



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

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20-ORD-005

January 16, 2020

In re: David Raper/Kentucky State Police

Summary: The Kentucky State Police ("KSP") did not violate the Open Records Act ("Act") in denying a request for a copy of an explicit photograph contained within the subject investigation file on the basis of KRS 61.878(1)(a). Because the requested photograph is private by nature, and its content has no manifest bearing on how KSP discharged its duty of conducting the investigation, application of the balancing test required under KRS 61.878(1)(a) weighs in favor of the privacy interest and KSP properly withheld the photograph.

Open Records Decision

The question presented in this appeal is whether KSP violated the Act in denying David Raper's ("Appellant") April 29, 2019, request for certain records pertaining to "the extortion case involving Joshua T. Phillips, Dee A. Bowman *aka* Dee A. Phillips, and the Commonwealth[,] originally filed in Spencer County Circuit Court on December 13, 2013. Specifically, he requested "a copy of the investigative file(s), uniform citation(s), Shelby County Grand Jury indictment(s), any statements and affidavits from victim(s) and witnesses, copies of exhibits to include text messages and photos, a copy of any plea agreements, and any information dealing with restitution." Following some delays and subsequent correspondence between the parties, KSP provided all existing records that satisfied the request except for the "photograph of Todd Walls

referenced in Trooper Hedges' [Narrative Report]." The photograph is currently the only record in dispute.

By letter directed to the KSP Records Custodian on September 10, 2019, Appellant asked for a copy of the photograph referenced in the report, acknowledging "that the photograph is pornographic in nature." He also submitted a request by letter dated October 4, 2019, to KSP's Photo Lab, asking for a copy of the photograph, which "relates specifically to the extortion charge for which Mr. and Mrs. Phillips were also arrested and convicted." In his October 30, 2019, letter to the Records Custodian, Appellant noted that KSP had omitted "a photograph of Todd Walls apparently taken by Mr. Walls himself in the bathroom of the Taylorsville Police Department" from the records that KSP previously disclosed. In response to Appellant's October 30, 2019, letter, KSP denied his request for the specific photograph, citing KRS 61.878(1)(a), "as disclosure would constitute an unwarranted invasion of personal privacy." KSP also referenced 17-ORD-269 in support of its denial. Thereafter, Appellant filed this appeal.

In response to this appeal, KSP reiterated its position regarding application of KRS 61.878(1)(a) to this photograph and noted that KSP previously withheld the identical photograph in a response this Office upheld in 17-ORD-269. In resolving 17-ORD-269, the Attorney General reviewed the photograph *in camera* pursuant to KRS 61.880(2)(c) and 40 KAR 1:030 Section 3, before affirming the denial by KSP. Because this Office has already reviewed the subject photograph, and ultimately determined that KSP lawfully withheld it pursuant to KRS 61.878(1)(a), KSP asked this Office to follow the precedent established in 17-ORD-269 and find that it properly withheld the photograph.¹ This Office agrees that the subject photograph has already been found exempt pursuant to KRS 61.878(1)(a). 17-ORD-269, p. 5. Accordingly, KSP did not violate the Act in denying Appellant's request.

In *Ky. Board of Examiners of Psychologists v. Courier-Journal and Louisville Times Co.*, 826 S.W.2d 324 (Ky. 1992), the Kentucky Supreme Court established

¹ As in this case, in 17-ORD-269 this Office was asked to determine whether KSP violated the Act in the disposition of the Appellant's request to inspect "the KSP Investigative file on former Taylorsville Police Officer[] Todd Walls, involving extortion by Joshua Phillips and Dee Bowman."

the standard for determining whether a public agency has properly relied upon KRS 61.878(1)(a) in denying access to public records (or portions thereof). Recognizing the Act “exhibits a general bias favoring disclosure,” the Court formulated a test whereby “the public’s right to expect its agencies properly to execute their functions” is measured against the “countervailing public interest in personal privacy” when the records sought contain information that touches upon the “most intimate and personal features of private lives.” *Id.* at 327-328. The determination of whether a public agency has properly relied upon KRS 61.878(1)(a) turns on whether the offense to personal privacy that would result from disclosure of the information outweighs the public benefit, and is an “intrinsically situational” determination that can only be made in a “specific context.” *Id.* See *Cape Publications v. City of Louisville*, 191 S.W.3d 10 (Ky. App. 2006)(holding that “bright-line rules permitting or exempting disclosure are at odds with controlling precedent” and “case-by-case analysis” is required); *Kentucky New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76, 83 (Ky. 2013).

The Court of Appeals refined this standard in *Zink v. Com., Dep’t of Workers’ Claims, Labor Cabinet*, 902 S.W.2d 825, 828 (Ky. App. 1994), reasoning that *if* the information requested is of a “personal nature,” the next question is “whether public disclosure ‘would constitute a clearly unwarranted invasion of personal privacy.’” This determination “entails a ‘comparative weighing of antagonistic interests’ in which the privacy interest in nondisclosure is balanced against the general rule of inspection and its underlying policy of openness for the public good.” *Id.* (citation omitted). The only relevant public interest “is the extent to which disclosure would serve the princip[al] purpose of the Open Records Act. . . .” *Id.* at 829. The result in *Zink* hinged on the fact that disclosure of the inherently private information “would do little to further the citizens’ right to know what their government is doing and would not in any real way subject agency action to public scrutiny.” *Id.*

Having exercised this Office’s authority under KRS 61.880(2)(c) and 40 KAR 1:030 Section 3, by reviewing the requested photograph *in camera*, this Office first acknowledged the “highly personal nature” of the subject photograph. As stated in 17-ORD-269 at p. 5 (emphasis added):

[I]n one of the uniform citations supplied by [the Appellant] the defendants were charged with extorting money by threatening

“that explicit pictures of the victim would be sent to his wife, boss, and media in attempt to ruin the victim’s reputation and credibility within the community.” Since this photograph is of a private and explicit nature, and has no inherent relevance to how KSP performed its duties, we find that the balance weighs in favor of the privacy interest under KRS 61.878(1)(a), and thus the photograph was lawfully withheld.

The instant appeal presents no basis to depart from this governing precedent. Accordingly, this office affirms the denial of the Appellant’s request on the basis of KRS 61.878(1)(a).

Either party may appeal this decision by initiating action in the appropriate circuit court under KRS 61.880(5) and KRS 61.882. Pursuant to KRS 61.880(3), the Attorney General shall be notified of any action in circuit court, but shall not be named as a party in that action or in any subsequent proceeding.

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Distributed to:

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