



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

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20-ORD-089

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In re: Shawn R. Burden/Kentucky Labor Cabinet

Summary: The Kentucky Labor Cabinet (“Cabinet”) violated the Open Records Act (“Act”) in withholding the names of private individuals who submitted complaints, either telephonically or electronically, to the KY-SAFER Hotline. However, the Cabinet did not violate the Act in withholding other personal information about the complainants, including home addresses, telephone numbers, and personal e-mail addresses, under KRS 61.878(1)(a).

Open Records Decision

On May 6, 2020, Shawn R. Burden (“Appellant”) requested a copy of “[a]ll submissions to the ‘Team Kentucky Non-Compliance Reporting (COVID-19)’ website from the first date the site was accepting submission[s] to the current date[.]” In a timely written response, the Cabinet acknowledged that it possessed documents responsive to his request, namely, all complaints received via the KY-SAFER Hotline, whether telephonically or electronically. The Cabinet provided spreadsheets listing the identity of the complainant (if provided), his or her contact information, and a summary of the complaint. However, the Cabinet categorically redacted complainants’ names, addresses, and contact information such as telephone numbers and e-mail addresses under KRS 61.878(1)(a). Appellant now challenges the Cabinet’s redactions to the spreadsheets.

Public records that contain “information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy” are exempt from disclosure under KRS 61.878(1). However, like all exemptions, the personal privacy exemption must “be strictly construed.” KRS 61.871. The “unambiguous purpose of the Open Records Act is the disclosure of public records even though such disclosure ‘may cause inconvenience or embarrassment to public officials or others.’” *Beckham v. Bd. of Educ. of Jefferson Cty.*, 873 S.W.2d 575, 577 (Ky. 1994) (quoting KRS 61.871).

To determine whether a record may be properly redacted or withheld under KRS 61.878(1)(a), this Office measures the public’s right to know that public agencies are properly executing their functions against the “countervailing public interest in personal privacy” when the records in dispute contain information that touches upon the “most intimate and personal features of private lives.” *Ky. Bd. of Examiners of Psychologists v. Courier-Journal and Louisville Times Co.*, 826 S.W.2d 324, 328 (Ky. 1992). This balancing test requires 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.

To be sure, there are certain categories of personal information that public agencies may categorically redact. In *Kentucky New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76 (Ky. 2013), the Kentucky Supreme Court recognized that private citizens’ addresses, telephone numbers, social security numbers, and driver’s license numbers will hardly ever provide insight into whether a public agency is properly executing its function. *See also Zink v. Com., Dept. of Workers’ Claims, Labor Cabinet*, 902 S.W.2d 825 (Ky. App. 1994). As such, the Cabinet was right to redact each complainant’s address, telephone number, and personal e-mail address.

However, in *Kentucky New Era* the Court did not sanction the categorical redaction of private citizens’ names. In fact, there are some instances where the public’s right to know the identity of a private citizen is paramount to monitoring the propriety of public agency action. In *Cape Publications, Inc. v. Univ. of Louisville Foundation, Inc.*, 260 S.W.3d 818 (Ky. 2008), the Court found that the public had a legitimate interest in the names of private donors to public universities. *Id.* at 822. However, the determination of whether a particular name could be released

depended upon what steps the private donor took to preserve his or her privacy. As a result, the names of those donors who sought anonymity could be properly withheld, but not the names of donors who failed to request anonymity. *Id.* at 824.

Here, this Office must weigh the public's interest in knowing the names of complainants against the privacy interests at stake. The KY-SAFER Hotline was established to allow private citizens to report violations of the Governor's social distancing orders and recommendations. If a complaint is substantiated, the Cabinet will "take appropriate action to ensure the public health and safety of Kentuckians."¹ However, it remains unclear what constitutes "appropriate action." In addition, the Cabinet has not indicated there is any mechanism for a hearing by which those charged with non-compliance may confront their accusers; nor is there any means by which the public can determine whether the Cabinet investigates every complaint of alleged non-compliance thoroughly and fairly or whether it imposes penalties, if any, in a proper and consistent manner. Without such procedures, it is unclear if an accused will ever be afforded the opportunity to confront his accuser. The accuser could be a genuinely concerned citizen, or the accuser could be a competitor seeking advantage. This lack of a transparent process, coupled with the severe consequences that can result from an erroneous determination, strongly suggest that the public has a legitimate interest in the identities of the complainants.

As for the privacy interests at stake, long ago this Office recognized that "a person's name is personal but it is the least private thing about him . . . [and] should not be deleted from a public record unless there is some special reason provided by statute or court order (i.e., adoption records)." OAG 82-234, p. 3. Nevertheless, this Office has also considered a request for anonymity as being critical in determining whether KRS 61.878(1)(a) applies to a person's identity. *Compare* 12-ORD-149 (finding that agency failed to demonstrate that the complainant sought anonymity) *with* 16-ORD-055 (finding that agency met its burden because the complainant sought anonymity out of fear of retaliation). Moreover, a private individual's privacy "interest becomes stronger with regard to personal information the dissemination of which could subject him or her to adverse repercussions. Such repercussions can include embarrassment, stigma, reprisal, all the way to threats of physical harm." *Kentucky New Era*, 415 S.W.3d 76

¹ KYSafer, available at <https://govstatus.egov.com/kysafer> (last accessed June 12, 2020).

at 83. Conversely, an individual's privacy interest in his or her name, which is already minimal, diminishes when there is no indication that dissemination could subject that individual to adverse consequences.

In this case, the Cabinet has explained that complainants are not required to give their names and they can submit their complaints anonymously. Additionally, there is no suggestion in the record that the complainants are in danger of reprisal or physical harm. In those instances where the complainant did not choose to remain anonymous, it significantly undermines any claim that the complainant legitimately feared negative consequences.²

Weighing the significant public interest in ensuring the Cabinet is properly and effectively performing its governmental function, particularly under these unprecedented circumstances, against the minimal privacy interest in retaining the anonymity of the individuals who did not request anonymity, the Attorney General finds that the Cabinet erred in withholding the complainants' names and thus violated the Act, but properly withheld their personal and contact information pursuant to KRS 61.878(1)(a).

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.

² On the other hand, the Cabinet cannot produce nonexistent records (or fields) nor is the Cabinet required to "prove a negative" in order to refute an unsubstantiated claim that certain records exist in the possession or custody of the agency in the absence of a *prima facie* showing by the requester. See *Bowling v. Lexington Fayette Urban Cty. Gov't*, 172 S.W.3d 333, 340-341 (Ky. 2005). If the Cabinet does not possess the names of some complainants, because those complainants did not provide their names, the Cabinet cannot provide that information.

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Distributed to:

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