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23-ORD-016

January 30, 2023

In re: Kim Underwood/Department of Corrections

Summary: The Department of Corrections (“the Department”) violated the Open Records Act (“the Act”) when it redacted pages of requested records without explaining how the exception on which it relied applied to the redactions.

Open Records Decision

Kim Underwood (“Appellant”) submitted a request to the Department to inspect “[w]ritten responses, proposals, score sheets, and related documentation” associated with a specified Request for Proposal (“RFP”). In a timely response, the Department denied the request under KRS 61.878(1)(o) because the requested records were related to “an active procurement.” This appeal followed.

After the appeal was initiated, the Department abandoned its reliance on KRS 61.878(1)(o) because the procurement process had concluded and the contract at issue became final. The Department now claims the appeal is moot. *See* 40 KAR 1:030 § 6. While the issue regarding the Department’s initial reliance on KRS 61.878(1)(o) may be moot, this appeal is not. That is because the Department did not fully produce all the requested records. Rather, the Department redacted information from the records that it claims is exempt under KRS 61.878(1)(a) and KRS 61.878(1)(c). Moreover, the Department failed to explain how either exemption applied to support its redactions.

Under KRS 61.880(1), “[a]n agency response denying, in whole or in part, inspection of any record shall 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.” Further, the agency’s explanation must “provide particular and detailed information,” not merely a “limited and perfunctory response.” *Edmondson*

v. Alig, 926 S.W.2d 856, 858 (Ky. 1996). “The agency’s explanation must be detailed enough to permit [a reviewing] court to assess its claim and the opposing party to challenge it.” *Ky. New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76, 81 (Ky. 2013).

Here, the Department issued a new response after the appeal was initiated, in which it stated, “Pages which are confidential and proprietary are being withheld, including personnel [*sic*] information of key staff which is exempt pursuant to KRS 61.878(1)(a). Additionally, the following records are also being withheld: financial statements, professional references, equipment schematics, personnel policies, COVID-19 policies and manuals, proprietary software, insurance policy information, and operations manuals pursuant to KRS 61.878(1)(c)(1) as they may permit an unfair commercial advantage.”

Regarding the first exemption on which the Department now relies, KRS 61.878(1)(a) exempts from inspection “[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.” In reviewing an agency’s denial of an open records request based on the personal privacy exemption, 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, Dep’t of Workers’ Claims*, 902 S.W.2d 825, 828 (Ky. App. 1994). However, the Supreme Court of Kentucky has held that certain categories of information about private individuals provide minimal insight into governmental affairs and may be categorically redacted under KRS 61.878(1)(a). *Ky. New Era*, 415 S.W.3d at 89. Here, the Department has not described the types of personal information it withheld nor explained how the redacted information implicates a personal privacy interest that outweighs a public interest. Accordingly, the Department has not carried its burden of proving that KRS 61.878(1)(a) permitted the redactions it made to the responsive records.

Regarding the second exemption on which the Department now relies, KRS 61.878(1)(c)1 exempts from inspection “[r]ecords 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.” The burden of proof rests with the public agency to sustain its denial of a request to inspect public records. KRS 61.880(2)(c).¹

Here, the Department states only that it is withholding “financial statements, professional references, equipment schematics, personnel policies, COVID-19 policies

¹ When a public agency invokes KRS 61.878(1)(c)1 on behalf of a private entity, this Office will permit “argument and input from the non-party to the appeal” to assist the public agency in meeting its burden. See, e.g., 09-ORD-010. However, the Department did not provide any “argument [or] input from the non-party to the appeal” to assist it in meeting its burden in this instance.

and manuals, proprietary software, insurance policy information, and operations manuals pursuant to KRS 61.878(1)(c)(1) as they may permit an unfair commercial advantage.”

To sustain its denial under KRS 61.878(1)(c)1, the Department must first prove the records were “confidentially disclosed to” it. Although the Department has not affirmatively stated that these records were confidentially disclosed to it, it has stated that these records related to proposals made in the state procurement process. 200 KAR 5:307 provides that “[p]roposals shall not be subject to public inspection until negotiations between the purchasing agency and all offerors have been concluded and a contract awarded.” Accordingly, such records were “confidentially disclosed” to the Department when the proposals were initially made.

Even if the Department had demonstrated these provisions were confidentially disclosed to it, the Department must also establish that the withheld records are “generally recognized as confidential or proprietary.” KRS 61.878(1)(c)1. In *Hoy v. Kentucky Industrial Revitalization Authority*, 907 S.W.2d 766, 768 (Ky. 1995), the Supreme Court considered the applicability of KRS 61.878(1)(c)2² to records related to the “financial history of [a] corporation, projected cost of [a] project, the specific amount and timing of capital investment, copies of financial statements and a detailed description of the company’s productivity, efficiency and financial stability.” The Court concluded, “It does not take a degree in finance to recognize that such information concerning the inner workings of a corporation is ‘generally recognized as confidential or proprietary.’” *Id.* Therefore, the Court found those categories of information satisfied the second element of the exception.

This Office has generally recognized as confidential or proprietary “private financial affairs” (01-ORD-143); “trade secrets, investment strategies, economic status, or business structures” (17-ORD-198; 16-ORD-273; 07-ORD-166); “the method for determining [a] contract price” and “business risks assumed” (17-ORD-002); “costing and pricing strategy” (92-ORD-1134; OAG 89-44); and “corporate assets of a non-financial nature that have required the expenditure of time and money to develop and *concern the inner workings of the private entity*” (10-ORD-001 (emphasis added)). The common factor among these categories of information is “the insight they provide into the *internal* operations of the entity making the disclosure to the public agency.” 20-ORD-019 (emphasis added).

Here, the Department has described the types of records it is withholding, but provides no evidence that “professional references,” “insurance policy information,” “personnel policies,” or “COVID-19 policies and manuals” are generally recognized as confidential. Nor has it explained how these records would disclose the inner

² KRS 61.878(1)(c)2 contains the identical language, “generally recognized as confidential or proprietary,” that appears in KRS 61.878(1)(c)1.

workings or financial status of the private entity, or how a competitor would obtain an unfair commercial advantage from the release of such information. Therefore, the Department has not met its burden of showing the withheld records are “generally recognized as confidential or proprietary.” KRS 61.878(1)(c)1.

However, “financial statements,” “equipment schematics,” and “operations manuals” are generally recognized as confidential and proprietary, and therefore may be withheld. *See Hoy*, 907 S.W.2d at 768. Moreover, the release of such information could give a competitor an unfair advantage, by providing insight into the financial workings of the company or trade secrets related to the construction and operation of the company’s equipment and products. *See id.* Accordingly, the Department did not violate the Act by withholding these records.

In sum, the Department violated the Act when it relied on KRS 61.878(1)(a) to redact “personnel [sic] information” but did not explain how the redacted information implicated a personal privacy interest that outweighs a public interest. The Department also failed to meet its burden that professional references, insurance policy information, personnel policies, or COVID-19 policies and manuals may be withheld under KRS 61.878(1)(c)1 because such information is not generally recognized as confidential or proprietary. However, the Department properly relied on KRS 61.878(1)(c)1 to withhold financial statements, equipment schematics, and operations manuals because such information is generally recognized as confidential or proprietary, and could provide a competitor an unfair commercial advantage.

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 e-mailed to OAGAppeals@ky.gov.

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Attorney General

s/ Zachary M. Zimmerer
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Distributed to:

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