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20-ORD-120

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In re: Artis Anderson/Cabinet for Health and Family Services

Summary: The Cabinet for Health and Family Services ("Cabinet") violated the Open Records Act ("Act") by failing to issue a timely written response to a request to inspect records. The Cabinet also violated the Act by failing to carry its burden of establishing that the attorney-client privilege applied to deny inspection of certain records.

Open Records Decision

On May 4, 2020, Artis Anderson ("Appellant") requested from the Cabinet fourteen categories of records that will be addressed below. Because Appellant did not receive any response from the Cabinet, he initiated this appeal challenging the constructive denial of his request. Based on the following, this Office finds that the Cabinet violated the Act when it failed to timely respond to a request to inspect records and because it failed to carry its burden of establishing that certain records were exempt from inspection due to the attorney-client privilege. The Cabinet otherwise appropriately denied the remaining requests.

Procedural violations. The Cabinet acknowledges that it received Appellant's request on May 7, 2020, but failed to log the request in the Cabinet's internal tracking system and mail a response to Appellant as required under KRS 61.880(1). On appeal, the Cabinet's initial response addressed eight of the fourteen categories of records requested, but stated without further explanation that it was "currently processing the remainder" of Appellant's May 4 request. The Cabinet

stated that it would "need to review any remaining responsive records to determine if they are releasable" once it received the outstanding records from the "appropriate departments[.]" The Cabinet stated that "any possible remaining documents" would not be available for inspection until June 26, 2020. Subsequently, on June 24, 2020, the Cabinet supplemented its response on appeal to address the remaining categories of records.

Under, KRS 61.880(1) 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."[1] However, under KRS 61.872(5), if public records are "in active use, in storage or not otherwise available," the public agency shall notify the requester within three days of the request and provide a "detailed explanation of the cause" for delaying inspection and "the place, time, and earliest date on which the public record will be available for inspection." Having failed to notify Appellant that the records were "in active use, in storage, or otherwise not available" or provide Appellant a detailed explanation for the cause of delay, the Cabinet violated the Act.

The personal privacy exception under KRS 61.878(1)(a). The Cabinet denied several of Appellant's requests under KRS 61.878(1)(a). Several of Appellant's requests implicated the financial records of specific private individuals, but he also sought "the names of other elderly Kentuckians" whose marriages the Cabinet had sought to annul.

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

[1] In response to the public health emergency caused by the novel coronavirus, the General Assembly enacted Senate Bill 150, which, among other things, extends the time for public agencies to respond to open records requests to ten days. However, the Cabinet did not respond to Appellant until more than a month after the request.

unwarranted' is intrinsically situational, and can only be determined within a specific context." *Id*. at 327-28.

The financial condition of private citizens is inherently personal and private information. In fact, this Office has previously recognized that "[t]here may be nothing that an individual wishes to protect more and prevent from public disclosure than his or her financial records." 02-ORD-209. Only in rare and exceptional circumstances would the public interest in a person's finances be so great as to overcome the strong presumption that these types of records remain confidential. In 02-ORD-209, this Office found that a woman's privacy interest in her financial records possessed by the Transportation Cabinet outweighed the public interest in those records, even when she was suing the Governor in highly publicized litigation. Accordingly, the Cabinet did not violate the Act when it denied access to the financial records Appellant requested.

Regarding Appellant's request for the names of those individuals whose marriages the Cabinet sought to annul, the Kentucky Supreme Court has held that certain categories of personal information may be categorically redacted under KRS 61.878(1)(a). *See Kentucky New Era v. City of Hopkinsville*, 415 S.W.3d 76 (Ky. 2013). However, the Kentucky Supreme Court did not extend such categorical redaction to the names of individuals. *Id*. at 86 ("As it now stands, the newspaper will be given the names of those involved[.]"). However, this Office need not decide whether KRS 61.878(1)(a) applies here because Appellant's request sought information, not public records. The Cabinet is not required to compile a list of names for Appellant to inspect. *See Dep't of Revenue v. Eifler*, 436 S.W.3d 550, 534 (Ky. App. 2013) ("The ORA does not dictate that public agencies must gather and supply information not regularly kept as part of its records.") Accordingly, the Cabinet did not violate the Act in denying Appellant's request for the names of individuals whose marriages the Cabinet sought to annul.

Attorney-client privilege under KRE 503. Appellant also requested a copy of any contract establishing an attorney-client relationship between Seth Thomas, an attorney, and Patricia Wiley, a former social worker no longer employed by the Cabinet. Appellant also sought any contracts establishing an attorney-client relationship between Mr. Thomas and Ms. Reynolds.[2] In addition, Appellant

[2] Ms. Reynolds was formerly married to Appellant. All of Appellant's requests relate, in some way, to the Cabinet's investigation of allegations of elder abuse allegedly committed against Ms. Reynolds by Appellant.

sought emails and communications exchanged between Mr. Thomas and Ms. Wiley.

It is not clear from the record on appeal whether the Cabinet possesses copies of the requested contracts. The Cabinet did not expressly state that copies of the contracts do not exist. Rather, the Cabinet denied Appellant's requests for these records based on the attorney-client privilege.

The attorney-client privilege applies to communications between a client and a lawyer "made for the purpose of facilitating the rendition of professional legal services to the client[.]" KRE 503(b). The privilege also protects communications between lawyers and representatives of their clients. KRE 503(b)(1). For the privilege to apply, the communication must be confidential, i.e. "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." KRE 503(a)(5). The privilege is incorporated into the Act by KRS 61.878(1)(l). *Hahn v. Univ. of Louisville*, 80 S.W.3d 771, 774 (Ky. App. 2001).

However, not all communications to which an attorney is a party are privileged communications. For example, "the privilege does not extend to contracts and billing records of attorneys working for a public agency." 97-ORD-66, p. 10. Therefore, if the requested contracts exist they are not shielded by the privilege. Moreover, the Cabinet did not carry its burden of explaining how the attorney-client privilege applies to deny inspection of the requested communications. KRS 61.880(2)(c). The Cabinet has not confirmed that Mr. Thomas provided legal representation to either Ms. Wiley or Ms. Reynolds, or that the subject communications were made in the course of rendering legal services. Because the Cabinet failed to meet its burden of establishing that the attorney-client privilege applied, it violated the Act.[3]

Records required to be kept confidential under KRS 194A.060(1). Appellant also requested copies of correspondence between Ms. Wiley (the former social worker), Robert Horn (Ms. Reynolds's legal guardian), and Ms. Reynolds's

[3] Although the Cabinet has failed to meet its burden of establishing that KRE 503 applies here, it does not mean that Appellant may have access to these records. *See Edmondson v. Alig*, 926 S.W.2d 856, 859 (Ky. App. 1996) (reversing the trial court's order to disclose records that may be confidential pursuant to applicable statutes, and ordering the circuit court to review the records *in camera* prior to ordering their release.)

daughter. The Cabinet denied these requests under KRS 194A.060(1), which requires the Cabinet to "promulgate administrative regulations that protect the confidential nature of all records and reports of the cabinet that directly or indirectly identify a [current or former] client or patient . . . of the cabinet and that ensure that these records are not disclosed to or by any person except" when the person, or her guardian, gives consent or when disclosure may be permitted under state or federal law. Further recognizing the sensitivity of these records, KRS 194A.060(2) provides that "[i]n all instances, the individual's right to privacy is to be respected." KRS 61.878(1)(l) exempts public records that have been made confidential by an act of the General Assembly, and KRS 194A.060 expresses the General Assembly's intent that these records should remain confidential. Accordingly, the Cabinet did not violate the Act in denying these requests.[4]

Nonexistent Records. Appellant also requested copies of interrogatories he served upon Ms. Wiley in a civil suit in 2015, as well as a copy of any video recorded by an identified law enforcement officer that depicted "the nakedness" of Ms. Reynolds. The Cabinet denied these requests by stating that it had searched for responsive records but was unable to locate responsive records.

The right to inspect and receive copies of public records only attaches if the records are "prepared, owned, used, in the possession of or retained by a public agency." KRS 61.870(2). A public agency cannot produce that which it does not have nor is a public agency required to "prove a negative" in order to refute an unsubstantiated claim that certain records exist. *Bowling v. Lexington-Fayette Urban Cty. Gov't*, 172 S.W.3d 333, 341 (Ky. 2005). Rather, the requester is first required to make a *prima facie* showing that records he requested exist in the possession of the agency. *Id.*

Regarding the requested interrogatories that Appellant purportedly served on Ms. Wiley, the Cabinet explained that Ms. Wiley "was not a named defendant in [the civil action]. Therefore, even if served an Interrogatory by Mr. Anderson, Ms. Wiley would be under no obligation to answer or maintain a copy in state records." Likewise, the Cabinet claims it never recorded a video matching the description Appellant provided. The Cabinet referred Appellant to the Woodford

[4] This Office further notes that in 16-ORD-046, and subsequently in 16-ORD-074, the Attorney General held that Mr. Anderson could not view client records without verification of his entitlement to such records pursuant to KRS 209.140. *See also* 17-ORD-074.

County Sheriff's Office, another public agency that may possess a copy of the requested video. *See* KRS 61.872(4). Although Appellant has not made a *prima facie* showing that these records exist in the Cabinet's possession, the Cabinet has explained why these records do not exist in its possession. There being no evidence to refute the Cabinet's claim that these records do not exist, this Office finds that the Cabinet did not violate the Act in denying these requests.

Moot Issues. Finally, Appellant requested copies of neglect or abuse complaints against him in which Ms. Reynolds was the alleged victim. The Cabinet agreed to provide Appellant with a copy of those complaints. Likewise, the Cabinet ultimately agreed to provide Appellant with a copy of documents responsive to Appellant's request for records of funds the Cabinet has received to combat elder abuse and the disbursement of those funds. Accordingly, the issues presented regarding accessibility of these records are now moot. *See* 40 KAR 1:030 § 6.

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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/s/ Michelle D. Harrison

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Distributed to:

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