



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

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20-ORD-026

February 20, 2020

In re: Jon Fleischaker/Louisville Metro Police Department

Summary: Louisville Metro Police Department (“LMPD”) violated the Open Records Act (“Act”) in redacting police officer witness information and withholding surveillance video and an officer entry log. However, LMPD otherwise met its burden of proof that responsive photographs did not exist, that redacting the identities of uncharged suspects was justified, and that certain records were exempt as preliminary drafts that were not adopted by the agency in taking final action.

Open Records Decision

On October 30, 2019, *WDRB News* reporter Valerie Chinn (“Appellant”) submitted three open records requests to LMPD, seeking records related to a Professional Standards Unit (“PSU”) investigation into alleged activity at a retirement party purportedly held on LMPD grounds. The first request sought, “the initiating letter and disciplinary action, if any[.]” The second request was for “the entire investigative file..., including... all video/audio interviews, body cam, damage reports of cruisers and any other documents, video or other materials from the investigation[.]” Appellant also requested, “pictures of all officers who were investigated.”

On November 14, 2019, LMPD provided Appellant the PSU Preliminary Findings, Summary, and Conclusions Memorandum (“Memorandum”), the PSU Case Investigative Record (“Investigative Record”), the investigation initiating

letter, the investigation closing letter, and the LMPD Rules and Conduct policies in the file. LMPD stated it withheld, “witness names, surveillance video, and titles” pursuant to KRS 61.878(1)(a), because “release of this information is considered an unwarranted invasion of personal privacy.”

LMPD denied WDRB’s request for copies of the remaining records in the file as “preliminary” under KRS 61.878(1)(i) and (j). The Investigative Record identified records in the file created during the investigation, including interviews and scheduling letters and emails. It also identified administrative records in the file, including an Ethics Tip-Line Complaint, a building surveillance video, and a Homicide Unit Office Entry Log. LMPD denied the request for photographs of suspect officers as nonexistent, stating that the investigation did not focus on police officers and “instead focused on an incident alleged to have occurred.”

On January 15, 2020, Appellant appealed, stating, “a police organization cannot redact the names of police officer witnesses under the personal privacy exemption[,]” because there is a significant public interest in the investigation of police conduct, outweighing any privacy concern. Appellant also stated that the investigation file is no longer preliminary, because all of the records were the basis for the final agency action.

LMPD responded to the appeal, stating that LMPD Chief Steve Conrad (“Chief Conrad”) based the decision to close the investigation solely on the Memorandum. LMPD provided an affidavit from Chief Conrad affirming that he reached his decision “without reviewing any other records contained within the investigation file.” LMPD provided this Office the records given to Appellant.

LMPD Improperly Redacted the Identities of Police Officer Witnesses But Properly Redacted the Identities of Police Officers Suspected of Misconduct.

This Office finds that LMPD improperly redacted the identities of police officer witnesses, but properly redacted the identities of police officers suspected of misconduct from the responsive records. The evidence establishes that this matter was an investigation of alleged misconduct by individual police officers despite LMPD describing the matter as an investigation into an “incident.” The record demonstrates that the Professional Standards Unit initiated this investigation based on an ethics complaint that identified specific police officers.

KRS 61.878(1)(a) exempts disclosure of “[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.” In *Kentucky Board of Examiners of Psychologists v. Courier-Journal and Louisville Times Co.*, 826 S.W.2d 324 (Ky. 1992), the Court found that this language “reflects a public interest in privacy, acknowledging that personal privacy is of legitimate concern and worthy of protection from invasion by unwarranted public scrutiny,” while the Open Records Act as a whole “exhibits a general bias favoring disclosure” and places the burden of establishing an exemption on the public agency. *Id.* at 327. This necessitates a “comparative weighing of the antagonistic interests. Necessarily, the circumstances of a particular case will affect the balance. [T]he question of whether an invasion of privacy is ‘clearly unwarranted’ is intrinsically situational, and can only be determined within a specific context.” *Id.* at 327-28.

When weighing the competing interests of personal privacy and the public interest in disclosure, this Office first determines whether the identity of the person “constitutes information of a personal nature.” *Lexington H-L Services, Inc. v. Lexington-Fayette Urban County Government*, 297 S.W.3d 579, 584 (Ky. App. 2009). Next, this Office must ascertain the strength of the privacy interest and balance that interest against the public interest in disclosure of the person’s identity. *Id.* at 584-85. Kentucky courts have upheld the categorical redaction of information that identifies civilian witnesses and uncharged civilian suspects from investigation records. *See e.g. Kentucky New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76 (Ky. 2013). In *Kentucky New Era*, the Kentucky Supreme Court affirmed a categorical rule to withhold the names and identities of civilian witnesses appearing in law enforcement records. *Id.* at 88. However, unlike the private citizens at issue in *Kentucky New Era*, the witnesses in this case were police officers who were on duty at the time of the alleged incident. These police officer witnesses have not been accused of wrongdoing, and therefore they suffer no risk of reputational harm or public embarrassment for participating in an internal investigation. *See id.* at 85. When weighing these police officers’ privacy interests against the public interest, this Office finds the balance weighs in favor of the public. Therefore, LMPD improperly redacted the names of police officer witnesses.

However, the balance changes in regards to uncharged police officer suspects. Disclosure of their identities would likely subject the officers to

embarrassment and stigma. *See id.* In this case, the police officers were wrongly accused of inappropriate sexual activity and alcohol use. These officers have a heightened privacy interest because they were ultimately not charged with any wrongdoing. *See* OAG 91-35; 12-ORD-227. Therefore, this case is distinguishable from *Palmer v. Driggers*, 60 S.W.3d 591 (Ky. App. 2001), because the police officer in that case had been officially charged with misconduct. When weighing the competing interests to personal privacy and the public interest, a finding that the public employee did not engage in misconduct tilts the balance in favor of the employee. However, evidence that demonstrates a public agency failed to adequately investigate the underlying claim, or that the investigation was biased, increases the weight of the public interest. In 06-ORD-052, this Office found a high public interest justifying disclosure of the identity of a public figure suspected, but not charged, with wrongdoing. *Id.* at pp. 4-5. (citing 05-ORD-224). However, the record in that appeal contained evidence that called into question actions taken during the investigation and the decision not to prosecute. *Id.* at 5.

This appeal is distinguishable from 06-ORD-052 because there is no evidence in the record of favoritism or bias in LMPD's investigation. The record shows that LMPD investigated in good faith, interviewed numerous witnesses, and collected statements and evidence. As such, disclosure of the suspects' identities is not necessary for an adequate appraisal of the investigation. *See* 12-ORD-227, p. 11.¹ Accordingly, LMPD did not violate the Act in redacting the identities of police officer suspects.

LMPD Properly Denied a Request for Photographs that were Nonexistent.

No evidence exists in the record that LMPD created or used photographs of police officers in the investigation. A public agency cannot provide a requester with access to a nonexistent record, nor is it required to "prove a negative" in order to refute an unsubstantiated claim that a certain record exists. *Bowling v. Lexington-Fayette Urban Cty. Gov't*, 172 S.W.3d 333, 341 (Ky. 2005). To obtain relief, the

¹ In 18-ORD-059, this Office noted that "[w]e recognize that in some rare instances, an allegation of sexual misconduct may not result in records indicating whether the allegation was substantiated or unsubstantiated. The analysis in that context may weigh in favor of nondisclosure of the identity" of the uncharged suspect. *Id.*, p. 5, n. 4. The Memorandum relied on by Chief Conrad stated that no evidence was found to support the allegations. As such, the facts in this appeal weigh in favor of nondisclosure of the identities of uncharged police officer suspects.

requester must first establish a *prima facie* case that the requested record exists. *Id.* However, Appellant produced no affirmative evidence that responsive photographs exist. If Appellant was requesting that LMPD create responsive photographs, the Act does not require a public agency to create responsive records to satisfy particular open records requests. *See* 02-ORD-112. In the absence of the requisite *prima facie* showing, or any facts or evidence supporting the existence of responsive photographs in the investigation file, this Office affirms LMPD's disposition of this request.

LMPD Properly Withheld Records Created by the Investigation.

LMPD properly withheld the interview records, scheduling letters, and emails created as part of the investigation, because they are preliminary records and Chief Conrad did not adopt them in reaching a final decision. These records are "preliminary drafts, notes" and "preliminary memoranda in which opinions are expressed" within the meaning of KRS 61.878(1)(i) and (j),² and they were never adopted as the basis of the agency's final action. *See* 15-ORD-202. In 19-ORD-217, this Office found that LMPD properly withheld interview transcripts in an investigation file because they were preliminary records, and Chief Conrad did not rely on them in reaching a final decision. *Id.* at 6. In that decision, as here, the record contained an affidavit provided by Chief Conrad avowing that he relied solely on a summary Memorandum as the basis for final action. *Id.* This Office "is not in a position to question the sufficiency of [the Memorandum] or substitute its judgment for that of the final decision maker, the record lacks any evidence to refute Chief Conrad's affidavit." *Id.* Accordingly, LMPD properly withheld these records as preliminary.

Other Public Records Contained in the Investigative File are not Preliminary.

The final category of records contained in the investigative file are public records created separately from the investigation which were used during the course of the investigation. These include surveillance videos and the Homicide

² KRS 61.878(1) excludes from disclosure: (i) preliminary drafts, notes, correspondence with private individuals other than correspondence which is intended to give notice of final action of a public agency; and (j) preliminary recommendations and preliminary memoranda in which opinions are expressed or policies formulated or recommended.

Unit Office Entry Log. This Office has found that similar records in a case file “cannot be properly characterized as drafts, notes, or recommendations, nor do they contain any opinions or recommendations even if characterized as memoranda” within the meaning of KRS 61.878(1)(i) and (j). 16-ORD-106, pp. 5-6. Like the Rules and Conduct policies and procedures LMPD disclosed, these records are not preliminary merely because investigators used them during the investigation. Therefore, these records were not properly withheld. Finally, the Ethics Tip-Line Complaint is no longer preliminary because, “any...[record] that spawns an investigation may be withheld until the investigation is concluded and final action taken, including a decision to take no action.” 06-ORD-268. Although the Ethics Tip-Line Complaint cannot be withheld as preliminary, if it cannot be redacted to protect the personal privacy of the accused officers, it can properly be withheld pursuant to KRS 61.878(1)(a) as discussed above.

Either party aggrieved by 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 J. Cameron
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/s/ John Marcus Jones

J. Marcus Jones
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