



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

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20-ORD-185

November 24, 2020

In re: Charlie Dietz/Northern Kentucky Health Department

Summary: The Northern Kentucky Health Department (“Department”) did not violate the Open Records Act (“Act”) when it redacted the names of private individuals from public complaints it received alleging noncompliance with executive orders relating to COVID-19 because the Department does not issue notices of violation based upon unverified complaints.

Open Records Decision

Charlie Dietz (“Appellant”) requested from the Department a copy of “[a]ll reports, logs, and data related to public complaints reported to [the Department] in regards to COVID-19/Governor’s Executive Orders, specifically including the complainant’s name (if provided)” during a specified date range. Appellant also requested “any warning letters, violation notices, cease and desist orders, citations or inspection reports issued by [the Department] in regards to” the same complaints made during the same period.

In a timely response, the Department provided 50 pages of responsive records. However, the Department cited KRS 61.878(1)(a) to justify its redaction of each complainant’s name from each of the reports, logs, and complaints it had received. The sole question presented on appeal is whether the Department violated the Act in redacting the name of the complainant from all existing responsive documents on the basis of KRS 61.878(1)(a).

Under KRS 61.878(1)(a), a public agency may withhold “information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.” 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 public record may be redacted or withheld under KRS 61.878(1)(a), this Office must weigh the public’s right to know that a public agency is properly executing its 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.

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 rarely provide insight regarding whether a public agency is properly executing its functions, and that information may be categorically redacted. *See also Zink v. Com., Dept. of Workers’ Claims, Labor Cabinet*, 902 S.W.2d 825 (Ky. App. 1994). Significantly, however, the *Kentucky New Era* Court did not authorize the categorical redaction of private citizens’ names.

As for the privacy interests that are implicated here, 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; 20-ORD-089. However, this Office has also deemed a request for anonymity to be critical in determining whether KRS 61.878(1)(a) permits withholding a person’s identity. *Compare* 12-ORD-149 (finding that the 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).

In 20-ORD-089, this Office recognized that in some instances a private citizen's identity is necessary to assess the propriety of the actions taken by a public agency. For example, in *Cape Publications, Inc. v. University of Louisville Foundation, Inc.*, 260 S.W.3d 818, 822 (Ky. 2008), the Court found that the public had a legitimate interest in knowing the names of private donors to a public university to assess potential impropriety and sources of undue influence via monetary contributions. However, the determination of whether the University was required to release a specific donor's name was dependent upon what steps, if any, the private donor had taken to preserve his or her privacy. *Id.* "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." 20-ORD-089, p. 2 (citing *Cape Publications v. Univ. of Louisville*, 260 S.W.3d 818 at 824).

This Office weighed these interests in 20-ORD-089. There, the Office considered whether the Labor Cabinet could redact the names of complainants. This Office found that it could not; the public had a strong interest in learning the names of the complainants where the Cabinet had taken action based on those complaints without providing any due process to the individuals and companies against whom the Cabinet had taken action. Thus, the lack of a transparent process, coupled with the severe consequences that could result from an erroneous determination, weighed strongly in favor of public disclosure of the complainants' names. *Id.*

Similarly, in 20-ORD-091, this Office noted that the Labor Cabinet had ordered Appellant to close his business, but had later retracted that order without providing the appellant there with any information regarding the basis for the Cabinet's action or its ultimate rescission of the order. Based upon those facts, and the reasoning outlined in 20-ORD-089, this Office concluded that "the public interest weighs strongly in favor of disclosure of the complainant's name and outweigh[ed] the complainant's privacy interest." 20-ORD-091, p. 2.

But this appeal is distinguishable, and that distinction compels a different result than that reached in 20-ORD-089 or 20-ORD-091. Here, the Department has explained that its investigative process does not simply take a claim of

noncompliance at face value. Instead, upon receiving a complaint alleging noncompliance, the Department sends an investigator to independently observe the business and report his or her findings. Any notice of violation that the Department issues is based upon the independent observations of the investigator, and the allegations made in a complaint have no bearing on whether the Department concludes that a violation has occurred. Accordingly, the Department maintains that the identity of the complainant is legally irrelevant in this case, unlike in 20-ORD-089, because the complaint “does nothing more than alert the [Department] that” it should investigate regarding the business’s compliance with the executive orders.

In addition, the Department emphasizes that due process requirements are satisfied through an existing process. In particular, a business owner who has received a citation may appeal the Department’s decision as provided in KRS Chapter 13B. The Labor Cabinet, in contrast, has never claimed that it independently investigates each complaint to confirm that a “violation” has occurred, or that the accused is granted a right to appeal that determination. *See, e.g.,* 20-ORD-184. For all of these reasons, the Attorney General finds that the Department properly relied upon KRS 61.878(1)(a) to redact the names of each complainant from the records it provided to Appellant.

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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