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24-ORD-010

January 17, 2024

In re: Dan Holman/City of Georgetown

Summary: Under 40 KAR 1:030 § 4, the Attorney General may not reconsider a decision rendered under the Open Records Act ("the Act"). The Office will not reconsider 23-ORD-301, in which it found that the City of Georgetown ("the City") properly withheld notes relating to the termination of an employee under KRS 61.878(1)(i). The City did not violate the Act when it withheld drug test results of a former employee under KRS 61.878(1)(a).

Open Records Decision

This appeal concerns two separate requests for public records. On November 27, 2023, Dan Holman ("Appellant") submitted a request to the City for "the document created by the Human Resources Director that reports about the circumstances of the firing" of "an executive level employee" on August 21, 2023.[1] The City denied the request by referencing its disposition of a previous request by the Appellant for the same document on October 5, 2023, which was the subject of the Attorney General's decision in 23-ORD-301.

Under 40 KAR 1:030 § 4, "[t]he Attorney General shall not reconsider a decision rendered under the Open Records Law." In 23-ORD-301, the Office affirmed the City's denial of the Appellant's request because the requested record is exempt under KRS 61.878(1)(i) as "notes." The Appellant now seeks to relitigate whether the record constitutes "notes" that are exempt under KRS 61.878(1)(i). Because the facts and issues presented here are identical to those in the previous decision, a new decision regarding the same record would amount to a reconsideration of 23-ORD-301. The Office declines to do so. *See, e.g.,* 20-ORD-148.

[1] The request also described five other categories of records the Appellant sought to inspect, but he is not appealing the City's disposition of those parts of his request.

For his second request, submitted on December 5, 2023, the Appellant sought a "full email chain, with attachments included, that was exchanged between" two individuals. In a timely response, the City provided the emails the individuals exchanged[2] but withheld "three pages containing drug test results [of a former employee] in accordance with KRS 61.878(1)(a), (k), and (l)." The City explained that the "personal nature of these types of records outweigh[s] the public's interest in disclosure" and "[t]he City is required to maintain confidentiality of certain records under 803 KAR 15:280, Section 4." The Appellant disagrees, claiming the results of the drug tests should be open for public inspection.

KRS 61.878(1)(a) exempts from disclosure "[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 requires a "comparative weighing of the competitive interests" between personal privacy and the public interest in disclosure. *Ky. Bd. of Exam'rs of Psychologists v. Courier-Journal & Louisville Times Co.,* 826 S.W.2d 324, 327 (Ky. 1992).

"At its most basic level, the purpose of disclosure focuses on the citizens' right to be informed as to what their government is doing." *Zink v. Commonwealth, Dep't of Workers' Claims,* 902 S.W.2d 825, 829 (Ky. App. 1994). Here, the public's right to monitor its government must be weighed against the asserted privacy interest of an individual in his toxicology report. In 09-ORD-156, the Office recognized that the results of a toxicology report implicate a privacy interest and that, in some cases, KRS 61.878(1)(a) may support withholding the results. However, in that decision, the Office held that the person's privacy interest in the report diminished once she was charged with a crime in connection with those results. Therefore, the Kentucky State Police did not carry its burden of showing that the public's right to be informed about the law enforcement function of government was outweighed by the individual's right of privacy in evidence used in a criminal case, notwithstanding that the criminal charges against the individual had been dismissed. Nevertheless, the Office also noted that, "if any bright line demarcates a heightened privacy interest [in a toxicology report], it is the line between being charged and not being charged" with a criminal offense.

Here, the Appellant has not claimed the former employee was criminally charged in connection with the drug test. In further support of the former employee's heightened privacy interest in the record, the City asserts it is a "drug-free workplace" under KRS 304.13-167(6) and the regulations promulgated by the Department of Workers' Claims, and it is bound by certain confidentiality rules as a result. Under 803 KAR 25:280 § 4, which the Department has promulgated under KRS 304.13-167(6), "[r]ecords of drug or alcohol test results, written or otherwise,

[2] The City redacted a private email address under KRS 61.878(1)(a). That redaction is not at issue in this appeal.

received by the employer shall be confidential communications and shall not be disclosed by the employer to any party" without a court order or a release signed by the employee. In light of the public policy expressed in this regulation, the Office concludes that the heightened privacy interest in the drug test results of a former employee in a drug-free workplace, who has not been criminally charged, outweighs the public interest in disclosure of the records. Accordingly, the City did not violate the Act when it withheld the test results.[3]

A party aggrieved by this decision may appeal it by initiating an 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.

Russell Coleman
Attorney General

/s/ James M. Herrick
James M. Herrick
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Distributed to:

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[3] Because KRS 61.878(1)(a) is dispositive of this issue on appeal, it is not necessary to address the City's alternative arguments under KRS 61.878(1)(k) and (l).