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23-ORD-084

April 13, 2023

In re: LuvShenda Howard/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 denied a request for records without adequately explaining why.

Open Records Decision

LuvShenda Howard ("Appellant") submitted a request to the Cabinet for records related to two unsubstantiated claims of child abuse she stated were filed against her former childcare business. The Cabinet denied her request because it claimed the Appellant was "not entitled to the records based on KRS 209.140." This appeal followed.

If an agency denies a request to inspect records, its written response 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." KRS 61.880(1). Although KRS 61.880(1) requires the explanation in support of denial to be "brief," the response cannot be "limited and perfunctory." *Edmondson v. Alig,* 926 S.W.2d 856, 858 (Ky. App. 1996). In *Edmondson*, the agency's response to a request stated only that "the information you seek is exempt under KRS 61.878(1)(a)(k)(l) [*sic*]." *Id.* The agency failed to explain how any of the three exemptions applied to the records withheld, and for that reason, the court held, it violated KRS 61.880(1). *Id.*

KRS 209.140 makes confidential "[a]ll information obtained by the department staff or its delegated representative, as a result of an investigation made" involving

adult abuse under KRS Chapter 209. However, under KRS 209.140(1), "[p]ersons suspected of abuse or neglect or exploitation" may have access to the information, "provided that in such cases names of informants may be withheld, unless ordered by the court." KRS 209.140 is incorporated into the Act under KRS 61.878(1)(l), which exempts from inspection "[p]ublic records or information the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly."

Here, the Cabinet's written response denying the Appellant's request stated only that the Appellant was "not entitled to the records based on KRS 209.140." The Cabinet's limited response did not explain how KRS 209.140 applied to the records it withheld. Moreover, if two unsubstantiated claims of "abuse or neglect" were filed against the Appellant's business, KRS 209.140 would not prevent the Appellant from having access to the requested information. Rather, the statute states the opposite: "All information obtained by the [Cabinet] . . . as a result of an investigation made pursuant to [KRS Chapter 209], shall not be divulged to anyone *except* . . . [p]ersons suspected of abuse or neglect or exploitation." KRS 209.140(1) (emphasis added). And as stated previously, the Appellant's business involved childcare, not adult care, so it is not at all clear how KRS 209.140 would apply to the records the Appellant requested. Thus, the Cabinet violated the Act when it denied a request for records without adequately explaining how the exemption on which it relied applied to the records it withheld. KRS 61.880(1).

On appeal, the Cabinet claims it erroneously cited KRS 209.140(1) as its basis for denial, instead of KRS 620.050(5). While KRS 209.140 applies to investigations of suspected adult abuse, KRS 620.050(5) exempts from inspection similar information in connection with an investigation of child abuse. Nevertheless, like KRS 209.140(1), KRS 620.050(5)(a) also permits the person suspected of committing child abuse to inspect the report of abuse made against her. Moreover, KRS 620.050(5)(d) permits inspection of such reports by a "licensed child-caring facility or child-placing agency evaluating placement for or serving a child who is believed to be the victim of an abuse, neglect, or dependency report." Thus, if the Appellant's business was accused of committing child abuse, or if her business was "serving a child who is believed to be the victim" of such abuse, she would be entitled to inspect the report.

However, the Cabinet states, "Upon further review of the situation, the Cabinet has found that the letter [the Appellant] attached to the appeal mistakenly referenced" her business in a letter communicating to a third party that suspected child abuse occurred. Thus, it appears neither the Appellant nor her business are

actually suspected of committing child abuse. And it is not clear from this record whether her business was "serving a child who is believed to be the victim" of such abuse. If not, then the Cabinet is correct that the Appellant is not among the people or entities permitted to inspect such records under KRS 620.050(5)—notwithstanding the serious and now apparently erroneous allegations it levied against the Appellant and her business. Ultimately, this Office cannot decide factual disputes in this forum. *See, e.g.*, 22-ORD-159 n.2 (noting "the Office does not decide factual disputes or assess the credibility of witnesses"); 22-ORD-073 (the Office could not decide a factual dispute about whether all responsive records were provided); 22-ORD-070 (the Office could not decide a factual dispute about how a public agency categorizes documents). Therefore, the Office cannot determine whether the Appellant falls within one of the exceptions under KRS 620.050(5) that would permit her to inspect the requested records.

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
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s/ Matthew Ray
Matthew Ray
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Distributed to:

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