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24-ORD-115

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In re: WDRB News/Transportation Cabinet

Summary: The Transportation Cabinet ("the Cabinet") violated the Open Records Act ("the Act") when it failed to meet its burden to support redacting information from records relating to the performance of a contract under KRS 61.878(1)(c)1. Such information is only exempt when it is confidentially disclosed to an agency or required to be disclosed to it and generally recognized as confidential or proprietary, and its disclosure would permit an unfair commercial advantage to competitors.

Open Records Decision

On December 22, 2023, WDRB News ("Appellant") requested copies of three categories of records from the Cabinet related to the Ohio River bridges in Louisville. First, the Appellant requested "[a]ll meeting agendas, minutes and notes involving ETC [Electronic Transaction Consultants, LLC] between August 1, 2023 and December 21, 2023 as specified in the Project Management Plan (PMP), Appendix A." Second, the Appellant requested "[a]ll monthly reports for 2023 submitted through December 21, 2023 regarding customer surveys submitted to the Joint Board under Technical Proposal No. CSC-089." Finally, the Appellant requested "[a]ll monthly operations reports submitted under Technical Proposal CSC-151." In response, the Cabinet provided heavily redacted documents. To support its redactions, the Cabinet relied on KRS 61.878(1)(c)1., stating, "The records contained proprietary information of the RiverLink administration contractor, [ETC], which information was redacted." This appeal followed.

Under KRS 61.880(1), "[a]n agency response denying, in whole or in part, inspection of any record shall 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." The agency's explanation must "provide particular and detailed information," not merely a "limited and perfunctory response." *Edmondson v. Alig*, 926 S.W.2d 856, 858 (Ky. 1996). "The agency's explanation must be detailed enough

to permit [a reviewing] court to assess its claim and the opposing party to challenge it." *Kentucky New Era, Inc. v. City of Hopkinsville,* 415 S.W.3d 76, 81 (Ky. 2013). Because the Cabinet merely stated the redacted information was "proprietary," without further explanation, it violated the Act. *See, e.g.,* 22-ORD-260.

On appeal, the Cabinet maintains its reliance on KRS 61.878(1)(c)1. to support its redactions. That statute exempts from disclosure "[r]ecords confidentially disclosed to an agency or required by an agency to be disclosed to it, generally recognized as confidential or proprietary, which if openly disclosed would permit an unfair commercial advantage to competitors of the entity that disclosed the records." The burden of proof rests with the public agency to sustain its denial of a request to inspect public records. KRS 61.880(2)(c). When a public agency invokes KRS 61.878(1)(c)1. on behalf of a private entity, the Office will permit "argument and input from the non-party to the appeal" to assist the public agency in meeting its burden. *See, e.g.,* 09-ORD-010.

Here, after consulting ETC, the Cabinet states the redacted information consists of three categories. The first category contains "[e]mployment decisions like number of employees, employee retention rates, and allocation of employees used to meet performance metrics," which the Cabinet claims "are often trade secrets because the contractor derives economic value from these proprietary practices and business decisions' not being known to competitors." The second category contains "[p]ast-performance statistics (e.g., whether service level agreements/key performance indicators are met, specific statistics like percentages)," because such statistics may be "used by competitors in procurements and bid protests to attack the contractor's reputation and obtain a commercial advantage." The third category contains "[s]olutions to system issues and other problems," which the Cabinet claims "are frequently trade secrets because the contractor derives economic value from these proprietary processes and remedies' not being known to competitors."

To sustain its redactions under KRS 61.878(1)(c)1., the Cabinet must first prove all the redacted information was "confidentially disclosed to [it] or required by [the Cabinet] to be disclosed to it." Typically an agency proves this element by showing a written agreement between the agency and the business to maintain confidentiality, or otherwise demonstrates "the efforts made by the parties . . . to ensure the confidentiality of shared information." 20-ORD-019; 17-ORD-002. Here, although ETC clearly disclosed the redacted information to the Cabinet, the Cabinet has not provided a written confidentiality agreement or otherwise shown it required the ETC to provide it with the required information. Rather, it merely states ETC and the Cabinet "agreed"—*after* the Cabinet received the Appellant's request—that the redacted information had been confidentially disclosed to the Cabinet. This, without more, is insufficient to show that the information was "confidentially disclosed to [the Cabinet] or required by [the Cabinet] to be disclosed to it" under

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KRS 61.878(1)(c)1. *See, e.g.,* 22-ORD-260; *see also* 09-ORD-050 (noting a "bare statement that [a private entity has] asked the [agency] to treat . . . records as confidential" is insufficient to sustain a denial under KRS 61.878(1)(c)1).

Even if the Cabinet had demonstrated the redacted information was confidentially disclosed to it, or required to be disclosed to it, the Cabinet must also establish that the redacted information is "generally recognized as confidential or proprietary." KRS 61.878(1)(c)1. In *Hoy v. Kentucky Industrial Revitalization Authority,* 907 S.W.2d 766, 768 (Ky. 1995), the Supreme Court of Kentucky considered the applicability of KRS 61.878(1)(c)2.[1] to required disclosures of "a financial history of [a] corporation, projected cost of the project, the specific amount and timing of capital investment, copies of financial statements and a detailed description of the company's productivity, efficiency and financial stability." The Court concluded that "[i]t does not take a degree in finance to recognize that such information concerning the inner workings of a corporation is 'generally recognized as confidential or proprietary.'" *Id.* Therefore, the Court found that those categories of information satisfied the second element of the exception.

In past decisions, the Office has generally recognized as confidential or proprietary "private financial affairs," *see, e.g.,* 01-ORD-143; "trade secrets, investment strategies, economic status, or business structures," *see, e.g.,* 17-ORD-198; 16-ORD-273; 07-ORD-166; "the method for determining [a] contract price" and "business risks assumed," *see, e.g.,* 17-ORD-002; "costing and pricing strategy," *see, e.g.,* 92-ORD-1134; OAG 89-44; and "corporate assets of a non-financial nature that have required the expenditure of time and money to develop and *concern the inner workings of the private entity,"* 10-ORD-001 (emphasis added). The common factor among these categories of information is "the insight they provide into the *internal* operations of the entity making the disclosure to the public agency." 20-ORD-019 (emphasis added).

Here, the Cabinet has redacted information relating to ETC's staffing levels and staff allocation for the RiverLink contract, statistics regarding ETC's performance of the contract, and information about specific problems with ETC's performance of the contract[2] and actions ETC took to correct those problems. These types of information are not like those the Office has previously found are confidential or proprietary under KRS 61.878(1)(c)1., as they do not tend to disclose the inner workings or financial status of a private entity. They merely document ETC's

[1] Although KRS 61.878(1)(c)2. pertains to information that is required to be disclosed to an agency in conjunction with a loan, grant, tax incentive, or for other regulatory reasons, it also states the information must be "generally recognized as confidential or proprietary" for the exemption to apply.

[2] Although the Cabinet focuses on ETC's "solutions" to its contract administration problems as allegedly being trade secrets, the Cabinet has redacted not merely "solutions," but the descriptions of the problems themselves.

performance of its duties under a public contract. Further, the Appellant has provided a Monthly Operations and Maintenance Report dated June 2022 from ETC's predecessor in the RiverLink bridge contract, Kapsch TrafficCom AG ("Kapsch"). In that report, Kapsch provided, without redaction, the same staffing information for the project, performance statistics, and problem reports the Cabinet and ETC have redacted here. The fact a competitor has previously disclosed this information is evidence that it is not "generally recognized as confidential or proprietary" by those engaged in this type of business. Moreover, the Cabinet has not pointed to any solutions to problems by ETC that reveal "trade secrets," nor are any obvious trade secrets evident upon an examination of the unredacted records.[3]

Further, the Appellant argues, there are various inconsistencies in the Cabinet's position. For example, in ETC's monthly operations report for November 2023, the Cabinet entirely redacted call volumes to customer service representatives. But that statistic does not show whether ETC met performance levels, nor does it fit any of the other categories of information the Cabinet claims to be proprietary. The Appellant additionally notes the Cabinet redacted the frequency with which a key performance indicator was not met in October 2023, but did not redact the same figure for November 2023. Finally, the Appellant shows the Cabinet redacted performance statistics that RiverLink's public relations firm had separately provided to the Appellant in a written response to questions. Therefore, the Cabinet has not met its burden of showing the redacted information is "generally recognized as confidential or proprietary."

Finally, to support its denial under KRS 61.878(1)(c)1., the Cabinet must show that the redacted information, if disclosed, "would permit an unfair commercial advantage to competitors of the entity that disclosed" it. Although the Cabinet claims the disclosure of information regarding ETC's staffing allocation, performance statistics, and performance problems in administering the RiverLink contract could allow ETC's competitors to obtain a "commercial advantage," it has not shown how any such advantage would be unfair. The public is entitled to know the details of how efficiently, or inefficiently, ETC has administered a public contract. If such information reveals ETC has not adequately performed the tasks it agreed to perform, it would not be "unfair" for ETC's competitors to learn that information and use it to their advantage in competing for similar contracts. Accordingly, the Cabinet has failed to meet its burden of proof that the redacted information is exempt from disclosure. Thus, the Cabinet violated the Act when it redacted information from the requested records under KRS 61.878(1)(c)1.

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[3] The Cabinet has made the unredacted records available to the Office for review under KRS 61.880(2)(c). Because the Office requested further substantiation from the Cabinet under KRS 61.880(2)(c), the unredacted records will not be disclosed by the Office pursuant to that subsection.

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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/s/ James M. Herrick
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