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**20-ORD-184**

November 24, 2020

In re: Charlie Dietz/Kentucky Labor Cabinet

**Summary:** The Kentucky Labor Cabinet (“Cabinet”) violated the Open Records Act (“Act”) when it withheld the names of private individuals who submitted complaints to the KY-SAFER Hotline.

***Open Records Decision***

Charlie Dietz (“Appellant”) requested from the Cabinet a copy of “[a]ll reports generated, logs and data collected from reports made” to the KY SAFER reporting service, regardless of whether the reports were received via the KY SAFER telephone reporting system or the KY SAFER website, between July 07, 2020 and August 29, 2020. Appellant also sought copies of any warning letters, violation notices, cease and desist orders, citations, or inspection reports that the Cabinet issued between March 15, 2020 and August 29, 2020, regarding violations of the Governor’s Covid-19 executive orders and guidelines.

In a timely written response, the Cabinet produced copies of the requested reports that it had extracted from the web portal and telephone system. With regard to the warning letters, violation notices, and other citation documents, the Cabinet attached responsive documents generated through July 24, 2020, and stated that documents generated after July 24 were still being compiled and would be available no later than September 21, 2020.

However, the Cabinet, citing KRS 61.878(1)(a), redacted from all of the documents the names of the complainants and any personal identifying information, such as addresses and telephone numbers. The Cabinet cited

*Kentucky New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76 (Ky. 2013) and *Zink v. Commonwealth*, 902 S.W.2d 825 (Ky. App. 1994) in support of its position that names of private individuals may be properly withheld under the circumstances presented. Shortly thereafter, Appellant initiated this appeal. He challenges only the Cabinet's redaction of the complainants' names.

The Attorney General has already addressed the sole question presented in this appeal. See 20-ORD-089; 20-ORD-091.<sup>1</sup> In general, this Office has assigned little weight to the privacy interest associated with a name appearing in a public record without corresponding personal contact information, the redaction of which Appellant does not challenge. See, e.g., OAG 82-234 (finding that an individual's name is the least private thing about him.). The relevant "analysis does not turn on the purposes for which the request for information is made or the identity of the person making the request." *Zink*, 902 S.W.2d at 828. Rather, "the Legislature clearly intended to grant any member of the public as much right to access to information as the next."<sup>2</sup> *Id.* Accordingly, the only relevant public interest considered "is the extent to which disclosure would serve the principle [sic] purpose of the Open Records Act. . . . [T]he purpose of disclosure focuses on the citizens' right to be informed as to what their government is doing." *Id.* at 828-29.

Here, as in 20-ORD-089, the Cabinet argues that disclosure of the complainants' names "does not advance the public purpose of the Open Records Act in providing accountability for the Cabinet's actions, and that categorical redaction of this information" was justified under KRS 61.878(1)(a). The Cabinet maintains that relevant information has been disclosed, including "the number and type of complaints received, the substance of the complaints, and the final action taken on the complaints." In making the same arguments as before, the Cabinet ignores the crucial information (or lack thereof) that weighed heavily in

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<sup>1</sup> On appeal, the Cabinet noted that neither decision carries the force and effect of law under KRS 61.880(5)(b) in light of the ongoing litigation challenging the result in both cases. See *Kentucky Labor Cabinet v. Burden*, Franklin circuit Court Case No. 20-CI-00565 and *Kentucky Labor Cabinet v. Hunt*, Franklin Circuit Court Case No. 20-CI-00564. However, this Office will continue to adhere to the position reflected in those decisions when the facts and arguments presented by the agency remain the same and no published appellate opinion rejects the Attorney General's analysis. See, e.g., 16-ORD-173, p. 2; 06-ORD-230; 07-ORD-132; 08-ORD-049; 18-ORD-001.

<sup>2</sup> The only exception to this rule is found at KRS 61.874(4)(b), which does not apply here.

favor of disclosure – the complete absence of any due process in adjudicating these complaints. As stated in 20-ORD-089:

[T]he 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.

Yet the Cabinet persists in its refusal to explain what due process procedures, if any, it uses to adjudicate these complaints. Does the Cabinet independently verify each complaint prior to issuing a notice of violation, or does it depend solely on an unverified statement by a member of the public to sanction business? If the former, then the interest in the identity of the complainant would be diminished. *See e.g.*, 20-ORD-185 (finding that the public interest in the identity of complainants was diminished because the Northern Kentucky Health Department independently verified the substance of complaints prior to issuing sanctions.) If the latter, then the only mechanism the public may use to determine why certain businesses are punished is through requests made under the Act for records identifying the source and basis of the alleged violation. *See, e.g.*, 20-ORD-089.

Instead of explaining the procedures in place to address these complaints, like the Northern Kentucky Health Department in 20-ORD-185, the Cabinet claims that Appellant is a member of a specific Facebook group and that he posts the information that he obtains under the Act on that social media page. The Cabinet asserts that Appellant's disclosure of such information "will have a chilling effect on citizens' good-faith reporting of non-compliance with public health orders"

and may create the “very real potential for the possibility of harassment for those who have filed complaints[.]”

Calling public attention to the activities of governmental agencies, and inviting scrutiny to ensure equal and fair treatment when no other procedure apparently exists, is one of the primary purposes of the Act. If the government is making decisions about which businesses it will sanction based on unverified statements, the public has a right to know the identity of those complainants. But if the government is sanctioning businesses based on the independent observations of its investigators, and no violation is issued based on unverified complainant statements, then the complainant’s identity becomes largely irrelevant because the complainant’s statements would not have caused the government to sanction the business. *See, e.g.,* 20-ORD-185. Having failed to explain what due process procedures are afforded the accused, such that the public’s interest in the complainant’s identity could be diminished, the Cabinet has failed to carry its burden that KRS 61.878(1)(a) applies to withhold these names. KRS 61.880(2)(c). As such, it violated the Act.

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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#301

Distributed to:

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