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20-ORD-183

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In re: Dinsmore & Shohl/Laurel County Correctional Center

Summary: The Laurel County Correctional Center ("Center") violated the Open Records Act ("the Act") when it failed to issue a timely written response denying a request for records and when it denied requested records as confidential and proprietary information.

Open Records Decision

On July 2, 2020, attorneys from Dinsmore & Shohl ("Appellant") submitted a request to the Center to obtain copies of records associated with the Center's use of a technology product provided by a private company, Codex Corp., d/b/a Guardian RFID ("Guardian"). Specifically, Appellant sought:

1) All documents referring to cell checks within the Center;
2) All documents related to cell check system vendors of the Center;
3) All documents referring to or mentioning Guardian; and
4) All correspondence between representatives of the Center and Guardian.

On August 4, 2020, the Center responded by forwarding an email authored by a Guardian representative. Guardian, and therefore the Center, claimed that three categories of responsive records would be withheld as exempt under KRS 61.878(1)(c)1.[1] Those records included email communications between Guardian representatives and the Center, the "Guardian RFID Quickstart [sic] Guide," and

[1] The Center provided other responsive records for which it did not claim an exemption.

"Guardian RFID Interface Documentation revised on December 5, 2019." This appeal followed.

As an initial matter, the Center violated the Act when it failed to issue a written response within the statutory period. The Center claims that it "reached out" to Appellant on July 22, 2020, because that was the date the request was received. But even if that is true, it was required to issue a written response within ten days.[2] Because the Center did not issue a written response until August 4, 2020, more than ten days after it claims to have received the request, its response was untimely.

Under KRS 61.878(1)(c)1., a public agency may deny a request for "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." Generally, this exemption applies to financial information a company provides to a public agency that might permit a competitor to ascertain the economic status of the company. *See Marina Management Service, Inc. v. Com. of Ky., Cabinet for Tourism*, 906 S.W.2d 318, 319 (Ky. 1995). Company trade secrets may also be withheld under KRS 61.878(1)(c)1. *See Cabinet for Economic Development v. Courier-journal, Inc.*, No. 2018-CA-001131, 2019 WL 2147510 *9 (Ky. App. May 17, 2019) (unpublished) (finding that the records at issue were "not in the nature of trade secrets, investment strategies, economic status, or business structures" and thus could not be withheld). "[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) (overruled on other grounds by *Hoskins v. Maricle*, 150 S.W.3d 1 (Ky. 2005)).

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[2] Normally, a public agency must respond to an open records request within three business days. KRS 61.880(1). In response to the public health emergency caused by the novel coronavirus, however, the General Assembly modified that requirement when it enacted Senate Bill 150 ("SB 150"), which became law on March 30, 2020, following the Governor's signature. SB 150 provides, notwithstanding the provisions of the Act, that "a public agency shall respond to the request to inspect or receive copies of public records within 10 days of its receipt." SB150 § 1(8)(a).

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 the redaction of certain information 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 more than a trivial unfair commercial advantage if disclosed. Here, the Center has failed to carry its burden for each category of records.

Emails between Guardian and the Center. The first category of records that the Center withheld included email communications between Guardian and the Center. Guardian claimed that these emails contained "an individual's comments about [another commercial entity] and its offerings." Guardian claimed these emails were sent in confidence and that Guardian's knowledge about a competing company is proprietary. However, neither the Center nor Guardian explain how a Guardian employee's knowledge about *another company* is Guardian's proprietary information. Therefore, there is no basis to withhold these emails under KRS 61.878(1)(c)1.

Another set of emails relates to the "operation" of Guardian's cell check system and questions about its "Go Live" date. However, neither Guardian nor the Center explain how the disclosure of these emails will provide "more than a trivial unfair advantage." *Southeastern United Medigroup, Inc.,* 952 S.W.2d at 199. It is unclear how the emails that contain questions about the "Go Live" date could provide any unfair advantage to a competitor. Presumably, the "Go Live" date has already occurred, and any issues related to that event have been resolved. On the other hand, emails about the "operation" of the system may contain proprietary trade secret information, if those discussions about the system would reveal the software code or other information permitting a competitor to "reverse engineer" the system.[3] But neither Guardian nor the Center demonstrate that to be the case, and they simply assert, without explanation, that the emails are about the system's "operation" and should not be disclosed. This bare assertion is not sufficient to carry the agency's burden under KRS 61.880(2)(c).

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[3] As used in this decision, the phrase "reverse engineer" means the ability for a competitor to obtain sufficient information about the design of the system such that the competitor could substantially replicate the design and sell it as a competing product.

Guardian RFID Quickstart Guide. The Guardian RFID Quickstart guide "is an overall description of the system and how to operate it[.]" Guardian states that this guide "is created to be unique to the individual user." As with the emails, Guardian fails to explain how a competitor could obtain a commercial advantage by obtaining a copy of this guide. Based on the title of the record, it is possible that this record contains information that could be considered a trade secret if a person could take the contents of the guide and reverse engineer the design of the system. But Guardian has not demonstrated that to be the case, and it is not for this Office to speculate whether disclosure might lead to an unfair commercial advantage. Moreover, under KRS 61.880(4), the Center is required to separate exempt records from nonexempt records, and to produce the nonexempt records. Neither Guardian nor the Center have explained why portions of the guide could not be redacted. Again, the public agency bears the burden of proof, and simply claiming that a record will provide an unfair competitive advantage is insufficient to carry that burden. KRS 61.880(2)(c).

Guardian RFID Interface Documentation. Guardian and the Center explained that "[t]he document discusses support for one-way and two-way integration with jail, records, and case management systems . . . . It was provided to the [Center] to aid in their use of the system." Again, this vague description does not explain why the record should be considered proprietary or how its release would provide an unfair advantage to a competitor. To prove that the potential unfair advantage is "more than trivial" the agency must explain what the unfair advantage actually is. *See Southeastern United Medigroup, Inc.*, 952 S.W.2d at 199. Repeating the language in KRS 61.878(1)(c)1. is not sufficient. Therefore, the Center violated the Act when it denied records as exempt under KRS 61.878(1)(c)1. without explaining how a competitor could obtain a competitive advantage.

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.

Daniel Cameron
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/s/Marc Manley
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