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24-ORD-086

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In re: *Lexington Herald–Leader*/Lexington Police Department

Summary: The Lexington Police Department ("the Department") violated the Open Records Act ("the Act") when it failed to respond to a portion of a request for records. The Department also violated the Act when it denied a request for written autopsy records; 911 recordings not containing an allegation of child abuse; records relating to a crisis intervention, other than the form specifically made confidential under KRS 210.365(9); a final summary, personal injury report, and CAD report; and surveillance videos. The Department did not violate the Act when it withheld autopsy photographs or recordings, a collision report, a 911 recording and JC-3 form containing an allegation of child abuse, a Crisis Intervention Report form, photographs depicting the death of a person, or portions of photographs and videos that identify uncharged parties or witnesses. The Department may withhold body-worn camera footage in its entirety to the extent permitted under KRS 61.168(4), but otherwise must redact such footage in accordance with KRS 61.878(4) and KRS 61.878(1)(a).

Open Records Decision

On November 29, 2023, the *Lexington Herald–Leader* ("Appellant") requested the Department's "complete and full investigative file . . . into the accident which resulted in" the death of a named individual on February 19, 2023, along with "911 calls made pertaining to this incident, interview transcripts or recordings, collision reports and autopsy records." In a timely response, the Department denied the Appellant's request for the complete investigative file because it could not "ascertain the nature and scope of [the] request" and "innumerable employee hours [would] be spent searching for undefined records." The Department denied the request for the collision report because it had already provided the report to the Appellant in response to a prior request. It denied the 911 recording under KRS 65.752(4) and KRS 61.878(1)(a) because the Appellant was not a party listed on the collision report. Finally, the Department withheld a Crisis Intervention Report along with "interviews

or recordings, body worn camera footage, photographs, and other associated documentation" as confidential under KRS 210.365(17) and KRS 61.878(1)(a). The Department did not specifically address the Appellant's request for autopsy records. This appeal followed.

When a public agency receives a request to inspect records, that agency must decide within five business days "whether to comply with the request" and notify the requester "of its decision." KRS 61.880(1). A public agency cannot simply ignore portions of a request. *See, e.g.,* 21-ORD-090. If the requested records exist and an exception applies to deny inspection, the agency must cite the exception and explain how it applies. Conversely, if the records do not exist, then the agency must affirmatively state that such records do not exist. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov't,* 172 S.W.3d 333, 341 (Ky. 2005). Here, the Department failed to respond to the Appellant's request for autopsy records. Thus, the Department violated the Act.

On appeal, the Department does not affirmatively state whether it possesses the requested autopsy records. Instead, it merely claims it is not the official custodian of autopsy records and the Appellant should address its request to the Fayette County Coroner or the Office of the State Medical Examiner. Under the Act, however, "public records" include all records "which are prepared, owned, used, in the possession of or retained by a public agency." KRS 61.870(2). The Office has long noted that "there is no specific exception to the [Act] that authorizes a public agency to withhold public records from an applicant because access to the records may be obtained from another public agency, even if the requested records might more appropriately or more easily be obtained from that other public agency." OAG 91-21. Rather, "[t]he mere possession of [public] records by the agency from which those records are requested is enough to compel that agency to make them available for public inspection or explain why they are exempt." 09-ORD-107. Here, the Department does not deny that it possesses the requested autopsy records, but claims they are confidential under KRS 72.031. That statute, however, only applies to an "autopsy photograph, other visual image in whatever form, video recording, or audio recording." The Department has not asserted an exception to the Act that applies to written autopsy records. Accordingly, the Department violated the Act when it failed to provide its copies of the written autopsy records to the Appellant, or of it does not possess its own copies, when it failed to affirmatively state as much.

With regard to the Appellant's request for a collision report, the Department asserts it is not required to fulfill a second request for the same record unless the Appellant provides a justification for resubmitting its request. That argument, however, is grounded upon KRS 61.872(6), which requires the Department to prove by "clear and convincing evidence" that the Appellant intended to disrupt its essential functions by making repeated requests, or that the request is unreasonably

burdensome. *See* 23-ORD-180. The Department has not made such a showing here. Nevertheless, the Department properly withheld the collision report because news-gathering organizations are only entitled to copies of automobile accident reports by following the procedure set forth under 502 KAR 15:010. *See* KRS 189.635(8)(d) ("A request under [KRS 189.635(8)] *shall* be completed using a form promulgated by [KSP] through administrative regulations in accordance with KRS Chapter 13A" (emphasis added)); *see also* 23-ORD-087 (finding that KSP is the official custodian of records for automobile accident reports). Thus, the Department did not violate the Act when it denied the Appellant's request for the collision report.

Regarding the Appellant's request for 911 recordings, the Department no longer relies on KRS 65.752(4), but claims *all* 911 recordings are exempt from disclosure under KRS 61.878(1)(a) as "[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." The proper application of KRS 61.878(1)(a) "requires a 'comparative weighing of the antagonistic interests'—the privacy interest versus the policy of openness for the public good." *Cape Publ'ns v. City of Louisville,* 147 S.W.3d 731, 734 (Ky. App. 2003) (quoting *Ky. Bd. of Exam'rs of Psychologists v. Courier–Journal & Louisville Times Co.,* 826 S.W.2d 324, 327 (Ky. 1992)). "[T]he question of whether an invasion of privacy is 'clearly unwarranted' is intrinsically situational, and can only be determined within a specific context." *Ky. Bd. of Exam'rs,* 826 S.W.2d at 327. In *Bowling v. Brandenburg,* 37 S.W.3d 785 (Ky. App. 2000), the Court of Appeals upheld the use of KRS 61.878(1)(a) to deny a request for a 911 recording of a family member reporting alleged threats of domestic violence. However, the *Brandenburg* court did not create a blanket exemption and hold that all 911 recordings are always except under KRS 61.878(1)(a). *See, e.g.,* 18-ORD-062; 09-ORD-164; 06-ORD-230; 04-ORD-161. This is because the agency has the burden of showing a heightened privacy interest that outweighs the public interest in disclosure of a particular record. Such a heightened privacy interest does not exist for *all* 911 recordings. *See* 06-ORD-230.[1]

To meet its burden to withhold 911 calls under KRS 61.878(1)(a), a public agency's response must, at a minimum, describe the content of the call to put in context the situation to which the government responded and the privacy interests that may be at stake. Only by explaining the content of the call can the requester or this Office meaningfully engage in the appropriate balancing test. For example, the severity of the emergency reported may impact the height of the public interest at

[1] The Department provides a Fayette Circuit Court opinion from 2008, which it claims establishes a blanket exemption for 911 recordings under KRS 61.878(1)(a) and *Brandenburg*. But a circuit court opinion is not controlling precedent, nor is its reasoning persuasive on this issue. *See* 06-ORD-230 n.1. Furthermore, the Kentucky Court of Appeals has since reaffirmed that not all 911 calls are exempt from disclosure under KRS 61.878(1)(a). *See Marshall Cnty. v. Paxton Media Grp., LLC*, No. 2008-CA-1100-MR, 2009 WL 153206, at *3 (Ky. App., Jan. 23, 2009).

stake by putting into context the appropriateness of the government's response, such as its timeliness or the resources it committed to the effort. Further, with respect to the privacy interest at stake, some situations are clearly more private than others. A call reporting sexual assault or abuse, or domestic abuse, as was the issue in *Brandenburg*, would be inherently more private than a call to report a fire or a car accident.

Here, the Department states that seven responsive 911 recordings exist, one of which pertains to an allegation of child abuse. It claims that recording is confidential under KRS 620.050. But that statute concerns the confidentiality of records and information obtained by the Cabinet for Health and Family Services or a children's advocacy center, not the records of a police department in general.[2] *See* 23-ORD-265 n.3. Nevertheless, KRS 620.050(5) does expressly apply to "[t]he report of suspected child abuse," which may be made "to a local law enforcement agency." KRS 620.030(1). Accordingly, the Department did not violate the Act when it withheld the 911 recording relating to an allegation of child abuse. As to the other six 911 recordings, the Department must rely on KRS 61.878(1)(a). However, the Department has not described the content of those recordings. Consequently, there is no basis on which to weigh a personal privacy interest against the substantial public interest in monitoring the activities of government agencies. Because the Department has not articulated a heightened privacy interest as to the remaining six recordings, the Department violated the Act when it withheld them.

With regard to the Department's withholding of the Crisis Intervention Report, KRS 210.365(9) requires law enforcement officers to report on a specialized form their "encounters with persons with mental illness, substance use disorders, intellectual disabilities, developmental disabilities, and dual diagnoses." KRS 210.365(17) provides that "[r]ecords generated under this section shall be treated in the same manner and with the same degree of confidentiality as other medical records of the prisoner." Under the Act, public access to medical records is analyzed under KRS 61.878(1)(a), and such records have consistently been recognized as containing information the disclosure of which would constitute an unwarranted invasion of personal privacy. *See, e.g.,* 23-ORD-281 n.2; 18-ORD-186; 06-ORD-209. Accordingly, the Department did not violate the Act when it withheld the Crisis Intervention Report as a medical record under KRS 210.365(17).

However, the Department attempts to sweep various other records under KRS 210.365(17). Specifically, the Department claims "interviews or recordings, body worn camera footage, photographs, and [unspecified] other associated

[2] A law enforcement agency may rely on KRS 620.050 to withhold records only when it shows "it was acting as the Cabinet's delegated representative[,] conducting an investigation under Chapter 620[, and] the information requested was obtained in the course of its investigation." 98-ORD-68. The Department has not attempted to make such a showing here.

documentation" relating to the same incident are "[r]ecords generated under" KRS 210.365 and must be treated as if they were medical records exempt from disclosure under KRS 61.878(1)(a). However, the text of KRS 210.365 does not support such a broad reading. Rather, the only record to which KRS 210.365(17) applies under these facts is the Crisis Intervention Report itself. Under KRS 61.871, "the exceptions [to the Act] provided for by KRS 61.878 or otherwise provided by law shall be strictly construed." Therefore, the Department violated the Act when it withheld "interviews or recordings, body worn camera footage, photographs, and other associated documentation" in reliance on KRS 210.365(17).[3]

Finally, on appeal, the Department retreats from its claim that the Appellant's request for its "complete and full investigative file" is not sufficiently precise to enable it to ascertain the scope of the request. Rather, the Department has "attempted to compile the investigative file" for the case, which it describes as "far more convoluted than the typical traffic accident case involving a pedestrian" because it is related in some way to "six other cases, including a crisis intervention and a child abuse case." The Department has offered to provide the Appellant "photographs of the scene of the traffic accident, not including photographs of the deceased individual," "video footage from a private business which do not include the consumer of crisis intervention services," and "body worn camera footage from Kentucky State Police, with redaction of personally-identifiable information of an uncharged party." However, the Department argues certain categories of records and information are exempt from disclosure.

First, the Department claims "the final summary, the personal injury report (NIBRS) and the CAD report" cannot be redacted "without risking inadvertently confirming the alleged child abuse victim or the consumer of crisis intervention," which it claims "are protected from disclosure by state law." As stated above, KRS 210.365(17) does not apply to records outside the Crisis Intervention Report itself. Further, KRS 610.050(5) does not apply to the Department's records other than a report of child abuse. Here, the report of child abuse consists of the 911 call containing the report and the JC-3 form used to report the suspected abuse.

The Department correctly notes that records related to child abuse investigations must be analyzed under KRS 61.878(1)(a). Juvenile victims of crime have a "heightened privacy interest[,] particularly in the context of records pertaining to . . . intensely personal crimes." *Ky. New Era, Inc. v. City of Hopkinsville,* 415 S.W.3d 76, 85 (Ky. 2013). Child abuse is a crime that gives rise to a substantial privacy interest on the part of the alleged victim. *See* 96-ORD-115. However, a public agency has a duty to separate exempt from nonexempt material under KRS 61.878(4). Further, the burden rests with the public agency to prove that such redaction is

[3] The disclosure of body-worn camera recordings is governed by KRS 61.168. However, the Department has not indicated how KRS 61.168 applies in this instance.

impossible in a particular case. *See* KRS 61.880(2)(c) (a public agency carries the burden of proof "in sustaining the action"). Here, the Department has not explained why redacting personal identifying information of the alleged juvenile victim would not be possible in the case of the summary, personal injury report, and CAD report. Accordingly, the Department violated the Act by withholding these records in their entirety. *See* 23-ORD-265.

As to photographs of the deceased victim, the Department correctly notes that KRS 61.878(1)(q) exempts from disclosure "photographs . . . that depict the death . . . of a person" except for certain exceptions under which the Appellant does not qualify. Additionally, the Department correctly asserts that photographs of the scene may be redacted under KRS 61.878(1)(a) insofar as they would disclose the identities of "uncharged parties or witnesses." *See Ky. New Era*, 415 S.W.3d at 85. However, the Department is not correct that surveillance videos that "concern the crisis intervention investigation" are automatically "exempt pursuant to KRS 201.365." Therefore, the Department has not met its burden of proof that the surveillance videos may be withheld in their entirety. Accordingly, they must be provided with any redactions that may be necessary under KRS 61.878(1)(a).

The Department also states there is body-worn camera footage pertaining to the investigation from both the Kentucky State Police ("KSP") and the Department itself. As to KSP's footage, the Department states it can provide the video to the Appellant "with redaction of personally identifying information of uncharged parties and witnesses." As to its own video, however, the Department claims it cannot be redacted without "risk[ing] inadvertently confirming the child abuse victim or the consumer of crisis intervention training." However, the Department is not conducting the proper analysis of body-worn camera footage.

Under KRS 61.168(4), with some exceptions, "a public agency may elect not to disclose body-worn camera recordings containing" certain types of footage without the duty to redact under KRS 61.878(4). Among these are footage "of a minor child" under KRS 61.168(4)(f), footage that "[w]ould reveal the identity of witnesses [or] could jeopardize the safety, security, or well-being of a witness" under KRS 61.168(4)(h), and footage that "[i]ncludes a public safety officer carrying out duties directly related to the hospitalization of persons considered mentally ill" under KRS 61.168(4)(l). To the extent that body-worn camera footage is exempt under the provisions of KRS 61.168(4), the Department did not violate the Act by withholding such footage in its entirety. However, to the extent that the footage is not exempt under KRS 61.168(4), it must be provided with the redactions that are proper under KRS 61.878(1)(a) and *Kentucky New Era,* as the Department has not met its burden of proving that such redaction is impossible.

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.

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