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25-ORD-106

April 24, 2025

In re: *Cincinnati Enquirer*/City of Covington

Summary: The City of Covington (“the City”) did not violate the Open Records Act (“the Act”) when it denied inspection of employee performance evaluations under KRS 61.878(1)(a).

Open Records Decision

On December 12, 2024, the *Cincinnati Enquirer* (“the Appellant”) requested to inspect the personnel file of a former City firefighter. In a timely response, the City made available a redacted copy of the personnel file. Among the documents not made available were 12 pages of performance evaluations, which the City withheld under KRS 61.878(1)(a), explaining that “[p]erformance evaluations constitute information of a personal nature, where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.” The City further stated that “performance evaluations can contain a great deal of personal information and should not be subject to disclosure without the most pressing of public needs.” Finally, the City asserted that “[t]hese evaluations are from 2013 and 2018, and a comparative balancing of the interests here does not reveal a pressing public interest that would outweigh the former employee’s privacy interest.” This appeal followed.

KRS 61.878(1)(a) exempts from disclosure under the Act “[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 antagonistic interests” between 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). Kentucky courts have recognized that “the performance of an ordinary employee or even one of comparatively high rank is not of such significant public interest that it should be subject to disclosure.” *Cape Publ’ns v. City of Louisville*, 191 S.W.3d 10, 13 (Ky. App. 2006). Moreover, public employees maintain a significant privacy interest in their performance evaluations.

The confidentiality of performance evaluations allows evaluators to speak more frankly about an employee than they might if the evaluations were known to be open to public disclosure. In addition, performance evaluations certainly can contain a great deal of personal information, and should not be subject to disclosure without the most pressing of public needs.

Id. One example of such a “pressing public need” is when the public employee is charged with “committing a criminal act made possible by his position at a public agency[.]” *Id.* at 14. In *Cape Publications*, the public employee was charged with such an offense, which also led to the administrative suspension, and eventual resignation, of his supervisor. *Id.* Therefore, the Court found that the employee had “to some extent forfeited his privacy interest” by engaging in criminal activity, and that both his evaluation and that of his supervisor were subject to partial disclosure. *Id.*

Here, the Appellant claims disclosure of the firefighter’s evaluations would not constitute an unreasonable invasion of personal privacy because he “was accused of wrongdoing while in the course of his duties as a firefighter, and because his performance evaluations will shed light on the operation of a public entity.” In response, the City acknowledges the firefighter was accused of “misconduct in 2024 and late 2023” and “was charged with multiple violations of city policy and fire department policy in 2024.”¹ Unlike the situation in *Cape Publications*, the firefighter here was not charged with criminal conduct.² Rather, the record indicates he was accused of “unprofessional behavior” and being “verbally abusive” to a coworker.

The Act requires a “case-by-case analysis” of privacy claims under KRS 61.878(1)(a). *Cape Publ’ns*, 191 S.W.3d at 14. In *Cape Publications*, the Court of Appeals found a city employee forfeited some degree of his privacy interest by committing a crime. The court also recognized a “public interest in knowing what a city evaluator thought of the job performance of a supervisor of a person who used his position to commit a crime.” *Id.* Here, however, there is no insinuation of criminal conduct, nor any alleged misconduct by a supervisor or an agency head, but merely violations of city policy and fire department policy by a low-level employee. Furthermore, the evaluations at issue pertain to the firefighter’s performance from 2013 and 2018, many years before he allegedly committed the policy violations. Therefore, as to these specific evaluations, there is no basis to infer the employee

¹ Those charges resulted in a disciplinary hearing, during which the firefighter chose to resign.

² Further, even in a criminal context, a person who is investigated, but not charged with a crime, maintains a privacy interest under KRS 61.878(1)(a). See *Lexington H-L Services, Inc. v. Lexington–Fayette Urb. Cnty. Gov’t*, 297 S.W.3d 579, 584 n.6 (Ky. App. 2009); see also 12-ORD-227. Thus, “uncharged suspects” have a privacy interest that criminal defendants do not. *Ky. New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76, 88 (Ky. 2013).

forfeited any portion of his privacy interest, nor is there any “pressing” public interest that would overcome the normal “confidentiality of performance evaluations” under KRS 61.878(1)(a). *Cape Publ’ns*, 191 S.W.3d at 13; *see, e.g.*, 21-ORD-072; 16-ORD-185; 07-ORD-125 (finding performance evaluations exempt from inspection). Accordingly, the City did not violate the Act when it denied inspection of the firefighter’s evaluations.

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
James M. Herrick
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