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**20-ORD-016**

February 5, 2020

In re: Scott Horn/Lexington Public Library

***Summary:*** The Lexington Public Library ("LPL") violated the Open Records Act ("Act") in failing to explain with sufficient detail how the cited exceptions applied to specific records it withheld as required under KRS 61.880(1). Because LPL did not provide the particularized justification that KRS 61.880(1) requires in its original response to the requester, it did not satisfy its burden of justifying the denial for records it withheld (or portions it redacted) pursuant to KRS 61.878(1)(a), (i), and (j). LPL was required under KRS 61.878(4) to separate any non-exempt material from exempt material rather than deny access to certain records entirely.

## *Open Records Decision*

The question presented in this appeal is whether LPL violated the Act in the disposition of Scott Horn's ("the Appellant") December 1, 2019, request for the following records:

1. Records of communications between LPL management and diversity consultant Demetria Miles-McDonald, including emails, email attachments, text messages to/from LPL provided cell phones, and meeting notes[;]

2. Records reflecting plans, decisions, or roadmaps that resulted from communications with the diversity consultant[;]

3. Results of LPL surveys of LPL staff conducted or commissioned by LPL management during 2019[;]

4. Records reflecting LPL management's upcoming plans to transfer/rotate branch managers, including any that show their future or planned assignments, and any communications to branch managers informing them of these decisions or plans.[1]

Mr. Horn clarified that all references to "LPL management" encompassed the executive director, the director of access and initiatives, the director of community engagement, the finance officer, the branch managers, and "all additional staff located in the administrative suite of the central library."

LPL partially denied Appellant's request. Quoting KRS 61.878(1)(a),(i), and (j), LPL generally maintained that, "[s]ince certain requests made in Sections 1-4 represent personal information, preliminary drafts, notes, recommendations, or memoranda, your request to inspect records of this nature is denied. No final agency action has been taken, therefore, this information will be excluded from the records made available to you." Based upon the following, this Office finds the agency's response violated the Act.

As a threshold matter, KRS 61.880(1) provides that upon receipt of a request, a public agency "shall determine within three (3) [business] days . . . whether to comply with the request and shall notify in writing the person making the request, within the three (3) day period of its decision." LPL's December 4, 2019, response to Appellant's December 1, 2019, request was timely under KRS 61.880(1), but otherwise deficient because LPL failed to *either* permit Appellant to inspect non-exempt responsive records *or* explain the basis for exceptions upon which it relied to deny access to records it withheld. Pursuant to KRS 61.880(1), a public "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*."

[1] Appellant also requested additional records not discussed herein, which LPL provided.

(emphasis added.) The language of KRS 61.880(1) "directing agency action is exact. It requires the custodian of records to provide particular and detailed information in response to a request for documents." *Edmondson v. Alig*, 926 S.W.2d 856, 858 (Ky. App. 1996). A "limited and perfunctory response," such as that provided here, does not "even remotely compl[y] with the requirements of the Act . . . ." *Id*.

KRS 61.880(2)(c) states, "[t]he burden of proof in sustaining the action shall rest with the agency[.]" The Kentucky Supreme Court has recognized that a public agency "bears the burden to rebut the strong presumption in favor of disclosure." *Commonwealth v. Chestnut,* 250 S.W.3d 655, 660 (Ky. 2008). A "bare assertion" simply does not satisfy that burden. 19-ORD-045, p. 9. Here, LPL cited the statutory exceptions it relied upon per KRS 61.880(1), but failed to provide any explanation of how the cited exceptions applied to records it withheld.

*First*, LPL violated the Act by invoking the exemption in KRS 61.878(1)(a) without explaining how this exemption applied to the category of documents withheld. LPL's unsupported statement that disclosure of unspecified records or information would constitute a clearly unwarranted invasion of personal privacy, without any specific facts or context, "was merely an insufficient paraphrase of the statutory language." 19-ORD-147, p. 1. A public agency "should provide the requesting party and the court with sufficient information about the nature of the withheld record (or the categories of the withheld records) . . . to permit the requester to dispute the claim and the court to assess it." *City of Ft. Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 852 (Ky. 2013).

"With no detailed explanation of the privacy interest at issue, [this Office] must find that [the agency] has not met its burden of proof under KRS 61.880(2)(c) to sustain its invocation of KRS 61.878(1)(a)[.]" 16-ORD-057, p. 4. Existing legal authority permits LPL to withhold truly personal information, such as home addresses, telephone numbers, Social Security Numbers, or medical information from existing responsive documents. *See*, *e.g.*, *Zink v. Commonwealth of Kentucky*, 902 S.W.2d 825, 828 (Ky. App. 1994). But LPL may not withhold records in their entirety simply because they may contain such personal information. KRS 61.878(4).

In *Kentucky Board of Examiners of Psychologists v. Courier-Journal and Louisville Times Co.*, 826 S.W.2d 324 (Ky. 1992), the Kentucky Supreme Court established the

standard for determining whether a public agency has properly relied upon KRS 61.878(1)(a) in denying access to public records (or portions thereof). Recognizing the Act "exhibits a general bias favoring disclosure," the Court formulated a test whereby "the public's right to expect its agencies properly to execute their functions" is measured against the "countervailing public interest in personal privacy" when the records sought contain information that touches upon the "most intimate and personal features of private lives." *Id.* at 327-328. Although there may be instances where a categorical redaction of information is reasonable, *Kentucky New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76, 83 (Ky. 2013), the determination of whether a public agency has properly relied upon KRS 61.878(1)(a) turns on whether the offense to personal privacy that would result from disclosure of the information outweighs the public benefit. *Ky. Bd. of Examiners of Psychologists*, 826 S.W.2d at 327-328. This has been called an "intrinsically situational" determination that can only be made in a "specific context." *Id*.

Significantly, the Kentucky Supreme Court has rejected the practice of "*blanket* denials of ORA requests, *i.e*., the nondisclosure of an entire record or file on the grounds that some part of the record or file is exempt . . . ." *Kentucky New Era, Inc.* 415 S.W.3d at 88 (original emphasis). In that case, the Court determined that although the City employed a "categorical" redaction policy, the City had "complied scrupulously with KRS 61.878(4) by 'making available for examination' the requested records after having separated, in its view, the excepted private information from the nonexcepted public information." *Id.*

Unlike the City in *Kentucky New Era*, in responding to Appellant's request under the Act, and on appeal, LPL merely claimed that "certain correspondence contained personal information about employees."[2] LPL did not explain how the information was personal in any manner sufficient to weigh the interests between privacy and public access. Nor did it identify any discrete category of information

[2] After receiving LPL's deficient response, Appellant sent further correspondence asking LPL a series of questions designed to obtain more information about why LPL was denying the request. The parties have argued on appeal whether this additional correspondence amounts to "requests for information" to which an agency is not required to respond. *See* 00-ORD-76; 04-ORD-080. However, this Office does not consider Appellant's additional correspondence to be "requests for information." Rather, it is apparent that Appellant's subsequent correspondence was an attempt to make LPL remedy its deficient response and explain how the claimed exemptions applied to the requested documents.

that was inherently personal. LPL also failed to explain how the documents contained such extensive personal information to warrant withholding the records in their entirety. For these reasons, LPL violated the Act.

*Second*, LPL violated the Act by failing to identify the documents withheld, categorize the documents based on whether KRS 61.878(1)(i) or (j) applied, and explain how those exceptions applied to the category of documents withheld. These exemptions permit agencies to withhold records that include preliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency, and preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended. But under *University of Kentucky v. Lexington H-L Services, Inc., d/b/a Lexington Herald-Leader*, "preliminary records which form the basis for the agency's final action are subject to disclosure." 579 S.W.3d 858, 863 (Ky. App. 2018).

In response to Appellant's four requests, LPL maintained that "the [Decide] Diversity consultant's work is not complete. The work continues and is in phase two. No formal presentation has been reported to the Board and no final action has been taken by the [LPL]." LPL's response is not sufficient. Both initially and in subsequent responses, LPL failed to identify or make a good faith estimate of how many responsive documents it possessed. It further failed to identify which category of records it withheld on the basis of KRS 61.878(1)(i) or (j), and which categories of records it withheld on the basis of KRS 61.878(1)(a). LPL's response amounts to a blanket denial. Furthermore, the record on appeal is devoid of adequate information to determine whether some or all of the records fall within the parameters of each exemption claimed.

Instead, the record on appeal demonstrates that on December 9, 2019, LPL transferred the Village Branch manager from her position and sent an internal bulletin to staff announcing that personnel change, as well as other management changes. The bulletin further stated, "[b]ased on the feedback we have received from the staff and Community served by the Village Branch, we recognize the need for a Spanish-speaking Manager at that location." The record, therefore, suggests that LPL took final action. To the extent any responsive communications, recommendations, or memoranda between Decide Diversity and LPL contributed to this action, those records are no longer preliminary and must be disclosed. In the absence of sufficient information to determine whether some or all of the withheld material forfeited its preliminary character, this Office must conclude

LPL failed to satisfy its burden of justifying withholding such records under KRS 61.878(1)(i) or (j).

In conclusion, LPL's initial response to the first itemized request violated the Act because LPL failed to explain how the exemptions it relied upon applied to the relevant records. Regarding itemized requests two, three, and four, LPL also argued on appeal that there were no responsive documents to these requests that were not provided. However, LPL's initial response denying the request applied all of its claimed exceptions to all of the itemized requests. Like LPL's response to itemized request one, the failure to categorize responsive documents and explain how the exemptions applied to these itemized requests violated the Act. It is difficult to square LPL's representation that on the one hand documents exist that are preliminary in nature, yet on the other hand, there are no additional documents in its possession. To the extent any additional documents exist that are responsive to itemized requests two, three, and four, LPL has failed to meet its burden to demonstrate that the claimed exemptions apply to those additional documents.[3]

Either party may appeal this decision may appeal by initiating action in the appropriate circuit court per 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 proceeding.

Daniel Cameron
Attorney General

/s/ Michelle D. Harrison

Michelle D. Harrison
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Distributed to:

Scott Horn

[3] Appellant requested that this Office review the remaining documents under KRS 61.880(2)(c). However, because LPL failed to meet its burden on the face of its initial response, this Office has sufficient information to find that LPL violated the Act.

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