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21-ORD-151

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In re: Courier-Journal/Louisville Metro Police Department

Summary: The Louisville Metro Police Department (the "Department") violated the Open Records Act ("the Act") when it did not explain how the personal privacy exemption applied to redact certain phone numbers from call logs on Department-owned cell phones. The Department did not violate the Act when it denied a request for text messages and call logs contained on Department employees' privately-owned cell phones.

Open Records Decision

On May 17, 2021, the Courier-Journal ("Appellant") submitted a request to the Department in which it sought copies of text messages sent or received by a specific officer on his Department-owned cell phone between noon on May 31, 2020 and noon on June 2, 2020. The Appellant also sought copies of any text message logs on the Department-owned device for the same period. In a timely response, the Department provided two pages of cell phone billing records, one from the May billing cycle and one from the June billing cycle. The Department further stated that it was unable to provide copies of the requested text message log because "the cell phone carrier is not providing a detailed call log for any [Department] accounts."

On July 2, 2021, the Appellant submitted a second similar request, but expanded the scope of its request to include text messages sent and received during the same period by multiple Department employees, on both their Department-owned cell phones and personal cell phones. In a timely response, the Department denied the request for text messages contained on Department-owned phones under KRS 61.878(1)(a), stating that the release of such messages would be an unwarranted intrusion into personal privacy. The

Department also stated it needed additional time to obtain the call logs from the cell phone carrier. The Department stated the records would be available on or before August 16, 2021, but when it received such call logs it intended to redact the phone numbers appearing in the log under KRS 61.878(1)(a) as well. Finally, the Department denied the request as it related to the employees' privately-owned cell phones, again stating that such messages are exempt under KRS 61.878(1)(a). The Appellant then initiated this appeal, claiming that the Department could not rely on KRS 61.878(1)(a) to justify its denial of all parts of its request.

On appeal, the Department provides the Appellant with the text messages sent and received on the Department-owned cell phone of the first officer identified in the Appellant's first request. Therefore, any claim regarding these records is now moot. *See* 40 KAR 1:030 § 6. The Department claims that no responsive text messages exist on the other employees' Department-owned cell phones.

Once a public agency states affirmatively that it does not possess any responsive records, the burden shifts to the requester to present a *prima facie* case that the requested records do exist. *Bowling v. Lexington-Fayette Urban Cty. Gov't*, 172 S.W.3d 333, 341 (Ky. 2005). If the requester establishes a *prima facie* case that records do or should exist, "then the agency may also be called upon to prove that its search was adequate." *City of Ft. Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 848 n.3 (Ky. 2013) (citing *Bowling*, 172 S.W.3d at 341). Here, the Appellant presents no evidence that there should be responsive text messages on the remaining employees' Department-owned cell phones. Therefore, this Office cannot find that the Department violated the Act when it claims no additional responsive records exist.

Also on appeal, the Department provides the Appellant with the requested call logs. However, as it indicated it would do, the Department redacted phone numbers appearing in the call logs under KRS 61.878(1)(a). In support of its action, the Department states only that the phone numbers "are exempt as an unwarranted invasion of personal privacy and that the privacy interest substantially outweighs the public's interest in this matter." The Department provides no additional information about the phone numbers that would support this claim.

To determine whether a record may be properly redacted or withheld under KRS 61.878(1)(a), this Office measures the public's right to know that public agencies are properly executing their functions against the

"countervailing public interest in personal privacy" when the records in dispute contain information that touches upon the "most intimate and personal features of private lives." *Ky. Bd. of Examiners of Psychologists v. Courier-Journal and Louisville Times Co.*, 826 S.W.2d 324, 328 (Ky. 1992). This balancing test requires a "comparative weighing of the antagonistic interests. Necessarily, the circumstances of a particular case will affect the balance . . . [T]he question of whether an invasion of privacy is 'clearly unwarranted' is intrinsically situational, and can only be determined within a specific context." *Id.* at 327-28.

To be sure, there are certain categories of personal information that public agencies may categorically redact. In *Kentucky New Era, Inc. v. City of Hopkinsville*, the Kentucky Supreme Court recognized that private citizens' addresses, telephone numbers, social security numbers, and driver's license numbers will hardly ever provide insight into whether a public agency is properly executing its function. 415 S.W.3d 76, 89 (Ky. 2013); *see also Zink v. Com., Dept. of Workers' Claims, Labor Cabinet*, 902 S.W.2d 825 (Ky. App. 1994). Thus, in *Kentucky New Era*, the Kentucky Supreme Court held that law enforcement agencies may categorically redact the telephone numbers of private citizens appearing in police reports.

"On the other hand, where the disclosure of certain information about private citizens sheds significant light on an agency's conduct, we have held that the citizen's privacy interest must yield." *Id.* at 86. In 04-ORD-065, this Office found that a school district could not redact the phone numbers of specific individuals called on publicly-owned equipment. In reaching that conclusion, this Office cited its previous decisions, dating back to 1986, in which the Office has held that there is significant public interest in the phone numbers called by public officials using publicly-owned equipment. *See, e.g.*, OAG 86-21 (phone numbers dialed using publicly-owned phones); 96-ORD-238 (same as applied to facsimile numbers).

Here, the records at issue are call logs and text messages, not police reports. Thus, the phone numbers were not incidentally collected as part of a routine law enforcement investigation. Because a law enforcement agency may redact the phone numbers of witnesses, suspects, or victims of crimes from police reports and similar records under *Kentucky New Era*, the same types of phone numbers may be redacted from call logs and text messages for similar reasons. But the Department has not explained who is associated with the redacted numbers. If the numbers are associated with other Department employees, or other individuals who were not contacted as a result of a law

enforcement investigation, the personal privacy interests of those individuals would seem to be subordinate to the public interest in ensuring that publicly-owned equipment is being used for public business. *See, e.g.*, 04-ORD-065. The Department carries the burden of proving that KRS 61.878(1)(a) applies to each of the numbers it has redacted. *See* KRS 61.880(2)(c). But it provides no information about these phone numbers that would permit this Office to engage in the balancing test required under *Kentucky Board of Examiners of Psychologists,* 826 S.W.2d at 327-28. Therefore, the Department violated the Act.

The Appellant also requested text messages on the Department employees' privately-owned cell phones. The Department originally denied this request under KRS 61.878(1)(a), but on appeal, it claims that text messages on privately-owned cell phones are not public records. This Office has consistently found that text messages sent and received on privately-owned devices, for which no public funds have been spent, are not "public records" under KRS 61.870(2). *See, e.g.*, 21-ORD-146 (discussing the history of the statute in more detail and which the Office reaffirms today); 21-ORD-127; 15-ORD-226. As it has done previously, this Office admonishes public employees to refrain from using privately-owned devices to conduct government work. But KRS 61.870(2), as currently enacted, does not include text messages on privately-owned devices within the definition of "public record." Therefore, the Department did not violate the Act when it denied the Appellant's request for the text messages contained on privately-owned devices.

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 proceedings.

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