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CHRIS GORMAN
ATTORNEY GENERAL

THE CAPITOL
FRANKFORT 40601
(502) 564-7600

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In re: Keith Page/Kentucky Transportation Cabinet

OPEN RECORDS DECISION

This appeal originated in the submission of a request for public records by Keith Page, a private investigator from Urbandale, Iowa, to the Kentucky Transportation Cabinet. Mr. Page was retained by Mark Calvert, of Des Moines, Iowa, to locate the owner of a vehicle registered in Kentucky, which was being driven by another individual when it struck Mr. Calvert's vehicle. The driver, Mr. Page advises, "has basically admitted liability," but refuses to make a reasonable settlement offer. Accordingly, Mr. Calvert wishes to contact the registered owner "to effect insurance claims."

On June 16, 1995, Mr. Page, acting on Mr. Calvert's behalf, submitted a request to the Transportation Cabinet for copies of motor vehicle registration records and records reflecting insurance coverage. On the same date, Jon D. Clark, Commissioner for the Department of Administrative Services, responded to Mr. Page's letter, advising him that the information he requested was being released to him. However, Commissioner Clark noted, the owner's address, birthdate, and social security number would be masked pursuant to KRS 61.878(1)(a), which excludes from the application of the Open Records Act, "Public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." In addition, Commissioner Clark advised Mr. Page that records relating to insurance coverage should be directed to the McCracken County Clerk's Office. This appeal followed.

We are asked to determine if the Kentucky Transportation Cabinet violated provisions of the Open Records Act by partially denying Mr. Page's request. For the reasons set forth below, we conclude that the Cabinet properly withheld the social security number and birthdate of the vehicle's owner, as well as her home address. Disclosure of these items of information, under the facts presented, would constitute a clearly unwarranted invasion of personal privacy.

In an early open records decision, the Kentucky Court of Appeals developed a standard by which to judge the propriety of an agency's invocation of the personal privacy exemption codified at KRS 61.878(1)(a). Board of Education of Fayette County v. Lexington-Fayette Urban County Human Rights Commission, Ky.App., 625 S.W.2d 109 (1981). At page 111 of that decision, the court observed:

> [W]e should point out that we do not subscribe to the tilting toward disclosure doctrine [adopted by the federal courts] but rather apply the test of balancing the interests of the parties as well as those of the public measured by the standard of a reasonable man.

The court thus recognized that "we must treat these actions on a case by case basis." Board of Education at 111.

The Kentucky Supreme Court revisited this issue in 1992, refining the standard set forth in Board of Education and departing, at least in part, from that decision by establishing that the Open Records Act does, in fact, "exhibit[ ] a general bias favoring disclosure." Kentucky Board of Examiners of Psychologists v. Courier-Journal and Louisville Times Co., Ky., 826 S.W.2d 324, 327 (1992). The court began its analysis with the proposition that "[t]he public's 'right to know' under the Open Records Act is premised upon the public's right to expect its agencies properly to execute their statutory function." Continuing, the court observed:

> In general, inspection of records may reveal whether the public servants are indeed serving the public, and the policy of disclosure provides impetus for an agency steadfastly to pursue the public good.

Id. The court also recognized that the existence of the privacy exemption "reflects a public interest in privacy, acknowledging that personal privacy is of legitimate concern and worthy of protection from invasion by unwarranted public scrutiny." Board of Examiners at 327.

Drawing on these fundamental principles, the court articulated the following standard for determining if a record may properly be excluded from public inspection pursuant to KRS 61.878(1)(a):

> [G]iven the privacy interest on the one hand and, on the other, the general rule of inspection and its underlying policy of openness for the public good, there is but one available mode of decision, and that is by comparative weighing of the antagonistic interests. Necessarily, the circumstances of a particular case will affect the balance. The statute

> contemplates a case-specific approach by providing for de novo judicial review of agency actions, and by requiring that the agency sustain its action by proof. Moreover, the question of whether an invasion of privacy is 'clearly unwarranted' is intrinsically situational, and can only be determined within a specific context.

Board of Examiners at 327-328.

In closing, the court admonished that "the policy of disclosure is purposed to subserve the public interest, not to satisfy the public's curiosity . . . ."

In Zink v. Commonwealth of Kentucky, Ky.App., 902 S.W.2d 825 (1994), the Court of Appeals was again presented with a challenge to an agency's invocation of the personal privacy exemption. Echoing the rule announced in Board of Examiners, the court elaborated on its "mode of decision":

> [O]ur analysis begins with a determination of whether the subject information is of a "personal nature." If we find that it is, we must then determine whether public disclosure "would constitute a clearly unwarranted invasion of personal privacy." This latter determination entails a "comparative weighing of antagonistic interests" in which the privacy interest in nondisclosure is balanced against the general rule of inspection and its underlying policy of openness for the public good. [Board of Examiners] at 327. As the Supreme Court noted, the circumstances of a given case will affect the balance. Id. at 328.

Zink at 828. Applying this standard, the court concluded that the Commonwealth of Kentucky, Department of Workers Claims, properly denied an attorney, who admitted that he intended to use the records for direct mail solicitation, access to injury report forms filed with the Department, which contained marital status, number of dependents, wage rate, social security number, home address, and telephone number pursuant to KRS 61.878(1)(a). It is instructive to examine this decision at some length.

The Court of Appeals first recognized that the information which appears on the injury report forms is "generally accepted by society as details in which an individual has at least some expectation of privacy." Zink at 828. Rejecting the requester's argument that the same information is contained in other public documents which are available for public inspection, such as police accident reports, the court, citing OAG 76-511, reasoned that "when an individual enters on the public way, breaks a law, or inflicts a tort on his fellow man he forfeits his privacy to a certain extent." Id. Similarly, the court rejected the argument that information

such as telephone numbers and home addresses are frequently available through telephone directories and voter registration lists, noting that "[w]e deal . . . not in total nondisclosure, but with an individual's interest in selective disclosure." Id.

Turning to the issue of whether an invasion of privacy is warranted by weighing the public interest in disclosure against the privacy interests involved, the court first established that its analysis "does not turn on the purposes for which the request for information is made or the identity of the person making the request." Zink at 828. The court amplified on this position:

> We think the Legislature clearly intended to grant any member of the public as much right to access to information as the next. [Footnote omitted.] While binding precedent has yet to clearly speak to the point, we believe that the only relevant public interest in disclosure to be considered is the extent to which disclosure would serve the principle purpose of the Open Records Act. This is the approach the United States Supreme Court has taken in a similar analysis of requests under the Freedom of Information Act (FOIA). *See Dept. Of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 774-75. 109 S.Ct. 1468, 1482-83, 103 L.Ed.2d 774, 796-97 (1989). As stated in Board of Examiners, supra, "[t]he public's 'right to know' under the Open Records Act is premised upon the public's right to expect its agencies properly to execute their statutory functions. In general, inspection of records may reveal whether the public servants are indeed serving the public, and the policy of disclosure provides impetus for an agency steadfastly to pursue the public good." 826 S.W.2d at 328. At its most basic level, the purpose of disclosure focuses on the citizens' right to be informed as to what their government is doing. That purpose is not fostered however by disclosure of information about private citizens that is accumulated in various government files that reveals little or nothing about an agency's own conduct. The relevant public interest supporting disclosure in this instance is nominal at best. Disclosure of the information appellant seeks would do little to further the citizens' right to know what their government is doing and would not in any real way subject agency action to public scrutiny. While there may be some merit to appellant's assertion that the broad public interest would be served by the dissemination of information to injured workers regarding their legal rights under the workers' compensation statutes, this cannot be said to further the principal purpose of the Open Records Act.

Zink at 828, 829. In a footnote, the court acknowledged that KRS 61.874 requires an

individual requesting records for a commercial purpose to state that purpose, and authorizes a different fee for reproduction in these instances, and that KRS 61.872(6) permits an agency to deny inspection of records upon clear and convincing evidence that repeated requests are intended to disrupt essential functions of the agency. Zink at 828, n.l. These provisions did not alter its conclusion that the only relevant public interest is the extent to which disclosure would serve the principal purpose of the Open Records Act "to further the citizens' right to know what their government is doing and . . . subject agency action to public scrutiny." Zink at 829.

Against what it denominated a de minimis public interest, the court weighed the privacy interests of the injured workers who were the subjects of the records in the personal information in those records. With respect to home addresses and telephone numbers, the court was guided by the Sixth Circuit Court of Appeals decision in Heights Community Congress v. Veterans Administration, 732 F.2d 526 (6th Cir. 1984), cert. den., 469 U.S. 1034, 105 S.Ct. 506, 83 L.Ed. 2d 398 (1984). Citing that decision, the court recognized:

> "There are few things which pertain to an individual in which his privacy has traditionally been more respected than his own home." [Citation omitted.] The importance of the right to privacy in one's address is evidenced by the acceptance within society of unlisted telephone numbers, by which subscribers may avoid publication of an address in the public directory, and postal boxes, which permit the receipt of mail without disclosing the location of one's residence. These current manifestations of the ancient maxim that 'a man's home is his castle' [citation omitted] support the . . . important privacy interest in the addresses sought.

Heights Community Congress at 529, cited in Zink at 829. Reiterating that "[o]ne of our most time honored rights is the right to be left alone . . . ," Zink at 829, and that a home address and telephone number are items of information that an individual "may fervently wish to remain confidential or only selectively released," id., the court expressed its reluctance "to denigrate the sanctity of the home, that place in which an individual's privacy has long been steadfastly recognized by our laws and customs." Id.

The Court adopted a similar approach to social security numbers, which it characterized as "[t]hose nine digits [which] represent no less than the keys to an information kingdom as it relates to any given individual." Noting that social security numbers are "commonly treated circumspectly," id., the court concluded that their release would be "no less intrusive" than the release of home addresses and telephone numbers. As we have noted, the court ultimately held that because

the privacy interests of the individuals who were the subjects of the requested records "substantially outweights the negligible Open Records Act related public interest in disclosure," id., disclosure would constitute a clearly unwarranted invasion of personal privacy. Applying the same test to the facts before us, we reach the same conclusion.

Mr. Page is an investigator retained by Mark Calvert to locate the owner of a vehicle which collided with Mr. Calvert's vehicle. Because he will receive a fee or commission for his services, the use to which Mr. Page intends to put the information contained in the requested records must be considered a commercial one. KRS 61.870(4)(a). Had Mr. Calvert requested access to the same records, our conclusion would not be altered. In both instances, we can discern very little, if any, public interest which would be served by disclosure. As in Zink, release of the information sought would not further the citizens' right to monitor public agency action. And, as in Zink, while there may be some merit to Mr. Page's assertion that the public interest would be served "by insuring that a Kentucky resident cannot 'thumb their [sic] nose' at the system," this is not the public interest which the law was enacted to insure. "The relevant public interest supporting disclosure [both here and in Zink] is nominal at best." Zink at 829.

The competing privacy interests are, as the Zink court observed, weighty indeed. Not just in Kentucky, but throughout the United States, courts have long recognized a basic privacy interest in one's own house, characterizing that interest as "modest, but not compelling," American Federation of Government Employees, Local 1760 v. Federal Labor Relations Authority, 786 F.2d 554, 556-57 (2d Cir. 1986); "cognizable," Heights Community Congress at 529; "a meaningful interest . . . which merits some protection," United States Department of the Navy v. FLRA, 840 F.2d 1131 (3rd Cir. 1988); "significant," Aronson v. I.R.S., 767 F.Supp.378 (D. Mass. 1991), reversed on other grounds Aronson v. I.R.S., 973 F.2d 962 (1st Cir. 1992); and "a strong . . . interest," Wine Hobby USA, Inc. v. United States IRS, 502 F.2d 133, 136-137 (3rd Cir. 1974). Thus, although the courts have demonstrated differing degrees of sensitivity to the disclosure of home addresses, they are uniform in recognizing that there is a privacy interest at stake. As noted, Kentucky's Court of Appeals has determined that a home address is information which an individual "may fervently wish to remain confidential or only selectively released." Zink at 829.

Similarly, the courts have consistently recognized that individuals have a strong privacy interest in social security numbers. In a non-freedom of information case, the Fourth Circuit analyzed in considerable depth the evolution of the use, and the growing concern about the misuse, of social securtiy numbers. Greidinger v. Davis, 988 F.2d 1344 (4th Cir. 1993). We borrow liberally from the Fourth Circuit's analysis:

> Originated in 1936, a SSN is a nine-digit account number assigned by the Secretary of Health and Human Services for the purpose of administering the Social Security laws. See 42 U.S.C. § 405(c)(2)(B). SSNs were first intended for use exclusively by the federal government as a means of tracking earnings to determine the amount of Social Security taxes to credit to each worker's account. Over time, however, SSNs were permitted to be used for purposes unrelated to the *administration of the Social Security system. For example in 1961, Congress authorized the Internal Revenue Service to use SSNs as taxpayer identification numbers. Pub.L. No. 87-397, 75 Stat. 828* (codified as amended at 26 U.S.C. §§ 6113, 6676).

In response to growing concerns over the accumulation of massive amounts of personal information, Congress passed the Privacy Act of 1974. This Act makes it unlawful for a governmental agency to deny a right, benefit, or privilege merely because the individual refuses to disclose his SSN. In addition, Section 7 of the Privacy Act further provides that any agency requesting an individual to disclose his SSN must "inform that individual whether that disclosure is mandatory or voluntary, by what statutory authority such number is solicited, and what uses will be made of it." At the time of its enactment, Congress recognized the dangers of widespread use of SSNs as universal identifiers. In its report supporting the adoption of this provision, the Senate Committee stated that the widespread use of SSNs as universal identifiers in the public and private sectors is "one of the most serious manifestations of privacy concerns in the Nation." S.Rep. No. 1183, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 6916, 6943. In subsequent decisions, the Supreme Court took notice of the serious threats to privacy interests by the mass accumulation of information in computer data banks. For example, in *Whalen v. Roe*, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977), in rejecting a privacy challenge to a New York statute that: (1) required doctors to disclose to the state information about prescriptions for certain drugs with a high potential for abuse and (2) provided for the storage of that information in a centralized computerized file, the Court observed:

> We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files. The collection of taxes, the distribution of welfare and social security benefits, the supervision of

> public health, the direction of our Armed Forces, and the enforcement of all criminal laws all require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed. The right to collect and use such data is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures.

Id. at 605, 97 S.Ct. at 879 (footnote ommitted).

> Since the passage of the Privacy Act, an individual's concern over his SSN's confidentiality and misuse has become significantly more compelling. For example, armed with one's SSN, an unscrupulous individual could obtain a person's welfare benefits or Social Security benefits, order new checks at a new address on that person's checking account, obtain credit cards, or even obtain the person's paycheck. Elizabeth Neuffer, *Victims Urge Crackdown on Identity Theft*, BOSTON GLOBE, July 9, 1991, at 13, 20 (In Massachusetts, "[a]uthorities say that, with another person's Social Security number, a thief can obtain that person's welfare benefits, Social Security benefits, credit cards or even the victim's paycheck."); Michael Quint, *Bank Robbers' Latest Weapon: Social Security Numbers*, N.Y. Times, September 27, 1992, at 7 (SSN can be used to order new checks at a new address). [Footnote omitted.] In California, reported cases of fraud involving the use of SSNs have increased from 390 cases in 1988 to over 800 in 1991. Y. Anwar, *Thieves Hit Social Security Numbers*, San Francisco Chronicle, August 30, 1991, A1, A2. Succinctly stated, the harm that can be inflicted from the disclosure of a SSN to an unscrupulous individual is alarming and potentially financially ruinous. These are just examples, and our review is by no means exhaustive; we highlight a few to elucidate the egregiousness of the harm. [Footnote omitted.]

Greidinger at 1352-54. See also, Yeager v. Hackensack Water Co., 615 F.Supp. 1087 (D.C.N.J. 1985); I.B.E.W. Local Union No. 5 v. U.S. Dept. Of Housing and Urban Development, 852 F.2d 87 (3rd Cir. 1988); Oliva v. United States, 756 F.Supp. 105 (E.D. N.Y. 1991). The Kentucky General Assembly recently recognized the sensitive nature of social security numbers by amending KRS 186.412(2), relating to drivers licensing, to require the use of a numbering system that uses an identifier other than social security numbers. And, of course, the Kentucky Court of Appeals has characterized them as "the keys to an information kingdom . . . ." Zink at 829. Simply stated, the privacy interest in a social security number is substantial.

Mirroring the Supreme Court's view in Board of Examiners, supra, the Zink court established a bright line test for determining if a public agency's invocation of the privacy exemption was proper on the facts presented. If the nature of the request is unrelated to the fundamental purpose of the Open Records Act, then countervailing interests, such as privacy, must prevail. Given the cognizable privacy interest of the vehicle owner in the nondisclosure of her home address and social security number, and the absence of any public interest, i.e., an interest that will advance the purpose of the Act by exposing public agency action to public scrutiny, we find that the privacy interests outweigh the non-open records act related public interest in disclosure. Accordingly, the Transportation Cabinet properly denied Mr. Page access to the vehicle owner's home address and social security number.[1]

Thus the debate which rages across the nation has come to rest in Kentucky. The questions raised are troubling ones -- anonymity versus privacy, protection from government versus protection from our fellow citizens. In what conduct and transaction with the government may a private citizen enjoy a reasonable expectation of privacy, and does society recognize this expectation as reasonable? Lurking in the background, we hear the familiar "status quo" argument: If these records were available in the past, why are they unavailable now?

The answer is a simple one. Kentucky's courts have directed that those portions of public records containing information in which an individual has a cognizable privacy interest may be withheld if there is no public interest in disclosure. That is to say, if disclosure "would do little to further the citizens' right to know what their government is doing and would not in any way subject agency action to public scrutiny," Zink at 829, the privacy interest in those discreet portions of public records is superior. As the court noted at page 829 of the Zink decision, "[o]ne of our most time-honored rights is the right to be left alone . . . ." While the particular facts of this appeal may not be the most compelling for purposes of vindicating this principle,[2] we take our cue from the courts as they have construed the privacy exemption over time, and refined the test for determining the propriety

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[1]Although Mr. Page did not object to the redaction of the vehicle owner's birthdate, we would reach the same conclusion with respect to this item of information were the issue before us.

[2]It should be noted that in enacting the Drivers Privacy and Protection Act, 18 U.S.C. § 2721, Congress has recognized that a state department of motor vehicles must disclose personal information on a motor vehicle record "in connection with matters of motor vehicle or driver safety and theft . . .," 18 U.S.C. § 2721(b), and may disclose the same information for fourteen enumerated uses set forth in the statute. That Act will take effect three years after September 13, 1994.

of nondisclosure under that exception. We affirm the actions of the Transportation Cabinet.

A party agrieved by this decision may appeal it by initiating action in the appropriate circuit court. 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.

CHRIS GORMAN
ATTORNEY GENERAL

Amye Majors

AMYE B. MAJORS
ASSISTANT ATTORNEY GENERAL

aps/866

Distributed to:

Mr. Jon D. Clark
Commissioner
Dept. Of Administrative Services
Transportation Cabinet
Frankfort, Kentucky 40622

Mr. Keith Page
Page Investigations
P. O. Box 3566
3908 Rolling Green
Urbandale, Iowa 50322