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20-ORD-013

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In re: *The State Journal*/Kentucky State University

Summary: Kentucky State University (“KSU”) lawfully denied inspection of an employee’s performance evaluation under KRS 61.878(1)(a), but violated the Open Records Act (“the Act”) by denying access to payroll records and a grievance. KSU also violated the act by failing to specify the purpose for redactions, perform an adequate search for records, address a portion of a request, or respond to portions of requests. KSU subverted the intent of the Act by prohibiting use of a personal device to copy records, but did not subvert the intent of the Act by requesting an appointment to inspect records.

Open Records Decision

The question presented in this appeal is whether KSU violated the Act in its disposition of requests by *The State Journal* (“Appellant”) dated October 4, 17, and 30, for records relating to KSU General Counsel Lisa Lang. For the reasons that follow, this Office finds that KSU violated the Act.

First request

On October 4, 2019, the Appellant requested a copy of Ms. Lang’s personnel file. KSU received the request on October 8, 2019, and responded on October 11, 2019, that “records labeled 2019-050_0008 through 2019-050_0031” would not be provided because they consisted of a performance evaluation. Citing *Cape*

Publications v. City of Louisville, 191 S.W.3d 10 (Ky. App. 2006), KSU stated that the public interest in Ms. Lang's performance was not so significant as to outweigh her privacy interest in her evaluation. On October 15, after receiving payment from the Appellant, KSU provided copies of the remaining records, indicating that "the records have been redacted to remove personally identifiable information in accordance with KRS 61.878(1)(a)." KSU did not specify the nature of the redacted information.

KRS 61.878(1)(a) creates an exception to the Act for "[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 typically requires a "comparative weighing of the antagonistic interests" between privacy and the public interest in disclosure. *Kentucky Bd. of Examiners of Psychologists v. Courier-Journal & Louisville Times Co.*, 826 S.W.2d 324, 327 (Ky. 1992). To rely on the exception provided by KRS 61.878(1)(a), KSU had to provide "a brief explanation of how the exception applies to the record withheld." KRS 61.880(1).

Regarding the records that were redacted but disclosed, if the redactions consisted solely of "discrete types of information routinely included in an agency's records and routinely implicating similar grounds for exemption," such as date of birth, Social Security number, driver's license number, and home address, they may have been justified. *Kentucky New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76, 89 (Ky. 2013); 17-ORD-101 n.2. KSU, however, did not indicate that its redactions for "personally identifiable information" were limited to such discrete categories. In failing to provide any description of the nature of the alleged personally identifiable information and explain how KRS 61.878(1)(a) applied to the redactions, KSU violated the Act. 17-ORD-120.

As to Ms. Lang's performance evaluation, the courts have recognized the existence of a significant privacy interest in such records:

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*.

Cape Publications, 191 S.W.3d at 13 (emphasis added). Thus, where a local parks department employee was charged with “committing a criminal act made possible by his position at a public agency,” which also led to the administrative suspension and eventual resignation of his supervisor, both his evaluation and his supervisor’s were subject to disclosure to a newspaper under this high standard for public need. *Id.* at 14.

The Appellant argues that it “has reason to believe that Ms. Lang was recently disciplined” by KSU, and that this suspicion meets the standard of “the most pressing of public needs” articulated in *Cape Publications*. Even assuming the Appellant’s suspicions that Ms. Lang had been subjected to discipline were true, Appellant offers no authority for the proposition that Ms. Lang’s alleged discipline is equivalent to the criminal behavior in public employment that created “the most pressing of public needs” for disclosure of a performance evaluation. *Cape Publications*, 191 S.W.3d at 13.

Nor does Ms. Lang’s position as KSU general counsel alter the balance of interests in this case. While the performance evaluation of an *agency head* is of such “significant public interest” that its disclosure is warranted notwithstanding the privacy interest, “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.” *Id.* (emphasis added). Therefore, in the absence of facts to “support a claim of superior public interest [to] override” the “long-recognized privacy interest” in performance evaluations, this Office affirms KSU’s denial of access to Ms. Lang’s evaluation. 07-ORD-125; 16-ORD-185.

Second request

On October 17, 2019, Appellant requested inspection or copies of “all disciplinary records or records relating to personnel actions against Lisa Lang,” including “complaints/initiating documents, Lisa Lang’s written response[,] investigative records (notes, interviews, factual findings), and action taken.” Additionally, Appellant requested “personnel or payroll records documenting

temporary or permanent cessation of Lisa Lang's salary and letter of resignation (if any exists)."

On October 22, 2019, KSU responded that 68 pages of records had been located and that the Appellant could either receive copies or inspect the records "upon request and scheduling with the Office of Human Resources." In a follow-up e-mail discussion, Appellant asked, "Would it be possible for me to pick up copies of these records in person? If not, when could I schedule a time to inspect them?" The records custodian responded, "Yes, you may come by to inspect the records. Please schedule a time to ensure someone from [the Office of Human Resources] will be available." Appellant asked to come at 9:00 a.m. "tomorrow." The records custodian responded, "I have a scheduling conflict at 9 a.m. are you available at 10?"

Under certain conditions, an agency's request that a person schedule an appointment to inspect records can subvert the intent of the Act. *See* 15-ORD-182 (finding violation where an agency continually cancelled appointments); 93-ORD-48 (finding violation where the agency limited the hours for inspection from 8:00 a.m. to 11:00 a.m. for all requesters despite the office's not closing until 4:30 p.m.). KRS 61.872(3)(a) provides that "[a] person may inspect ... public records [d]uring the regular office hours of the public agency." It does not prohibit an agency from coordinating with a requester for a mutually convenient time, in the immediate future and during business hours, for inspection. In this case, the appointment was not a restrictive requirement or a cause of delay, but merely a means of facilitating inspection. KSU's requesting that Appellant schedule an appointment, and accommodating inspection within twenty-four hours of asking Appellant to schedule the appointment, did not subvert the intent of the Act under these facts.

However, after having made an appointment to inspect the records, the Appellant was denied inspection of Lisa Lang's payroll records. Although required to do so by KRS 61.880(1), KSU gave no basis for this denial. Accordingly, this Office finds that KSU's denial of Ms. Lang's payroll records violated the Act.

Appellant was permitted to inspect a two-page grievance dated March 27, 2018, filed by a KSU employee, which contained references to Lisa Lang but was not a personnel action against Ms. Lang. KSU did not clarify whether the 66 pages

of withheld records consisted entirely of Ms. Lang's payroll records, or whether they also included disciplinary records.

KSU neither denied the existence of disciplinary records nor asserted a basis for denial of such records. Instead, KSU merely produced a record that was nonresponsive to the request. If there are no records responsive to a certain portion of a request, it is the agency's duty to state that fact "in clear and direct terms." 02-ORD-144. Otherwise, the agency fails to discharge its statutory duty to respond. 17-ORD-247. Having stated no basis for its disposition of the request for records of personnel actions against Ms. Lang, KSU violated the Act.

Additionally, KSU refused to allow the Appellant to make copies of the records by photographing them with a cell phone. KSU cited no law in support of this refusal.

"This office has long recognized that the right to obtain copies is correlative to the right to inspect records." 07-ORD-252 n.1. As to the use of the requester's personal imaging equipment, only county clerks have statutory authority to "establish procedures ... restricting the use of devices" to copy public records. KRS 64.019(1). In the absence of such express authority, a public agency subverts the intent of the Act when it prohibits the public from photographing its records with a personal device, unless the agency offers "proof that the condition of the records ... was so poor that [the use of the device] risked damage or alteration to the records." 11-ORD-166.¹ Since KSU offered no such proof here, KSU subverted the intent of the Act, within the meaning of KRS 61.880(4), by forbidding the Appellant to photograph its records.

Third request

On October 30, 2019, Appellant requested a copy of all internal and external communications since August 1, 2019, "by and between KSU President M. Christopher Brown II, KSU Regents, any official/employee of those KSU units identified in the KSU Organizational Chart as 'High Level Administration,' [several named offices and divisions within KSU], and/or KSU faculty or staff,

¹ Although 11-ORD-166 involved a county clerk, the rationale for that decision ceased to apply to county clerks with the 2012 enactment of KRS 64.019.

relating to ... Lisa Lang's job performance," including any investigative documents. The Appellant also again requested Ms. Lang's performance evaluation.

On November 4, 2019, KSU responded that 23 pages of records had been located, and again required an appointment if the Appellant chose to inspect the records. After making an appointment, the Appellant was allowed to receive copies of Ms. Lang's 12-page "self assessment narrative of top goals and accomplishments" and a blank form titled "Managerial Performance Assessment."

Although it had previously denied access to Ms. Lang's performance evaluation on the basis of KRS 61.878(1)(a), and provided a sufficient explanation of that denial in the first request, KSU failed to restate the reason for denying access to the performance evaluation in response to this new request. Each open records request is subject to KRS 61.880(1), and an agency cannot ignore its obligations under the Act because it previously responded to a similar request. KRS 61.880(1) requires a public agency's partial denial of inspection to state "the specific exception authorizing the withholding of the record." Therefore, although the evaluation was properly withheld under KRS 61.878(1)(a), KSU violated the Act by failing to issue a written denial citing this exception in its November 4 response. 16-ORD-211.

Appeal and KSU's subsequent conduct

Appellant initiated this appeal on November 15, 2019. On November 22, 2019, an attorney for KSU stated that KSU believed it had "fully responded to the requests," but asked for additional time "to further examine the records." On December 3, 2019, KSU indicated that *after* the filing of the appeal all senior administrators had been asked to respond to the request for records relating to Lisa Lang's job performance, and that "[t]he search resulted in a single document which is exempt under KRS 61.878(1)(a) and 61.878(1)(i)." KSU did not state what the document was, nor did it explain how the two cited subsections applied to the record.

A public agency, upon receiving an open records request, has the duty "to make a good faith effort to conduct a search using methods which can reasonably

be expected to produce the records requested[.] Thus, the agency must expend reasonable effort to identify and locate the requested records.” 95-ORD-96 (internal quotation marks omitted). Although KSU did not state what type of search it initially performed, that search was clearly insufficient to locate all responsive records. KSU thus violated the Act by failing to conduct an adequate search prior to responding to Appellant’s third request. 19-ORD-025.

On December 5, 2019, due to KSU’s failure to identify the newly-discovered record, or to state explicitly whether it had withheld any disciplinary records responsive to Appellant’s second request, this Office requested a confidential review of the withheld records pursuant to KRS 61.880(2)(c). The records were to have been provided to this Office by December 20, 2019. On January 22, 2020, KSU finally submitted for review a copy of a two-page grievance against Ms. Lang dated August 5, 2019.

KRS 61.878(1)(i) applies to “[p]reliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency.” KSU did not indicate whether the grievance is purported to be a preliminary draft, a note, or correspondence with a private individual. As a grievance submitted by a public employee on a specific date, the document appears to be none of the three.

“[A]nalysis of the propriety of a public agency’s reliance on KRS 61.878(1)(i) is largely fact specific.” 00-ORD-168. Where an agency fails to explain how an exception under KRS 61.878(1) applies to the withheld record, it fails to meet its burden of proof under KRS 61.880(2)(c). 17-ORD-101 n.3. KSU’s bare assertion that the grievance is subject to KRS 61.878(1)(i) is insufficient to meet that burden.

Likewise, under KRS 61.878(1)(a), “the 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 Examiners of Psychologists*, 826 S.W.2d at 328. By failing to explain the application of the asserted exemption, KSU has failed to provide the necessary “specific context.”

The public purpose of the Act is to ensure “meaningful public oversight, to enable Kentuckians to know ‘what their government is up to.’” *Kentucky New Era*, 415 S.W.3d at 89. If a public agency identifies a personal privacy interest in a

public record, that interest must be weighed against the public interest in disclosure. *Ky. Bd. of Examiners*, 826 S.W.2d at 327-28. “Where the agency fails to articulate a privacy interest, however, ‘the balance is decisively in favor of disclosure.’” 19-ORD-227 (quoting 10-ORD-082). By merely citing KRS 61.878(1)(a) without articulating a significant privacy interest, KSU has not met its burden of proof. Therefore, this Office finds that KSU violated the Act by withholding the grievance.

Conclusion

KSU lawfully denied inspection of Ms. Lang’s performance evaluation under KRS 61.878(1)(a). KSU’s request that Appellant schedule an appointment, under the facts of this case, did not subvert the intent of the Act. However, KSU did violate the Act by its denial of access to Ms. Lang’s payroll records and the 2019 grievance, and by its failure to specify the purpose for redactions, perform an adequate search, or respond to specific portions of requests. KSU subverted the intent of the Act, within the meaning of KRS 61.880(4), by prohibiting the use of a personal device to copy records.

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court pursuant to KRS 61.880(5) and KRS 61.882. 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.

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