20-ORD-197

December 11, 2020

In re: Kevin Hayes/Kentucky Labor Cabinet

Summary: The Kentucky Labor Cabinet ("Cabinet") did not violate the Open Records Act when it denied a request for records that failed to precisely describe the records sought because the request, as framed, would have required the Cabinet to produce confidential and proprietary software code.

Open Records Decision

On July 31, 2020, Kevin Hayes ("Appellant") requested from the Cabinet a copy of "all non-system databases/tables on the SQL Server established for OSHA Express," or "all system data" if production in that format would be easier for the Cabinet. In a timely response, the Cabinet denied Appellant's request under KRS 61.878(1)(c)1., and claimed that the OSHA Express "database design, including any [and] all database table definitions, are considered proprietary to the OSHA Express® software." The Cabinet also denied the request as "overly broad" and invited Appellant to resubmit his request "and identify, with specificity, the documents" he was requesting. This appeal followed.

Given the technical nature of Appellant's request, the Cabinet reasonably interpreted the request as one seeking the entire OSHA Express system itself, including the design of database tables. Thus, the Cabinet denied the request under the exemption stated in KRS 61.878(1)(c)1. Under that exemption, an agency may deny inspection of "records confidentially 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." *Id.*

Generally, KRS 61.878(1)(c)1. applies to financial information that, if disclosed, 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). Such information may be withheld under the Act. Trade secrets may also be withheld under KRS 61.878(1)(c)1. *Cf. 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 May 17, 2019) (unpublished) (finding that the records at issue were "not in the nature of trade secrets, investment strategies, economic status, or business structures" and thus could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)).

On appeal, the Cabinet defends its claimed exemption. It explains that Assured Consulting Solutions, LLC ("ACS"), developed the OSHA Express software program. The program contains data from all OSHA-related complaints the Cabinet has received, and it includes legacy data from 1980 that was transferred from an older system. The data is categorized in tables using software code designed and developed by ACS. When the Cabinet adopted the OSHA Express system, it executed a nondisclosure agreement with ACS. Under that agreement, the Cabinet owns the data contained within the program, but ACS owns the OSHA Express software code that categorizes and displays such data. According to the Cabinet, "the database design, including any [and] all database table definitions," is confidential and proprietary information that, if disclosed, could permit a person to duplicate the software design. In other words, disclosing the software code would provide a competitor "substantially more than a trivial unfair advantage[.]" *Hughes*, 952 S.W.2d at 199.

The parties agree that "non-system data," which Appellant requested, is the raw data that the Cabinet enters into the system as it completes its reports, inspections, and investigations. This is the information, or data, which the Cabinet owns. The Cabinet has no objection to producing electronic or print records that

contain this information. However, if the "non-system data" is extracted from the system in the manner that Appellant has requested, the data is incomprehensible.[1] On the other hand, "system data," the parties agree, includes the "table designs" and "table definitions." Producing that material would necessarily require the Cabinet to produce the underlying software code, which is proprietary to ACS. ACS's software code is its trade secret. It confidentially discloses that code to the Cabinet when it grants the Cabinet a license to use the program. Therefore, ACS's software code may be withheld under KRS 61.878(1)(c)1.

Because the Cabinet agrees that the records it produces in the course of its investigation of OSHA complaints, and which are contained in the OSHA Express system, are public records subject to inspection, and the Cabinet is willing to produce those records if provided a specific request, this case is unlike the request for public records considered by the Court of Appeals in *Department of Kentucky State Police v. Courier-Journal*, 601 S.W.3d 501 (Ky. App. 2020). In that case, the Courier-Journal requested "[a]n electronic copy of the Uniform Citation File database and all its publicly available fields[.]" *Id*. at 503. The Courier-Journal then described in detail each of the many "publicly available fields" it sought. *Id*. (describing 31 different fields of information visible on ordinary uniform citations issued by law enforcement). The Kentucky State Police claimed, however, that it was unable to extract the public records from the database in a manner that would permit it to separate exempt records from nonexempt records. *Id*. at 507. Thus, it sought to deny the request in whole. Instead, in *Department of Kentucky State Police v. Courier-Journal*, the Court of Appeals explained that a public agency cannot store its data in a manner that prevents the agency from complying with the Act. *Id*.

Unlike the agency in *Department of Kentucky State Police v. Courier-Journal*, the Cabinet is able to generate several combinations of electronic reports based upon the specific fields of information sought. For example, the Cabinet explains that it could retrieve specific records or fields of information related to any "inspection, complaint, referral, accident and investigation within the system. From there the data could be exported to Excel or other formats that could be emailed or otherwise provided to the person for whom the open records request originated." When those electronic reports are generated and exported to a

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[1] The Cabinet explains that it could extract the "non-system data" itself, but that to do so would produce a meaningless string of characters. On appeal, the Cabinet provided a sample of such a file. It is incomprehensible.

spreadsheet in Excel or a similar program, the Cabinet is able to redact personal identifying information under KRS 61.878(1)(a). Moreover, such reports would not reveal the ACS's software code.

But Appellant did not request specific public records or fields of information contained within OSHA Express. Instead, Appellant sought all "non-system data," or all "system data," if that was easier to produce. In other words, Appellant asked the Cabinet to choose between two extremes: to produce all of the Cabinet's data even though it is incomprehensible computer jargon apart from the system (i.e., the "non-system data") *or* to produce all of the Cabinet's data *and* the software code that makes the data comprehensible (i.e., "system data"). That is a false dichotomy and not a properly framed request. As explained above, the Cabinet is capable of generating reports that can be exported to a spreadsheet containing specific fields of information sought.[2] Thus, the Cabinet is capable of separating the confidential and proprietary software code from the public records. To generate such reports, however, Appellant must precisely describe the public records or, in this case, the fields of information that he seeks.

Finally, to the extent that Appellant's request sought "any-and-all" records within OSHA Express, such a request does not "precisely describe" the public records sought, as is required under KRS 61.872(3)(b). And it is precisely the type of request this Office has historically agreed that an agency may reject. *See, e.g.*, 20-ORD-025; 13-ORD-077; 08-ORD-058. That is so because such "any-and-all" requests require agencies to produce an incalculable number of records. This case is no different. The Cabinet's database contains approximately 50,000 investigation files containing an untold number of records. For all of these reasons, the Cabinet appropriately denied Appellant's request as framed.

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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[2]   It appears that Appellant has asked the Cabinet to produce public records in a nonstandardized format. *See* KRS 61.874(3) ("If a public agency is asked to produce a record in a nonstandardized format, or to tailor the format to meet the request of an individual or a group, the public agency may at its discretion provide the requested format and recover staff costs as well as any actual costs incurred.").

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