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20-ORD-019

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In re: WPSD Local 6 News/City of Paducah

*Summary:* City of Paducah (“City”) violated the Open Records Act (“the Act”) because it did not meet its burden to support redacting a hotel market study under KRS 61.878(1)(c)1. Information is only exempt when it is confidentially disclosed to an agency and generally recognized as confidential or proprietary, and its disclosure would permit an unfair commercial advantage to competitors.

*Open Records Decision*

The question presented in this appeal is whether the City violated the Act in partially denying an October 22, 2019, request by WPSD Local 6 News (“Appellant”) for a copy of a January 2019 “Paducah TIF District Hotel Market Study” (“the Study”) prepared for the City by ConsultEcon, Inc. (“ConsultEcon”). For the reasons stated below, this Office finds that the City improperly redacted the Study in reliance on KRS 61.878(1)(c)1.

The City responded to Appellant’s request by providing a redacted copy of the Study with the following explanation:

Portions have been redacted in accordance with KRS 61.878(c)(1) [*sic*] which refers to records 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. We have redacted the tabular data that is proprietary to STR, Inc.

On October 31, 2019, after Appellant requested further explanation for the redactions, the City generally reiterated its original response. However, it did add that the City conducted its redactions after consultation with ConsultEcon. The City also referred to the following language from ConsultEcon at page I-2 of the Study:

Possession of this report does not carry with it the right of publication. This report incorporates tabular data that is proprietary to STR, Inc. [T]he data is not for public distribution. This report will be presented to third parties in its entirety and no abstracting of the report will be made without first obtaining permission of ConsultEcon, Inc., which consent will not be unreasonably withheld.

.... Neither all nor any part of the contents of this study shall be disseminated to the public through advertising media, news media or any other public means of communication without the prior consent of ConsultEcon, Inc.

Appellant initiated this appeal on November 7, 2019.

The City argues that this appeal is moot because the Appellant obtained an unredacted copy of the Study from another source. These conditions, however, do not render an appeal moot. *See* 97-ORD-87 (“a public agency cannot withhold public records from a requester simply because the records may be obtained from another source”).

Alternatively, the City relies upon KRS 61.878(1)(c)1., which states in relevant part, “records 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.” Under KRS 61.880(2)(c), a public agency bears the burden of proof in sustaining its denial of access to public records. Exceptions to the Act are to be “strictly construed.” KRS 61.871.

Thus, to support redacting records under KRS 61.878(1)(c)1., a public agency must establish that the material in question (1) has been confidentially disclosed to the agency, (2) is generally recognized as confidential or proprietary, and (3) would permit competitors of the disclosing entity an unfair commercial advantage if disclosed.

**“Records confidentially disclosed to an agency”**

The material for which the City claims confidential status is the “tabular data” obtained by ConsultEcon from a third-party research firm, STR Global, Inc. (“STR”), concerning hotel occupancy rates in Paducah over a period of years. According to the City’s response to the appeal, ConsultEcon is a “subscribed member” of STR. The subscription fee gives ConsultEcon access to STR’s “dSTAR reports,” which gather comparative data from hotels in particular geographic areas.

Despite ConsultEcon’s precatory language stating that the data it obtained from STR “is not for public distribution,” the record on appeal does not support a conclusion that the information was “confidentially disclosed to” the City. The Appellant cites ConsultEcon’s October 2, 2018, proposal to the City for the Study, which includes as an attachment ConsultEcon’s “Standard Terms and Conditions.” Neither the proposal nor the attachment mentions ConsultEcon’s acquisition of data from STR or any obligation for the City to keep this data confidential. The “Confidentiality” section in the Standard Terms and Conditions mentions only that ConsultEcon agrees to keep confidential information so designated “by the Client” (*i.e.*, the City). There is no reciprocal obligation for the City to keep confidential any information so designated by ConsultEcon.

This case is somewhat analogous to 19-ORD-146, in which this Office found that a water rate study commissioned by the City of Williamstown from an outside entity was “not a record disclosed to the City, but the City’s own record.” Here, the “Ownership and Use of Documents” section of the Standard Terms and Conditions states that “[t]he Client shall be entitled to own a copy of [all documents produced by ConsultEcon] and shall have a non-exclusive license to use, copy and reproduce them.” Thus, apart from ConsultEcon’s unilateral

recital in the Study itself, there is no evidence that the information from STR was “confidentially disclosed to” the City by ConsultEcon.

Nor does the record on appeal establish an underlying duty of confidentiality owed by ConsultEcon to STR. The City relies only on general language from STR’s website stating, “We deliver data that is confidential, accurate and actionable.” This statement appears to be advertising STR’s services, rather than STR imposing an obligation of confidentiality on subscribing members, such as ConsultEcon, or the members’ clients.

Even if ConsultEcon’s recitation on page I-2 of the Study could be regarded as a confidentiality agreement, a mere agreement is not conclusive in determining the confidentiality of a disclosure. 19-ORD-133. Whether a record is “confidentially disclosed to an agency” is demonstrated by “the efforts made by the parties ... to ensure the confidentiality of shared information.” 17-ORD-002.

The City admits that the mayor, a city commissioner, and a city employee made “unauthorized” disclosures of the unredacted Study to two private citizens and a “potential developer” prior to Appellant’s open records request. Unofficial voluntary disclosures do not automatically “result in the waiver of exemptions.” *Baker v. Jones*, 199 S.W.3d 749, 753 (Ky. App. 2006); *see also* 09-ORD-203 (“[s]elective disclosure is only prohibited amongst open records requesters”). Nevertheless, the conduct of high-level officials is indicative of the efforts made by the parties to ensure confidentiality. Since the totality of the circumstances does not indicate a confidential disclosure, the City has not established the first element of KRS 61.878(1)(c)1.

**“Generally recognized as confidential or proprietary”**

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.<sup>1</sup> to required disclosures of “a financial history of [a] corporation, projected cost of the project, the specific amount and timing of capital

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<sup>1</sup> KRS 61.878(1)(c)2. contains the identical language, “generally recognized as confidential or proprietary,” that appears in KRS 61.878(1)(c)1.

investment, copies of financial statements and a detailed description of the company's productivity, efficiency and financial stability." The Court concluded, "[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 met the second prong of the exemption.

Types of information found by this Office to be generally recognized as confidential or proprietary include "private financial affairs" (01-ORD-143); "trade secrets, investment strategies, economic status, or business structures" (17-ORD-198; 16-ORD-273; 07-ORD-166); "the method for determining [a] contract price" and "business risks assumed" (17-ORD-002); "costing and pricing strategy" (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 in these categories of information is the insight they provide into the internal operations of the entity making the disclosure to the public agency.

The categories of tabular data obtained by ConsultEcon from STR are mainly aggregate data about the hotel industry in Paducah. The following titles of tables and data sets demonstrate the aggregate nature of the data depicted:

Trend in Total Available Room Nights and Average Daily Available Room Nights in Paducah/McCracken County, 2012 through 2018

Accommodations Size Distribution in Paducah/McCracken County  
Hotels and Motels by Chain Scale in Paducah/McCracken County

Trend in Total Occupied Rooms Nights, Average Daily Occupied Room Nights and Average Annual Occupancy Rate in Paducah/McCracken County, 2012 to 2018

Trend in Total Room Revenue, Average Daily Rate and Revenue per Available Room in Paducah/McCracken County, 2012 to 2018

Average Number of Monthly Occupied Room Nights in Paducah/McCracken County, 2015 to 2018

Average Daily Room Rate in Dollars by Month in Paducah/McCracken County, 2015 to 2018

Number of High Occupancy Days by Month in Paducah/McCracken County, November 2017 to October 2018

Average Spent on Overnight Lodging

Total Spent on Overnight Lodging

Average Daily Rate (2015)

Estimated Room Demand due to Arts and Cultural Events

Percent of Annual Room Demand due to Arts and Cultural Events

The only table containing non-aggregate data is Table IV-2, "Inventory of Hotel and Motel Accommodations in Paducah/McCracken County Ranked by Number of Rooms," which states the number of rooms in each of 28 listed hotels.

The City has presented no evidence that information of this nature is "generally regarded as confidential or proprietary." Furthermore, these types of information are not similar to those previously affirmed as confidential or proprietary under KRS 61.878(1)(c)1., as they do not tend to disclose the inner workings or financial status of ConsultEcon, STR, or any other entity.<sup>2</sup> Thus, the City has not met its burden of proof for the second element of KRS 61.878(1)(c)1.

**"Unfair commercial advantage to competitors of the entity that disclosed"**

"[I]f it is established that a document is confidential or proprietary, and that disclosure to competitors would give them substantially more than a trivial unfair advantage, the document should be protected from disclosure." *Southeastern United Medigroup, Inc. v. Hughes*, 952 S.W.2d 195, 199 (Ky. 1997) (abrogated in part on other grounds by *Hoskins v. Maricle*, 150 S.W.3d 1 (Ky. 2004)).

In *Marina Management Service, Inc. v. Cabinet for Tourism*, 906 S.W.2d 318, 319 (Ky. 1995), the Court found KRS 61.878(1)(c)1. applicable to "information on

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<sup>2</sup> While Table IV-2 discloses one item of data about individual hotels – their number of rooms – there is likewise no evidence that that information is generally regarded as either confidential or proprietary.

asset values, notes payable, rental amounts ..., related party transactions, profit margins, net earnings, and capital income” of a private corporation. In finding that the information would permit an unfair commercial advantage to competitors, the Court reasoned, “The most obvious disadvantage may be the ability to ascertain the economic status of the entities without the hurdles systematically associated with acquisition of such information about privately owned organizations.” *Id.*

The City argues that disclosure of the tabular data obtained from STR would give an unfair commercial advantage to ConsultEcon’s competitors because ConsultEcon paid a membership fee for its subscription to STR.<sup>3</sup> The City has not stated the amount of the membership fee, nor has it alleged that ConsultEcon operates in a highly competitive market. *See* 17-ORD-002; 12-ORD-076; 09-ORD-031; 08-ORD-083 (existence of a highly competitive market is a relevant factor in favor of nondisclosure).

Furthermore, the City has not shown how the particular data sets included in the Study would be substantially advantageous to any hypothetical competitors of ConsultEcon, particularly after the Study had been paid for and completed. Based on such minimal information, this Office cannot conclude that public disclosure of the STR data ConsultEcon provided to the City would permit competitors of ConsultEcon “substantially more than a trivial unfair advantage.” *Southeastern United Medigroup*, 952 S.W.2d at 199.

The City further argues that “any local hotels that are not members of STR would be given an unfair commercial advantage over those hotels that are paid members due to the disclosure of and/or free access to proprietary information that STR only makes available to its paid subscribers.” Again, the City has not shown that non-payment of the STR membership fee amounts to substantially more than a trivial advantage. Nor has the City shown that these data sets, consisting of aggregate information plus the number of rooms in each of 28 hotels, would enable non-member hotels “to ascertain the economic status” of individual hotels to any unfair extent. *Marina Management Service*, 906 S.W.2d at 319.

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<sup>3</sup> The City makes no attempt to establish that STR itself would be unfairly disadvantaged by disclosure of the data.

Thus, the City has not met its burden of proof as to any of the three elements of KRS 61.878(1)(c)1. Accordingly, this Office finds that the City's redactions to the Study were made in violation of the Act.

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 proceeding.

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