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24-ORD-032

February 12, 2024

In re: Jason Lyvers/Kentucky Education and Labor Cabinet

**Summary:** The Kentucky Education and Labor Cabinet (“Cabinet”) did not violate the Open Records Act (“the Act”) when it redacted records under KRS 337.345, KRS 61.878(1)(i), and KRS 61.878(1)(a). However, the Cabinet did not carry its burden of showing that KRS 61.878(1)(h) allowed it to withhold an entire investigation file.

***Open Records Decision***

Jason Lyvers (“Appellant”) submitted a request seeking “Policy and Procedures” and “Employee Records” related to a specific business. In response, the Cabinet identified two separate investigations into that business. The Cabinet provided the case file for one investigation but redacted information made confidential under KRS 337.345, preliminary investigative information under KRS 61.878(1)(i) and (j), and private information under KRS 61.878(1)(a). The Cabinet withheld the entire case file related to the second investigation under KRS 61.878(1)(h). This appeal followed.

Under KRS 337.345, “the department<sup>1</sup> shall not disclose the identity of any individual filing a complaint” and any “information secured from inspection of the records . . . or from inspection of the employer’s premises . . . shall be held confidential and shall not be disclosed or be open to any person.” KRS 337.345 is incorporated into the Act through KRS 61.878(1)(l), which exempts from inspection public records “the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly.” The Cabinet explains that the redacted information was “obtained from inspections of the employer’s records.” The Office has previously found that “the Cabinet is prohibited from releasing . . . information

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<sup>1</sup> As used in KRS 337.345, “Department” means the Department of Workplace Standards in the Education and Labor Cabinet.” KRS 337.010(1)(b).

secured from inspection of the [employer's] records.” 99-ORD-168. Accordingly, the Cabinet did not violate the Act when it redacted information made confidential under KRS 337.345.

KRS 61.878(1)(i) exempts from disclosure “[p]reliminary drafts, notes, [and] correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency.” Notes may be characterized as records “created as an aid to memory or as a basis for a fuller statement,” such as “shorthand notes taken at a meeting.” 05-ORD-179. Here, the Cabinet explained that the requested notes were a compliance officer’s “rough work notes” created when officers “record their thoughts, observations, and opinions.” As such, these records were created for the purpose of aiding the officer’s memory so that he or she may craft a fuller statement about the event. Accordingly, they are “preliminary notes” within the meaning of KRS 61.878(1)(i), and the Cabinet did not violate the Act when it withheld them from inspection.<sup>2</sup>

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.” In reviewing an agency’s denial of an open records request based on the personal privacy exemption, the courts and the Attorney General balance the public’s right to know what is happening in 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, Inc. v. City of Hopkinsville*, 415 S.W.3d 76, 89 (Ky. 2013). These categories include home addresses, personal phone numbers, driver’s license numbers, and Social Security numbers. *Id.* Here, the Cabinet has explained that it redacted a Social Security number from the responsive records. Accordingly, the Cabinet did not violate the Act when it redacted a Social Security number under KRS 61.878(1)(a).

Finally, the Cabinet claims that the entire case file related to the second investigation is exempt under KRS 61.878(1)(h) because that case “is still active” and it “is still receiving information from both the complainant and the employer against whom allegations have been made.” KRS 61.878(1)(h) exempts “[r]ecords of law enforcement agencies . . . compiled in the process of detecting and investigating

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<sup>2</sup> Because KRS 61.878(1)(i) is dispositive of the issues related to the requested notes on appeal, it is unnecessary to address the Cabinet’s alternative argument relating to KRS 61.878(1)(j).

statutory or regulatory violations if the disclosure of the information would harm the agency by revealing the identity of informants not otherwise known or by premature release of information to be used in a prospective law enforcement action.” When relying on KRS 61.878(1)(h), the Cabinet must establish that, “because of the record’s content, its release poses a concrete risk of harm to the agency in the prospective action. A concrete risk, by definition, must be something more than a hypothetical or speculative concern.” *City of Ft. Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 851 (Ky. 2013).

Here, the Cabinet explains that, because its investigation is ongoing, the “release of investigation records while the investigation remains open and active could have a chilling effect on potential witnesses” and any released investigation records would be “incomplete and subject to misinterpretation” and lead to “bias of either party at a future adjudication hearing.” These claims are speculative and do not demonstrate, based on the actual contents of the records, a “concrete risk of harm to the agency in the prospective action,” as that term was interpreted by the *City of Ft. Thomas* Court. Thus, the Cabinet has failed to carry its burden that KRS 61.878(1)(h) allows it to withhold the entire file of the second investigation.

A party aggrieved by this decision may appeal it by initiating an 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](mailto:OAGAppeals@ky.gov).

**Russell Coleman**  
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