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20-ORD-033

March 2, 2020

In re: Lawrence Trageser/Louisville Regional Airport Authority

Summary: Louisville Regional Airport Authority ("Authority") violated the Open Records Act ('the Act") by failing to justify its redactions to a record under KRS 61.878(1)(a) or KRS 61.878(1)(h), but did not violate the Act by failing to produce a nonexistent record.

Open Records Decision

The question presented in this appeal is whether the Authority violated the Act in its disposition of a request by Lawrence Trageser ("Appellant") dated January 3, 2020, for certain records related to Authority employee Eric Brown. For the reasons that follow, this Office finds that the Authority partially violated the Act.

Appellant's request consisted of three parts: (1) "Any personnel change orders, restrictions or disciplinary action taken against employee Eric Brown since Sunday December 29, 2019"; (2) "Any documentation reflecting the status of employee Eric Brown's duties[,] such as being removed from law enforcement duties, on paid leave, on administrative duties, etc."; and (3) "Policies and procedures of [the] Authority regarding situations, as in this case where an employee acting in law enforcement capacity cannot possess a weapon."

In its response, the Authority stated that there were no records responsive to part 3. In response to parts 1 and 2, the Authority produced a copy of a one-

page "Notice of Administrative Leave for Investigative Purposes" to Mr. Brown dated December 31, 2019, along with the following explanation:

> This document has been redacted to remove information unrelated to your request, that is relating to an administrative proceeding of an agency or law enforcement agency and information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy accordance [*sic*] with KRS 61.878(1)(a) and (h). The Attorney General has opined that a public agency is required to remove the excepted information from the requested information and that addresses, and other personal information are exempt from disclosure.

In his letter of appeal, Appellant argued that the Authority had failed to explain its redactions and "falsely represented [the] non-existence" of policies and procedures responsive to part 3. In response to this appeal, the Authority asserted that its explanation of the redactions was "more detailed" than required by law, and reiterated that no policies existed that were responsive to part 3.

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. *Ky. 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), the Authority had to provide "a brief explanation of how the exception applies to the record withheld." KRS 61.880(1).

Although the Authority's response to the request mentioned "addresses, and other personal information," it did not assert that the redacted material consisted of such information. 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 might have been justified as "categorical" redactions. *See Ky. New Era, Inc. v. City of Hopkinsville,* 415 S.W.3d 76, 89 (Ky. 2013). The extent and placement of the redactions, however, suggest that they consist of narrative content, as opposed to discrete items of personal data.

For example, in one portion following narrative content, two entire lines of the record are redacted. In another portion, the final clause of a sentence is redacted following an introductory clause that references a collateral, pending action. Therefore, the Authority cannot rely on commonly recognized and accepted categorical redactions, but must establish that a personal privacy interest outweighs the public interest in disclosure.

The public purpose of the Act is to ensure "meaningful public oversight, to enable Kentuckians to know 'what their government is up to.'" *Ky. 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. *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, the Authority failed to explain the purpose of its redactions, and failed to meet its burden of proof on appeal.

The Authority also cited KRS 61.878(1)(h), which authorizes the nondisclosure of:

> Records of law enforcement agencies or agencies involved in administrative adjudication that were compiled in the process of detecting and investigating statutory or regulatory violations if the disclosure of the information would harm the agency by revealing the identity of informants not otherwise known or by premature release of information to be used in a prospective law enforcement action or administrative adjudication.

To invoke the exemption under KRS 61.878(1)(h), "the agency must show (1) that the records to be withheld were compiled for law enforcement [or administrative adjudication] purposes; (2) that a law enforcement action [or administrative adjudication] is prospective; and (3) that premature release of the records would harm the agency in some articulable way." *City of Fort Thomas v. Cincinnati Enquirer,* 406 S.W.3d 842, 850 (Ky. 2013).

With regard to the first element, the Authority did not assert that it was a law enforcement agency or that the "administrative proceeding" in question was

an adjudication. Rather, the Authority merely stated that the redacted material was "relating to an administrative proceeding of an agency *or* law enforcement agency" (emphasis added). Therefore, the Authority did not establish the first element of the exception.

Because the Authority failed to identify whether it was involved in a law enforcement action or administrative adjudication, it also failed to identify whether the purported law enforcement action or administrative adjudication was "prospective." It is unclear from this record whether the Authority actually plans or is considering any further adjudication regarding Mr. Brown. Thus, the Authority failed to establish the second element.

Finally, the Authority failed to state that disclosure of the redacted material would harm the agency as contemplated in the statute. To invoke KRS 61.878(1)(h), an agency must "articulate a factual basis for [how,] because of the record's content, its release poses a concrete risk of harm to the agency in [a] prospective action." *Id.* at 851. An agency response must therefore provide "sufficient information about the nature of the withheld record … and the harm that would result from its release to permit the requester to dispute the claim." *Id.* at 852. By merely citing KRS 61.878(1)(h), the Authority failed to explain how the exception applied.

When 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). Accordingly, this Office concludes that the Authority's deficient response violated the Act.

In its response to the request, the Authority also asserted that the redacted information was "unrelated to [Appellant's] request." The Appellant requested records showing that Mr. Brown had been placed on leave. From its context, the redacted material appears to address the reasons for placing him on administrative leave. Thus, the Authority inaccurately characterized the information as unresponsive to the request. Because the Authority failed to carry its burden to justify redactions to the record, the Authority's redactions violated the Act.

As to the Appellant's request for policies and procedures "regarding situations … where an employee acting in law enforcement capacity cannot possess a weapon," there is no basis to dispute the Authority's assertion that no responsive records exist. "[T]his office has been obliged to affirm public agency denials of requests based upon the nonexistence of records in the absence of a *prima facie* showing that the records being sought did, in fact, exist in the possession of the agency." 11-ORD-111.

Appellant argues that a policy must exist because the Authority's notice to Mr. Brown cited an "employee handbook." The context of that reference, however, indicates a policy on "Administrative Leave for Investigative Purposes," rather than a policy on "where an employee … cannot possess a weapon." Appellant's mere speculation does not constitute a *prima facie* showing that disputed records exist. *Id.* Therefore, this Office finds that the Authority did not violate the Act by failing to provide a nonexistent policy.

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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/s/ James M. Herrick

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Distributed to:

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