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22-ORD-040

March 8, 2022

In re: Lawrence Trageser/Anchorage Middletown Fire and EMS District

Summary: The Anchorage Middletown Fire and EMS District (the "District") violated the Open Records Act ("the Act") when its response to a request to inspect records did not comply with KRS 61.880(1). However, the District did not violate the Act when it could not produce for inspection records that do not exist within its possession or when it redacted certain personal and health-related information under KRS 61.878(1)(a).

Open Records Decision

Lawrence Trageser ("Appellant") submitted to the District a three-part request to inspect records. The first subpart sought copies of the personnel file of a specific employee. The Appellant specified that his request included "all disciplinary actions, reprimands, internal investigations and administrative leaves with pay or not" as well as "those documents that involve placing [the employee] on administrative leave for" the charges the Appellant had described.

The second subpart sought copies of "[t]he policies and procedures" the District relied on when it placed the employee on administrative leave with pay and allowed the employee to return to service. The third subpart sought copies of the personnel file of another employee, including "all disciplinary actions, reprimands, internal investigations, suspensions and administrative leaves with or without pay" as well as "documents that involve" that employee's suspension for an incident the Appellant had described. The Appellant also

requested "documents that reflect transferring [the employee] from EMS duties to fire suppression duties on an engine company."

In a timely response, the District provided 58 pages of records responsive to the third subpart of the Appellant's request and claimed it had reviewed and redacted them under KRS 61.878(1)(a) and (k) to protect personal and health-related information. The District denied the first subpart of the request under KRS 61.878(1)(h) because the records related to an ongoing investigation. The District denied the second subpart of the request because the District claims it does not possess any records responsive to this request. This appeal followed.

On appeal, the Appellant specifically claims that the District violated KRS 61.872(1) and KRS 61.872(5). Under KRS 61.872(1), "[a]ll public records shall be open for inspection by any resident of the Commonwealth, except as otherwise provided by KRS 61.870 to 61.884." The Appellant alleges that the District violated KRS 61.872(1) "by denying the records [he] requested." He also alleges that the District violated KRS 61.872(5), because he claims that the District denied his request for some records "without a response, let alone a detailed response as to why the records have been denied." However, KRS 61.872(5) applies only when an agency requires additional time to produce responsive records because the records are in active use, storage, or are otherwise unavailable. The District never claimed that it needed additional time to obtain records, but instead, simply denied certain portions of the Appellant's request. In doing so, however, the District failed to provide a sufficient explanation as to how the claimed exemptions applied to the withheld records.

When an agency receives a request under the Act, it is required to respond to the request and provide any nonexempt responsive records within five business days. KRS 61.880(1). Or, if the agency denies the request, it must "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." *Id.* The agency's statement must contain sufficient information for the requester, and for this Office or a reviewing court, to consider the appropriateness of the agency's claimed exemption. *See Kentucky New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76, 81 (Ky. 2013). An agency's "limited

and perfunctory response" is insufficient. *Edmondson v. Alig*, 926 S.W.2d 856, 858 (Ky. App. 1996).

Here, the District did respond to each subpart of the Appellant's request within five business days, but its response was deficient because it did not provide "a brief explanation of how the exception applies to the record withheld" when it denied the third subpart of the Appellant's request. Instead, the District simply stated "[c]ertain records have been withheld and redactions made where appropriate pursuant to KRS 61.878(1)(a) to protect personal information and pursuant to KRS 61.878(k) [*sic*] to protect health-related information." This "limited and perfunctory response" failed to provide sufficient information to allow the Appellant to determine whether the claimed exemptions applied, such as a description of the withheld records or the type of health information being withheld. Accordingly, the District violated the Act when it failed to provide a sufficient explanation for how the claimed exemptions applied to the records it withheld.

Turning to the exemptions that the District claims apply, KRS 61.878(1)(a) exempts "[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy[.]" When reviewing an agency's denial of a request based on the personal privacy exemption, this Office must weigh the public's right to know that a public agency is properly executing its 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. The courts and this Office balance the public's right to know what is happening within government against the personal privacy interest at stake in the record. *See Zink v. Commonwealth, Dept. of Workers' Claims*, 902 S.W.2d 825, 828 (Ky. App. 1994).

Although the District's initial response to the third subpart of the Appellant's request was deficient, the District cures this deficiency on appeal by explaining that the redactions encompassed "health-related information, including photographs and descriptions of certain injuries." Thus, the District has now explained the types of records it withheld—photographs and descriptions. It has also explained what those records reflect, pictures and descriptions of "certain injuries." Although this additional information is minimal, it is enough to weigh the competing interests of personal privacy and public oversight of government.

In 21-ORD-033, this Office weighed these competing interests to find that the public agency improperly redacted certain information that referred to an employee's disability. In that decision, the information about the employee's disability formed the basis for the agency's actions. Moreover, the redacted information did not describe the employee's actual disability or any protected health information, but instead used legal terms of art such as "long-term disability." Conversely, the facts at issue here are different because this redacted information contains "specific health-related information, including photographs and descriptions of certain injuries." Public employees clearly have a privacy interest in photographs of themselves. *See, e.g.*, 21-ORD-117 (collecting decisions that affirm the redaction of employee-photographs under KRS 61.878(1)(a)). Unlike the redactions at issue in 21-ORD-033, the specific health-related information contained in these records will not shed additional light on the agency's decision to suspend the employee for misconduct. As such, based on the evidence presented, the redacted information will not assist the public in ensuring that the District is properly executing its functions. Therefore, the District has carried its burden on appeal that KRS 61.878(1)(a) applies to withhold these portions of the responsive records.[1]

Regarding the other subparts of the Appellant's request, the District claims on appeal that, other than records it has withheld under KRS 61.878(1)(h), it possesses "no additional responsive documents in [the employee's] personnel file for the time frame specified in the" Appellant's first

[1] Because this Office concludes that the redacted portions of these records may be withheld under KRS 61.878(1)(a), it declines to consider the District's alternative argument that the records are exempt under KRS 61.878(1)(k).

subpart of the request.[2] The District also repeats on appeal that it does not possess any records responsive to the second subpart of the Appellant's request, where the Appellant sought "policies" the District relied on to take disciplinary action. The District claims that it followed the procedures established under KRS Chapter 75 when it took disciplinary action.[3]

Once a public agency states affirmatively that it does not possess responsive records, the burden shifts to the requester to present a *prima facie* case that requested records do exist in the possession of the public agency. *See Bowling v. Lexington-Fayette Urb. Cnty. Gov.*, 172 S.W.3d 333, 341 (Ky. 2005). If the requester is able to make a *prima facie* case that the records do or should exist, then the public agency "may also be called upon to prove that its search was adequate." *City of Fort 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 simply asserts that the District should possess additional records in the employee's file other than those withheld as part of the investigation. This Office has found that a requester's bare assertion that responsive records should exist is not sufficient to establish a *prima facie* case that requested records exist. *See, e.g.*, 20-ORD-094. Moreover, the District also explains that it "follows the procedures set forth in KRS Chapter 75 and does not have separately documented policies and procedures to pursue disciplinary action of the type at issue with" the employee. Thus, the District did not violate the Act when it could not produce records responsive to the first two subparts

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[2] The Appellant clarifies on appeal that his request was "[e]xcluding the investigation directly involved with the ongoing investigation of her being arrested." The Appellant has not challenged the District's reliance on KRS 61.878(1)(h) in withholding these investigative records.

[3] The District also argues that the Appellant should be time-barred from pursuing this appeal, because the District issued its response on October 13, 2021. As explained in 21-ORD-033, the Act does not require a requester to bring an appeal to this Office within a certain amount of time. *Cf.* KRS 61.870-61.882, et. seq., *with* KRS 61.846(2) (requiring an appeal to this Office within 60 days), *and* KRS 197.025(3) (requiring an inmate to appeal the denial of a request to inspect records within 20 days). The District also claims that the Appellant has been submitting requests to the District with the intent of disrupting its essential daily functions. *See* KRS 61.872(6); *see also* 16-ORD-005; 15-ORD-015. However, the District did not deny the Appellant's request under KRS 61.827(6), and this Office will not consider that issue because the District did not preserve it for this appeal.

of the Appellant's request because such records do not exist within its possession.

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 within 30 days from the date of this decision. 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. The Attorney General will accept notice of the complaint emailed to OAGAppeals@ky.gov.

Daniel Cameron
Attorney General

/s/Matthew Ray
Matthew Ray
Assistant Attorney General

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Distributed to:

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