



COMMONWEALTH OF KENTUCKY
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23-ORD-052

March 8, 2023

In re: Denise Steenbergen/Cabinet for Health and Family Services

Summary: The Cabinet for Health and Family Services (“the Cabinet”) violated the Open Records Act (“the Act”) when it did not determine within five business days of receiving a request to inspect records whether to grant or deny it and notify the requester of its decision. The Cabinet also failed to carry its burden to establish that KRS 61.878(1)(a) permitted the redactions it made to responsive records because it did not describe what material was redacted or explain how the privacy interests were implicated by the records.

Open Records Decision

On January 27, 2023, Denise Steenbergen (“Appellant”) submitted a request to the Cabinet for records related to a complaint lodged against her childcare center in August or September 2022. On February 7, 2023, the Cabinet responded and stated it received the Appellant’s request on January 30, 2023, and “forwarded it to [an employee] in Regulated child care [*sic*].” The Cabinet also informed the Appellant that its “Branch Manager of Records has already gone for the day,” but it “will for[ward] this email over to him[.]” On February 8, 2023, having received no further response from the Cabinet, the Appellant initiated this appeal.

On appeal, the Cabinet admits it failed to fully respond to the Appellant’s request due to a miscommunication regarding which division possessed responsive records. It now provides to the Appellant five pages of responsive records containing several redactions. The Cabinet does not identify what information it redacted, or explain how KRS 61.878(1)(a) applied to those redactions. Rather, the Cabinet states

only that “[c]onfidential information may have been redacted in compliance with KRS 61.878(1)(a) which provides that ‘[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy’ be withheld.”

When an agency receives a request under the Act, it must determine within five business days whether to grant or deny it and notify the requester of its decision. KRS 61.880(1). If the agency denies any portion of the request, it must also cite the exemption authorizing the denial and explain how it applies to records withheld. *Id.* Or, if the records are “in active use, in storage or not otherwise available,” the agency may delay access to the records if it gives the requester “a detailed explanation of the cause . . . for further delay and the place, time, and earliest date on which the public record[s] will be available for inspection.” KRS 61.872(5). Here, the Cabinet received the request on January 30, 2023, but did not issue a response until February 7, 2023, six business day later. Moreover, when it issued its response, it did grant the request, deny it and explain why, or invoke KRS 61.872(5) to delay inspection. Accordingly, the Cabinet violated the Act when it failed to issue a timely response to the request.

The Cabinet’s untimely final response, issued on February 15, 2023, after the appeal was initiated, also violated the Act. 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.” This exception typically requires a “comparative weighing of the antagonistic interests” between privacy and the public interest in disclosure. *Ky. Bd. of Examiners of Psychologists v. Courier-Journal & Louisville Times Co.*, 826 S.W.2d 324, 327 (Ky. 1992). Because the Cabinet relies on KRS 61.878(1)(a) to redact certain information, it must provide “a brief explanation of how the exception applies to the record withheld.” KRS 61.880(1). A public agency has the burden of proof in sustaining its action. KRS 61.880(2)(c). The Office has found that a public agency violates the Act when it does not describe the material redacted, or explain the privacy interest at stake such that KRS 61.878(1)(a) permits the redactions. *See, e.g.*, 20-ORD-013; 17-ORD-120; 17-ORD-101.

If the redactions consist solely of “discrete types of information routinely included in an agency’s records and routinely implicating similar grounds for exemption,” such as dates of birth, Social Security numbers, driver’s license numbers, and home addresses, they may have been justified. *Ky. New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76, 89 (Ky. 2013); 17-ORD-101 n.2. The Cabinet, however, did not indicate whether its redactions were limited to such categories. Instead, the

Cabinet simply stated that “[c]onfidential information may have been redacted in compliance with KRS 61.878(1)(a),” and then quoted the text of the exemption. Therefore, the Cabinet violated the Act when it failed to provide any description of the “[c]onfidential information” it redacted and explain how KRS 61.878(1)(a) applied to the redactions.¹

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court under KRS 61.880(5) and KRS 61.882 within 30 days from the date of this decision. Under 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:

Denise Steenbergen
David T. Lovely

¹ It appears that the information redacted may have been the names of children, their relatives, and the person who initiated the report. However, without more information, it is impossible to conclusively determine what was redacted or why. As a result, this Office is unable to determine if any privacy interests exist, or weigh those purported interests against the public’s right to know the Cabinet is exercising its governmental duty. While it may be appropriate to redact the names of children under KRS 61.878(1)(a), this Office has historically found that KRS 61.878(1)(a) does not apply to withhold the names of adults appearing in complaints to the Cabinet alleging child abuse, other than the name of the adult initiating the complaint. *See* 12-ORD-120. Rather, complaints made to the Cabinet alleging child abuse are entirely exempt from inspection, except a person suspected of such abuse may inspect the complaint. KRS 620.050(5)(a). The names of adults initiating complaints to the Cabinet are specifically exempt from inspection, even by the accused. KRS 620.050(11). Thus, while the Cabinet has failed to carry its burden to show that KRS 61.878(1)(a) applies to permit all of the redactions it made, some of the redacted information may indeed be exempt from inspection. The burden remains with the Cabinet to explain whether KRS 620.050(11) applies to support the redactions it has made.