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20-ORD-204

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In re: Thurman Wenzl/Kentucky Labor Cabinet

Summary: The Kentucky Labor Cabinet ("Cabinet") violated the Open Records Act ("the Act") when it did not issue a timely response to a request to inspect records. The Cabinet also failed to meet its burden on appeal that a specific record contained confidential and proprietary information permitting it to be withheld.

Open Records Decision

Thurman Wenzl ("Appellant") requested from the Cabinet a copy of all records associated with an industrial accident that the Cabinet is currently investigating. Although the Cabinet received the request on September 28, 2020, it did not issue a response until November 2, 2020. Eventually, the Cabinet searched for, and identified, several records responsive to Appellant's request, some of which the Cabinet withheld or redacted for various reasons. The Cabinet then informed the Appellant that it was communicating with a private crane manufacturer about whether the manufacturer considered certain information within those records to be confidential and proprietary. *See* KRS 61.878(1)(c)1. On that basis, the Cabinet informed the Appellant that it would provide its final response to his request on December 14, 2020. This appeal followed.

First, the Cabinet failed to issue its initial response until more than thirty days after receipt of the request.[1] Thus, the Cabinet violated the Act.

[1] Ordinarily an agency must respond to a request within three business days. KRS 61.880(1). However, in response to the Covid-19 state of emergency, the 2020 General Assembly passed SB 150, which extended the time to respond to ten calendar days. SB 150 became law on March 30, 2020, following the

Second, the Cabinet wrongly relied upon the "confidential and proprietary information" exemption under KRS 61.878(1)(c)1. to withhold a crane inspection schedule.[2] Under KRS 61.878(1)(c)1., agencies may exempt from inspection "records confidentially disclosed to an agency or required by an agency to be disclosed to it, generally recognized as confidential or proprietary, which if openly disclosed would permit an unfair commercial advantage to competitors of the entity that disclosed the records."

Generally, KRS 61.878(1)(c)1. applies to financial information that, if disclosed, might permit a competitor to ascertain the economic status of the company. *See Marina Management Service, Inc. v. Com. of Ky., Cabinet for Tourism*, 906 S.W.2d 318, 319 (Ky. 1995). Such financial information may be withheld under the Act. Trade secrets may also be withheld under KRS 61.878(1)(c)1. *Cf. Cabinet for Economic Development v. Courier-journal, Inc.*, No. 2018-CA-001131, 2019 WL 2147510 *9 (Ky. App. May 17, 2019) (unpublished) (finding that the records at issue were "not in the nature of trade secrets, investment strategies, economic status, or business structures" and thus could not be withheld). Under KRS 365.880(4), the Uniform Trade Secrets Act, a "trade secret" includes:

> [A] formula, pattern, compilation, program, data, device, method, technique, or process, that: (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

However, "[i]nformation cannot constitute a trade secret and, thus, is not confidential if the subject matter is 'of public knowledge or general knowledge in the industry' or if the

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Governor's signature. Nevertheless, the Cabinet admitted in its November 2, 2020, response that it received the request on September 28, 2020. Therefore, the Cabinet issued its response well beyond the ten-day deadline provided in SB 150.

[2] Although the Cabinet argues that this appeal is not ripe for review because the Cabinet planned to provide its final response on December 14, the Act provides that if "a person feels the intent of [the Act] is being subverted by an agency short of denial of inspection, the person may complain in writing to the Attorney General, and the complaint shall be subject to the same adjudicatory process as if the record had been denied." KRS 61.880(4). The Cabinet's initial response identified several responsive records and provided a detailed explanation as to why some records were being withheld. Appellant challenges only the Cabinet's decision to withhold one, specific record under KRS 61.878(1)(c)1, a crane inspection schedule. Appellant maintains that the Cabinet had no basis to claim that KRS 61.878(1)(c)1. applied to this one record. As such, he claims that the Cabinet's delay in providing this one record is itself a violation of the Act. Accordingly, under KRS 61.880(4), this appeal is ripe for review.

matter consists of 'ideas which are well known or easily ascertainable.'" *Insight Ky. Partners II, L.P. v. Preferred Automotive Servs., Inc.*, 514 S.W.3d 537, 555 (Ky. App. 2016) (quotations omitted). Ultimately, "if it is established that a document is confidential or proprietary, and that disclosure to competitors would give them substantially more than a trivial unfair advantage, the document should be protected from disclosure[.]" *Southeastern United Medigroup, Inc. v. Hughes*, 952 S.W.2d 195, 199 (Ky. 1997) (overruled on other grounds by *Hoskins v. Maricle*, 150 S.W.3d 1 (Ky. 2005)).

Here, the Cabinet withheld a record that was created by a private crane manufacturer. The record details the manufacturer's "annual, monthly, and daily crane inspection[s]." To support its reliance on KRS 61.878(1)(c)2., on appeal the Cabinet provides an email from the private crane manufacturer in which it explains why it believes this record contains confidential and proprietary information. In the email, the manufacturer claims that its crane inspection schedule is confidential and proprietary because it has "expended time and resources in developing and completing these forms . . . which were only provided to [the Cabinet] pursuant to the agency's investigatory authority." According to the email, the manufacturer's "competitors could use these documents to gain a competitive advantage, either by adopting them as their own and avoiding the cost and expenditure of resources incurred by [the manufacturer] in developing them or by publicizing the information on the completed forms in a way that casts [the manufacturer] in a negative light."

These claims are not persuasive. In *Insight Kentucky Partners*, the Court of Appeals considered substantially similar records, "vehicle repair histories." 514 S.W.3d at 555. The Court of Appeals held that those records were not trade secrets within the meaning of KRS 365.880(4). *Id*. The Cabinet has identified no meaningful distinction between "vehicle repair histories," which were not considered trade secrets in *Insight Kentucky Partners II, L.P.*, and "crane inspection histories." Moreover, neither the Cabinet nor the manufacturer explain how the release of the inspection records would provide a competitor anything "more than a trivial unfair advantage," if any. *Hughes*, 952 S.W.2d at 199. For these reasons, the Cabinet has failed to carry its burden that the crane inspection schedule is a "confidential and proprietary" record exempt under KRS 61.878(1)(c)1. Thus, the Cabinet violated the Act when it denied Appellant's inspection of the crane inspection schedule.

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 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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