope of work for this investigation and report.”²⁸

1. The KPPA/KRS Investigation

The Court undertook an *in camera* review of the KPPA/KRS Investigation, performed by CP LLP, as well as its 85 exhibits. CP LLP represents that it reviewed the following documents as part of its investigation:

[T]he audio recordings of the investment committee meetings between late 2008 to early 2017, relevant absolute return documents including staff memoranda, consultant presentations, tens of thousands of identified custodian emails and calendar notices, investment statement policies, investment transaction policies, relevant internal audits, and relevant fiduciary and conflict of interest statutes during that period. The Firm reviewed the Board of Trustees audio recordings and written minutes around 2011 and surrounding the strategic partnership agreement between KKR/Prisma and KRS from February, April and May 2015 and February, April and May 2016.

CP LLP also conducted interviews with certain individuals connected to the Underlying Action. The final report is a compilation of this information, including numerous pages of reproduced email exchanges as well as publicly available information (*e.g.*, newspaper articles). CP LLP also included “Comments” or “Considerations” relating to the compiled information. These comments/considerations are generally explained in terms of “alleged” violations and/or use conditional phrasing (*e.g.*, in terms of how facts “could be viewed” or “may be perceived”).

The document clearly states that “a complete analysis of potential legal remedies available to KRS” is detailed in a separate document (referred to as “Legal Recommendations”). The Legal Recommendations document also includes “pros and cons of undertaking legal action, a cost/benefit analysis of such action, and any possible legal impediments to the legal action” as well as “recommendations regarding best practices for investment activities.”

²⁸ Franklin Circuit Court, Division 1, Order, 21-CI-619, February 1, 2022.

2. Correspondence Relating to the KPPA/KRS Investigation

On August 24, 2020 KPPA/KRS released a Request for Proposals (“RFP”) for “Legal Investigative Services.”²⁹ According to the RFP’s “Scope of Work,” KRS was looking to retain “a qualified law firm capable of investigating specific investment activities conducted by the Kentucky Retirement Systems to determine if there are any improper or illegal activities on the part of the parties involved.” Proposals were due by September 14, 2020.³⁰ The KPPA/KRS Motion represented that “KPPA formally accepted the proposal entered by the law firm of Calcaterra Pollack LLP” on November 23, 2020.³¹

KPPA/KRS produced twelve documents it identified as responsive to the Court’s February Order seeking “correspondence, emails or other communications between KPPA and Calcaterra Pollock that are related to the scope of work for this investigation and report” for *in camera* review.

The most notable aspect of these documents is that they evidence submission of two proposals by CP LLP, one dated June 19, 2020 (over 2 months *prior* to the KPPA RFP) and another dated September 10, 2020, presumably submitted as part of the RFP solicitation for “Legal Investigative Services.” The sections of the proposals addressing the scope/plan of work to be undertaken and expectations for the “Final Report of Findings” were substantially identical. The Court also notes that the proposed “high end” fee range listed in CP LLP’s June proposal, \$1,242,975, closely corresponds to the fixed-fee contract amount agreed to by KPPA/KRS and CP LLP in the Personal Services Contract they ultimately executed (*i.e.*, \$1,200,000).³²

²⁹ Defendant’s Response in Opposition to Plaintiff’s Motion for Summary Judgment and Memorandum of Law in Support of Its Cross-Motion for Summary Judgment (“KPPA/KRS Motion”), December 17, 2021, 3 and Exhibit 1.

³⁰ *Id.* at Exhibit 1.

³¹ KPPA/KRS Motion at 3.

³² KPPA/KRS Emergency Motion for Extension of Time, April 19, 2021, Exhibit A.

STANDARD OF REVIEW

Summary judgment is proper “if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.”³³ The movant should not succeed unless it has shown “with such clarity that there is no room left for controversy.”³⁴ In reviewing motions for summary judgment, the Court views all facts in the light most favorable to the non-moving party and, resolving all doubts in its favor, grants the motion only when the facts indicate that the nonmoving party cannot produce evidence at trial that would render a favorable judgment.³⁵

The Court recognizes that summary judgment is a device that should be used with caution and is not a substitute for trial. “[T]he proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor.”³⁶ The Open Records Act requires “free and open examination of public records in the public interest”; and it further requires that “the exceptions ... shall be strictly construed, even though such examination may cause inconvenience or embarrassment to public officials or others.” KRS 61.871.

³³ CR 56.03.

³⁴ See *Steelvest, Inc. v. Scansteel Service Ctr.*, 807 S.W.2d 476, 482 (Ky. 1991).

³⁵ *Id.* at 480.

³⁶ *Jones v. Abner*, 335 S.W.3d 471, 480 (Ky. App. 2011).

ANALYSIS

a. The KORA Framework

The KORA was enacted in an effort to make the operations of the Commonwealth's agencies transparent to its citizens.³⁷ As explained by the Kentucky Supreme Court, the public's "right to know" about agency operations,

. . . is premised upon the public's right to expect its agencies properly to execute their statutory functions. In general, inspection of records may reveal whether the public servants are indeed serving the public, and the policy of disclosure provides impetus for an agency steadfastly to pursue the public good.³⁸

Given the KORA's focus on transparency, "[t]he public agency that is the subject of an Open Records request has the burden of proving that the document sought fits within an exception to the Open Records Act."³⁹

B. KPPA/KRS Claim Attorney-Client Privilege and Work Product Doctrine

In denying Plaintiff's request, KPPA/KRS claimed "the records requested are subject to the attorney-client privilege and the work product doctrine and are, therefore, exempt" from disclosure under the KORA (*i.e.*, as "materials pertaining to civil litigation beyond that which is provided by the Rules of Civil Procedure governing pretrial discovery" under KRS 61.878(1)). Kentucky Rules of Evidence 503(b) codified the attorney-client privilege, protecting from disclosure "confidential communications made for the purpose of facilitating the rendition of professional legal services to the client," while Kentucky Rule of Civil Procedure CR 26.02(3) codifies work product doctrine, similarly exempting "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation," Here,

³⁷ *Lawson v. Office of the Attorney General*, 415 S.W.3d 59, 70 (Ky. 2013).

³⁸ *Id.* (citations omitted).

³⁹ *Hardin Cty. Schs. v. Foster*, 40 S.W.3d 865, 868 (Ky. 2001); *see also Com., Cabinet for Health and Family Services v. Lexington H-L Services, Inc.*, 382 S.W.3d 875, 883 (Ky. Ct. App. 2012) (citations omitted).

where the party claiming the privilege is a governmental agency, it is appropriate to construe the protections of both attorney-client privilege and work product doctrine more narrowly.⁴⁰

1. Underlying Facts Are Not Protected

Neither the attorney-client privilege nor work product doctrine protects a mere factual record.⁴¹ Moreover, a compilation of facts cannot be “funnel[ed]” through attorneys in order to “confer privilege on otherwise unprivileged records.”⁴²

a. The KPPA/KRS Investigation Is Largely a Factual Summary

The KPPA/KRS Investigation is a compilation of factual information gathered by CP LLP from various sources. Most of the documents reviewed by CP LLP and summarized in the KPPA/KRS Investigation were either publicly available (*e.g.*, minutes of KRS Board of Trustees meetings or newspaper articles) or themselves subject to disclosure under the KORA (*e.g.*, various KPPA/KRS internal documents), or the additional transparency rules passed by the General Assembly in 2017 (*e.g.*, contracts with investment managers). Reducing these facts into summary form does not alter their fundamental character. Further, the act of hiring attorneys to create such a summary is not sufficient to confer protection under attorney-client privilege or work product doctrine. Simply put, KPPA/KRS can neither shield mere facts from disclosure nor convert them into materials that can be shielded from disclosure by engaging a law firm, at significant taxpayer expense, to gather and summarize such facts.

b. Even If Certain Segments Are More Than Mere Facts, Their Inclusion Does Not Shield The Entire Document from Disclosure

⁴⁰ See SCR 3.130(1.13), cmt. 9 (“when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved”).

⁴¹ *Collins v. Braden*, 384 S.W.3d 154, 159 (Ky. 2012) (attorney-client privilege “protects *only* the communication to the attorney” not “disclosure of underlying facts.”) (emphasis in original); *Duffy v. Wilson*, 289 S.W.3d 555, 559 (Ky. 2009) (“there is no work product privilege which protects the underlying facts”).

⁴² See, *e.g.*, *Henderson Cnty. Health Care Corp. v. Wilson*, 612 S.W.3d 811, 821 (Ky. 2020).

Based on the Court's *in camera* review of the KPPA/KRS Investigation, certain segments of the report, which are labeled as "comments" or "considerations," describe how facts "could be viewed" or "may be perceived." The Court is not persuaded that such hypothetical statements rise to the level of statements protected from disclosure.

However, even if such "comments" or "considerations" were exempt from disclosure, it was improper to use this relatively insignificant portion of the report as justification for a blanket denial of access to the entire investigation report (and related documents). To the extent some portion of a document is exempt from disclosure, an "agency shall separate the excepted and make the nonexcepted material available for examination."⁴³ In doing so, the agency is not permitted to treat the entirety of an investigation "as if it were one giant record, unable to be separated or compartmentalized" for the purposes of asserting privileges and making redactions.⁴⁴ Based on its *in camera* review, the Court finds that any such commentary in this Report is *de minimis* and does not provide a basis for withholding the documents from public scrutiny.

2. Even If Any Portion of the KPPA/KRS Investigation Was Protected by Attorney-Client Privilege, KPPA/KRS Waived the Privilege When It Voluntarily Provided It to the OAG

To the extent any portion of the KPPA/KRS Investigation was protected from disclosure as "confidential communication" between attorneys at CP LLP and KPPA/KRS, such protection was waived when KPPA/KRS voluntarily provided the KPPA/KRS Investigation to the OAG on May 13, 2021.

a. The Court Did Not Order KPPA/KRS to Provide the Report to the OAG

⁴³ KRS 61.878(4).

⁴⁴ *Univ. of Ky. v. Kernel Press, Inc.*, 620 S.W.3d 43, 55.

KPPA/KRS asserts that this Court “ordered KPPA to turn over the Investigation Report for the OAG’s review, an Order with which KPPA merely complied as required.”⁴⁵ However, this assertion is plainly wrong and cannot be supported in pleadings or hearing transcripts. Put simply, KPPA/KRS voluntarily provided the Report to the OAG, and both the OAG and KPPA repeatedly represented to the Court that the Report would be shared with the Attorney General for purposes of drafting the Amended Complaint, and that it would be shared with the public in some format.

KPPA/KRS points to this Court’s April 8 and April 22 Orders in support of its assertion. However, the Court’s Orders reflect discussions with KPPA/KRS, the OAG, and other parties centered on *the timing* of KPPA/KRS providing the final investigation report to the OAG, not whether it would provide the report. Moreover, prior to either of those Orders, KPPA/KRS and the OAG made multiple representations to the Court that the KPPA/KRS Investigation would be shared not only with the OAG but with the Court, the parties, and the public. For example, in the April 7 hearing (*i.e.*, the hearing on the OAG’s Second Motion for Extension), KPPA/KRS counsel made multiple representations to the Court that the document KPPA/KRS and CP LLP were working to finalize would be a public document.⁴⁶ Statements from OAG counsel also indicated that it expected to receive content that would be contemporaneously made available to the public.⁴⁷ If KPPA had candidly informed the Court that it was asserting the attorney-client privilege and objected to sharing the document with OAG, the Court would not have granted the OAG’s request for extensions of time. No such objection was ever raised by KPPA, and the Court finds that any

⁴⁵ KPPA/KRS Motion at 9.

⁴⁶ *See e.g.*, Plaintiff’s Reply, Exhibit C (Transcript of April 7, 2021 Hearing) at 4-5 (KPPA/KRS counsel’s answer to the Court’s question on timing of “the report being made available”: “I’m not able to give you a date certain at this time as to when the final report or the report that’s going to be disseminated to the public will be in final form” and “the KPPA board [will] review that preliminary draft and then ultimately have the result in a final draft that will be disseminated to the public.”) (emphasis supplied).

⁴⁷ *See, e.g.*, OAG’s First Motion for Extension at 3.

objection based on an after-the-fact assertion of attorney client or work product privileges has been waived.

In addition, KPPA/KRS counsel did not make objections or raise any privilege claims relating to the KPPA/KRS Investigation in the hearings before this Court on February 8, April 7, or April 21. Moreover, KPPA/KRS counsel did not make objections or raise any privilege claims relating to the KPPA/KRS Investigation in the KPPA/KRS Emergency Motion for Extension filed on April 19. Finally, KPPA/KRS did not make objections or raise any privilege claims relating to the KPPA/KRS Investigation when it filed its Notice of Compliance with the Court on May 17.

Although parties are not required to file “formal exceptions” to rules or actions of a court, they must “at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court, and on request of the court, his grounds therefor.”⁴⁸ A party who does not “timely object” is “deemed to have waived any such objection.”⁴⁹ Here, KPPA/KRS did not lodge any objections and, as such, has waived any opportunity to claim that the Court ordered it to provide the KPPA/KRS Investigation to the OAG.

b. KPPA/KRS’s Voluntary Disclosure to the OAG Constituted a Waiver

Under KRE 509, attorney-client privilege is waived if the holder “voluntarily discloses or consents to disclosure of any significant part of the privileged matter.” Here, KPPA/KRE supplied the KPPA/KRS Investigation, prepared by law firm CP LLP, to the OAG on May 13, 2021.

⁴⁸ CR 46.

⁴⁹ *Kentucky Utilities Company v. South East Coal Company*, 836 S.W.2d 407, 409 (Ky. 1992) (“We need not provide extensive authority for the proposition that a party must timely object or be deemed to have waived any such objection.”).

KPPA/KRS nevertheless could claim that disclosure did not occur if: (1) the OAG was acting as its attorney or (2) KPPA/KRS and the OAG were operating under a common interest privilege.

i. KPPA/KRS and the OAG Are Not Engaged in an Attorney/Client Relationship

Neither the OAG nor KPPA/KRS has undertaken actions consistent with an attorney/client relationship. For example, per the First Motion for Extension, the OAG did not expect to receive a non-public version of the KPPA/KRS Investigation.⁵⁰ Moreover, the OAG has made explicit statements during discovery in the Underlying Action indicating that it does not represent KPPA.⁵¹ Further evidencing the lack of an attorney-client relationship, the OAG has insisted that its efforts to respond to Defendants' discovery requests in the Underlying Action have been impeded because it does not have possession, custody, or control of documents in the possession of KPPA/KRS.⁵²

KPPA/KRS has similarly undertaken actions that expressly conflict with the notion that it has an attorney-client relationship with the OAG. Critically, as noted by Plaintiff, KPPA/KRS has retained separate outside counsel to advise it in the Underlying Action⁵³ as well as asserted in the briefing for this case that the OAG is "acting independently of and without the direction or control of KPPA."⁵⁴

ii. KPPA/KRS and the OAG Do Not Fall Within the Common Interest Privilege

⁵⁰ See also Complaint, Exhibit G at 3. ("It's not clear that the actual report provided to the KRS board will be public, but the contract does provide for the preparation of a public summary of the report, and we would anticipate receiving that when that report is made available.")

⁵¹ See, e.g., Complaint, Franklin Circuit Court, Division 1, 22-CI-00016, Exhibit 6 (Transcript of March 10, 2022 Hearing on Commonwealth's Motion for Guidance), 64, ("Ms. Edelman that has never been an issue. We've said it a thousand times, we do not represent KPPA.")

⁵² See Commonwealth's Motion for Guidance and Scheduling Regarding Commonwealth's Responses to Certain Defendants' Request for Production of Documents, Franklin Circuit Court, 17-CI-01348 (February 22, 2022), 4-5.

⁵³ Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment, 7, 8. Plaintiff's Response in Opposition to KPPA's Motion for Summary Judgment and Reply in Support of His Motion for Summary Judgment, 8.

⁵⁴ KPPA/KRS Motion at 8.

KPPA/KRS further cannot claim that its disclosure to the OAG was protected under the common interest doctrine. The common interest doctrine, codified as KRE 503(b)(3), extends the attorney-client privilege to confidential communications between parties in litigation and their representatives where the communication concerns a matter of common interest. However, as discussed *supra*, when KPPA/KRS provided the KPPA/KRS Investigation to the OAG it was (and continues to be) separately represented.

KPPA has not established that it has a common interest arrangement with the OAG regarding the KPPA/KRS Investigation or its use.⁵⁵ In this case, both KPPA and the OAG have disavowed any joint representation or common interest as it relates to the Report, repeatedly asserting that the OAG “had no role in KPPA’s contracting with the Calcaterra Firm” and had no information or “documentation related to KPPA’s retention of the Calcaterra Firm . . . or any investigative materials generated as a result of the Calcaterra Firm’s independent investigation.”⁵⁶ Just as the Court of Appeals held with regard to the relationship between KPPA/KRS and the *Mayberry* Plaintiffs in the *Prisma* case, here KPPA/KRS has no more than a “rooting interest” in any potential award secured by the OAG, and, as such, it cannot claim protection from disclosure under the common interest privilege.

In further support of its special intra-agency relationship with the OAG, KPPA/KRS cites KRS 61.645(11), which provides: “[t]he Attorney General, or an assistant designated by him or her, may attend each meeting of the board and may receive the agenda, board minutes, and other information distributed to trustees of the board upon request.” This provision does not, however,

⁵⁵ See *Prisma Capital Partners LP v. Kentucky Retirement Sys.*, 2020 WL 5083454, at *8 (Ky. App. 2020) (rejecting KPPA/KRS’s assertion of the common interest doctrine where there was only a “rooting interest” in possible financial recovery).

⁵⁶ OAG’s Response in Opposition to Tier 3 Group’s Motion for Preservation of Documents, 17-CI-01348, Franklin Circuit Court (May 9, 2021), 2-3; see also OAG’s First Motion for Extension.

on its own create a privileged relationship since, Board agendas, minutes, and other materials generally would be available to the public. The second sentence of KRS 61.645(11) further clarifies that additional action must be taken in order to create an attorney-client relationship between KPPA/KRS and the OAG, stating “[t]he Attorney General may act as legal adviser and attorney for the board, and the board may contract for legal services” (emphasis supplied). As discussed *supra*, KPPA/KRS has not asked the Attorney General to act as its legal adviser in this matter, and to the contrary, it has engaged separate counsel.

3. The Work Product Doctrine Will Not Protect Against Disclosure

Although the work product doctrine may operate to exempt “mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party” from disclosure, the doctrine is inapplicable to the KPPA/KRS Investigation because: (1) the KPPA/KRS Investigation was not prepared in anticipation of litigation; (2) protection under the doctrine was waived when KPPA/KRS supplied the investigation to the OAC; or, (3) Plaintiff has shown that he has substantial need for the KPPA/KRS Investigation.

a. The KPPA/KRS Investigation Was Not Prepared “in Anticipation of Litigation”

Generally, the threshold issue in evaluating the merits of any claim of protection under the work product doctrine is whether a document was prepared “in anticipation of litigation.”⁵⁷ Questions of whether parties have gathered information in “anticipation” of using it as evidence in a lawsuit is most likely to arise where a suit has not yet been filed. Here, the Underlying Action has been in litigation since December 2017. However, given the history of KPPA/KRS’s actions

⁵⁷ See, e.g., *Duffy v. Wilson*, 289 S.W.3d 555, 558 (Ky. 2009).

during the pendency of this case, the Court is skeptical of the claim that the KPPA/KRS Investigation was created “in anticipation of litigation.”

In April 2018 KPPA/KRS represented in its Joint Notice to this Court that it had created an “independent special litigation committee of the Board of Trustees” which was tasked with “investigat[ing] and consider[ing] the claims asserted in the [Underlying Action], and determin[ing] what role KPPA/KRS should take in this litigation.” It further explained that this “independent special litigation committee” had concluded that KPPA/KRS should not pursue the claims asserted by the *Mayberry* Plaintiffs and, in any event, “would not have been in a position to pursue those claims.” In its examination of these facts, the Court of Appeals concluded that materials exchanged by KPPA/KRS and the *Mayberry* Plaintiffs “were unquestionably created ‘in anticipation of litigation.’”⁵⁸

The present facts are, however, far different. While KPPA/KRS “reserve[d] all rights which then might be available to it,” if the *Mayberry* Plaintiffs’ claims were dismissed for lack of standing (which occurred in July 2020), the Court questions whether such “rights” include the ability to conduct serial investigations into the claims in the Underlying Action under the banner of “anticipation of litigation.” Very little has changed since KPPA/KRS filed the 2018 Joint Notice alerting the Court that it would not pursue the claims in the Underlying Action: the list of Defendants is largely the same; the complaints filed by the OAG are virtually identical to the complaint filed by the *Mayberry* Plaintiffs in 2017; and, just as KPPA/KRS explained in the 2018 Joint Notice, the litigation is still “not typical of litigation a corporate board or state agency could

⁵⁸ See *Prisma Capital Partners LP*, at *7.

easily authorize.” Thus, the Court is not surprised that the decision announced by the KPPA Board in May 2021 is virtually identical to the decision announced to the Court in the 2018 Joint Notice.⁵⁹

c. KPPA/KRS’s Voluntary Disclosure of the KPPA/KRS Investigation Waived Work Product Protection

In certain instances, voluntary disclosure of documents otherwise protected by work product may create a waiver.⁶⁰ The 6th Circuit Court of Appeals undertook a thorough review of the circumstances under which disclosing materials to a third party will waive work product protection in *In re Columbia/HCA Healthcare Corporation Billing Practices Litigation*, 293 F.3d 289 (6th Cir. 2002). In finding that Columbia/HCA Healthcare had waived its ability to assert the work product doctrine in connection with documents it had voluntarily produced to the Department of Justice, the 6th Circuit commented that “waiver of the protections afforded by the work product doctrine is a tactical litigation decision.”⁶¹ That is, where attorneys and their clients prepare documents in the midst of ongoing litigation, “the subsequent decision on whether or not to ‘show your hand’ is quintessential litigation strategy” and allowing such documents to retain any protection against disclosure under the work product doctrine undermines its intent.⁶²

The analytical framework applied by the 6th Circuit is equally compelling in this case. KPPA/KRS made a tactical decision to cooperate with the OAG and provide the KPPA/KRS Investigation to its attorneys. If KPPA/KRS had made the investigation public contemporaneously with supplying it to the OAG, as was represented to the Court, this entire case would be moot. However, once KPPA/KRS made the tactical decision to “show its hand” to the OAG, with whom

⁵⁹ The Court is not persuaded by KPPA/KRS counsel’s claim that the KPPA/KRS Investigation was necessary because it involved “different parties, different claims.” Complaint, Exhibit G (Transcript of February 8, 2021 Hearing), 12.

⁶⁰ See *Transit Auth. of River City v. Vinson*, 703 S.W.2d 482, 486 (Ky. App. 1985).

⁶¹ *Id.* at 306.

⁶² *Id.* at 306-307.

it shares no privileged relationship, it cannot hide behind attorney-client privilege or the work product doctrine to withhold the investigation from public view.

The 6th Circuit raised a final point on the public policy favoring waiver that the Court finds particularly compelling in this case:

If internal investigations are undertaken with an eye to later disclosing the results to a government agency, the outside counsel conducting the investigation may hesitate to pursue unfavorable information or legal theories about the corporation. Thus, allowing a party to preserve the doctrine's protection while disclosing work product to a government agency could actually discourage attorneys from fully preparing their cases.⁶³

The Court is concerned that this reluctance to “pursue unfavorable information or legal theories” may have influenced the KPPA/KRS Investigation. Indeed, in reviewing the KPPA/KRS Investigation, the Court could see areas in which the report fell short of the comprehensive analysis of “improper or illegal activities” purportedly sought under the contract. For example, an Advisory Services Agreement, which forms the basis for substantial, serious allegations by plaintiffs outside the Underlying Action, is mentioned only once the KPPA/KRS Investigation. The Advisory Services Agreement itself, any amendments, internally-referenced side agreements, and any termination notice were omitted from the exhibits. In addition, fundamental assumptions in the report (*e.g.*, that certain KPPA/KRS employees report to the Executive Director only on administrative matters) significantly narrow its focus and favor a limited investigation. These aspects of the KPPA/KRS Investigation support the legal analysis that favors waiver of work product protection upon disclosure to a third party.

In short, a full review of the CP Report gives rise to questions as to whether the purpose and intent of the CP Report was fully expose all the relevant facts (and to determine if the KPPA and its employees made mistakes), or if the CP Report was commissioned to cover up or

⁶³ *Id.* at 306 (citations omitted).

minimize those mistakes in an effort to convince the OAG to not pursue claims that could prove embarrassing to the current or former management of KPPA. The public paid \$1.2 million dollars for this Report. The public has a right to know its contents and decide if it got what it paid for. The Open Records Act requires strict construction of any exceptions to public disclosure “even though such examination may cause inconvenience or embarrassment to public officials or others.” KRS 61.871.

d. In Any Event, Plaintiff Has Demonstrated a Need for the KPPA/KRS Investigation

Even if the KPPA/KRS Investigation is protected work product and that protection has not been waived, Plaintiff has demonstrated a compelling need for it. In determining whether to order disclosure, courts distinguish between factual work product and opinion work product; the latter includes the “mental impressions, conclusions, opinions, or legal theories of an attorney.”⁶⁴ To order disclosure of factual work product, a party must show a substantial need and the inability to obtain the substantial equivalent without undue hardship.⁶⁵ Opinion work product is subject to disclosure if it is “directed to the pivotal issue . . . and the need for the material [is] compelling.”⁶⁶ Plaintiff satisfies both standards.

The KPPA/KRS Investigation is “directed to” investment activities by KPPA/KRS that are the “pivotal issue[s]” in the Underlying Action and related cases. Indeed, the OAG represented to the Court that the information in the KPPA/KRS Investigation would be “highly relevant” in preparing its amended intervening complaint.

⁶⁴ See *Morrow v. Brown, Todd & Heyburn*, 957 S.W.2d 722, 724 (Ky. 1997).

⁶⁵ See *Transit Auth. of River City*, 703 S.W.2d at 486.

⁶⁶ *Morrow*, 957 S.W.2d at 726.

Requiring Plaintiff to replicate this investigation, which was prepared at a cost of \$1.2 million and entailed review of voluminous documents, through discovery would be inefficient and, indeed, create undue hardship. Finally, the critical value in the KPPA/KRS Investigation is that it was conducted at the request of KPPA/KRS itself, which confers an aura of impartiality that would be impossible for Plaintiff replicate.⁶⁷ The Plaintiff represents an individual who has been accused of wrongdoing in the underlying cases. He has a right to an effective defense of those allegations, and denying him access to the CP Report would be fundamentally unfair, especially in view of the fact that the taxpayers paid for the preparation of the Report.

CONCLUSION

The Kentucky Supreme Court has explained that “[c]ompeting interests are at the core of every [KORA] case” and also confirms that judicial resolution involves “balancing of those interests within the parameters laid out by the legislature.”⁶⁸ Thus, where the relevant public records involve allegations of wrong-doing by an agency, a court must weigh the “public interest in how promptly, thoroughly and effectively [an agency] respond[s]” to the allegations against any counter-balancing interests raised by the agency.⁶⁹

Here, KPPA/KRS did not satisfy its burden for showing that the Report of its investigation should be exempt from disclosure under KORA. Conversely, a number of factors weigh in favor of disclosure. KPPA/KRS undertook a series of investments during 2011-2017, which the Kentucky Supreme Court acknowledged were clouded by allegations of “significant misconduct.” It participated in a questionable bid solicitation process to contract with attorneys

⁶⁷ See *Transit Auth. of River City*, 703 S.W.2d at 486 (holding that the work product doctrine was inapplicable where an investigative report would be “impossible” to replicate).

⁶⁸ *University of Kentucky*, 620 S.W.3d at 53.

⁶⁹ *Id.*

for a (second) investigation that cost taxpayers at least \$1.2 million. Finally, after representing to the Court that the KPPA/KRS Investigation would be available to the public in some form, it has refused any such access. Accordingly, under the KORA the public has a compelling interest in reviewing the KPPA/KRS Investigation to ascertain whether the agency acted “promptly, thoroughly and effectively.” The Court notes that the CP Report that is the subject of this Open Records request is essentially a compilation and review of the factual matters, which contains little if any legal analysis. The separate document containing “Legal Recommendations” is not within the scope of this ruling.

Accordingly, for the reasons stated above, the KPPA is directed to make the CP Report available to the Plaintiff and the public within 10 days of the entry of this Order.

SO ORDERED this 25th day of August, 2022.



PHILLIP J. SHEPHERD, JUDGE
Franklin Circuit Court, Division I

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