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21-ORD-006

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In re: Robyn Smith/Labor Cabinet

Summary: The Labor Cabinet (“Cabinet”) violated the Open Records Act (“the Act”) when it denied a request to inspect training and skills assessment materials and certain directives issued to unemployment insurance referees.

Open Records Decision

On September 25, Robyn Smith (“Appellant”) requested that the Cabinet provide copies of all training and skills assessment materials for referees within the Office of Unemployment Insurance. She also requested copies of all directives given to referees for situations in which a party fails to appear at a hearing. In its search for responsive records, the Cabinet identified certain training materials and quality review reports as responsive records, but denied inspection of those records under KRS 341.190(4). This appeal followed.

On appeal, the Cabinet asserts that the training materials and quality reviews are confidential under KRS 341.190(4). KRS 341.190 requires certain unemployment compensation records and reports to remain confidential. For example, each “employing unit” must “keep true and accurate work records of all workers employed by it, of the wages paid by it to each worker, and such other information as the secretary of the . . . Cabinet considers necessary for the proper administration of this chapter.” KRS 341.190(2). Additionally, the secretary may request from any employing unit specific records related to individual workers as well as “other related matters . . . which the secretary considers necessary to the

effective administration of this chapter.” KRS 341.190(3). And under KRS 341.190(4), the subsection upon which the Cabinet relies, “[i]nformation obtained from an employing unit or individual and other records made by the cabinet in the administration of this chapter are confidential and shall not be published or be open for public inspection,” except as otherwise provided.

To justify denial of Appellant’s request, the Cabinet relies on a single clause within one subsection of KRS 341.190, which requires the Secretary to make confidential “[i]nformation obtained from an employing unit or individual and other records made by the cabinet in the administration of [KRS Chapter 341].” KRS 341.190(4) (emphasis added). The Cabinet’s proposed interpretation, however, is not supported by the text of the statute. And the “the text of the statute is supreme.” *Owen v. Univ. of Ky.*, 486 S.W.3d 266, 270 (Ky. 2016) (citing Scalia & Garner, *Reading Law* 56 (2012)). Moreover, “nothing requires a statute’s subsection to be read in a vacuum rather than in the context of the entire statute.” *Chrysalis House, Inc. v. Tackett*, 283 S.W.3d 671, 674 (Ky. 2009). As the Kentucky Supreme Court has stated:

In construing statutes, our goal, of course, is to give effect to the intent of the General Assembly. We derive that intent, if at all possible, from the language the General Assembly chose, either as defined by the General Assembly or as generally understood in the context of the matter under consideration. We presume that the General Assembly intended for the statute to be construed as a whole, for all of its parts to have meaning, and for it to harmonize with related statutes. We also presume that the General Assembly did not intend an absurd statute or an unconstitutional one.

Shawnee Telecom Resources, Inc. v. Brown, 354 S.W.3d 542, 551 (Ky. 2011) (citations omitted). In adhering to these principles of statutory interpretation, this Office is also specifically guided by KRS 61.871, which requires that exceptions to the Act be “strictly construed.”

KRS 341.190 requires the Secretary of the Education and Workforce Development Cabinet to protect information about individual workers and employers obtained in the course of administering the unemployment insurance program. Under the statute, an employer must “keep true and accurate work records of all workers employed by it, of the wages paid by it to each worker, and

such other information as the secretary of the . . . Cabinet considers necessary for the proper administration of this chapter.” KRS 341.190(2).¹ Additionally, the Secretary may request any information “which the secretary considers necessary to the effective administration of this chapter.” KRS 341.190(3). And under KRS 341.190(4), the subsection upon which the Cabinet relies, “[i]nformation obtained from an [employer] or individual and other records made by the cabinet in the administration of this chapter are confidential and shall not be published or be open for public inspection,” except as otherwise provided.

Each of these three subsections refer first to employers or individuals, and second, to certain records related to those groups of people – *i.e.*, wage statements, work records, termination records. Then, after identifying specific records, the subsections conclude with variations of a phrase referring to “other information” or “other records” that are necessary to administer KRS Chapter 341. By including such “catch-all” phrases throughout KRS 341.190, the General Assembly was referring to “other records” that are similar to wage statements, work records, and termination records. *Cf. Steinfeld v. Jefferson County Fiscal Court*, 229 S.W.2d 319, 320 (Ky. 1950) (finding that when a statute designates particular subjects or classes which are followed by a generally inclusive phrase, courts will limit the scope of the general phrase to include similar subjects or classes designated). The Cabinet’s interpretation, on the other hand, would make confidential every record it creates in the administration of the unemployment compensation program. Records related to Cabinet-employee disciplinary actions, time sheets, personnel files, travel reimbursements, and procurement records, to name a few, would be removed from public inspection under the Cabinet’s unmoored interpretation. That cannot be the case.²

¹ “[T]his chapter” refers to KRS Chapter 341, which pertains to Kentucky’s unemployment compensation program. As defined in KRS 341.005(1), “cabinet” means the Education and Workforce Development Cabinet. However, on August 14, 2020, the Governor issued Executive Order 2020-686 to transfer the unemployment compensation program to the Labor Cabinet.

² The Cabinet suggests that its broad reading of the confidentiality language in KRS 341.190(4) is controlling because, according to 05-ORD-186, this Office “will generally defer to the public agency in its interpretation of confidentiality provisions which are binding upon it.” KRS 61.871, however, requires that exceptions to the Act must “be strictly construed.” Under KRS 61.880(2)(c), the Attorney General, not the Cabinet, is tasked with adjudicating open records disputes. While this Office will consider an agency’s proposed interpretation of confidentiality provisions, this Office declines the invitation to abandon meaningful review of a dispute arising under the Act.

The Cabinet has not claimed that its training materials contain sensitive information pertaining to specific employers or workers. Nor has the Cabinet claimed that its quarterly quality reviews contain information about specific employers or workers.³ Consequently, these records are not confidential under KRS 341.190(4).

Finally, the Cabinet suggests that disclosure of these records may jeopardize its federal funding under 42 U.S.C. § 503. However, 42 U.S.C. § 503, on its face, does not include any provision making continued federal payments contingent on the States maintaining the confidentiality of records. The Department of Labor, however, has promulgated a regulation requiring confidentiality of “UC information which reveals the name or any identifying particular about any individual or any past or present employer or employing unit, or which could foreseeably be combined with other publicly available information to reveal any such particulars[.]” 20 CFR § 603.4(b). Therefore, only unemployment compensation information that identifies, or could foreseeably identify, any worker or employer is confidential under federal law. That is, federal law requires the same information to remain confidential as that required under KRS 341.190.

Moreover, as applicable here, the Department of Labor has specifically excluded “provisions, rules, regulations, and interpretations” of unemployment compensation law, “including statements of general policy and interpretations of general applicability” from the confidentiality requirement. 20 CFR § 603.2(c) (defining “public domain information”); 20 CFR § 603.5 (excluding “public domain information” from the confidentiality requirements). That is precisely what training materials are – interpretations of unemployment compensation law, and statements of general policy, that referees are required to learn.

Neither KRS 341.190 nor federal law requires that the training materials or quarterly reviews remain confidential. Those authorities only require that the identities of employers and workers, and certain information pertaining to them, remain confidential. If portions of the responsive records contain such

³ Even if the responsive records contained such information, the Cabinet has not explained why it could not redact such information. *See* KRS 61.878(4).

information, then those portions may be redacted. But the Cabinet violated the Act when it withheld the records in their entirety.

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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