



COMMONWEALTH OF KENTUCKY  
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**21-ORD-027**

February 9, 2021

In re: Paul Zapala/Louisville Metro Police Department

**Summary:** Because the Louisville Metro Police Department (“Department”) failed to respond to an open records request within ten days, it violated the Open Records Act (“the Act”) as modified by Senate Bill 150. The Department also violated the Act when it withheld autopsy records, other than autopsy photographs and recordings made confidential by KRS 72.031.

***Open Records Decision***

On October 7, 2020, Paul Zapala (“Appellant”) requested copies of a 911 call and an investigation report concerning a suicide that had occurred the previous month. The Department denied the request on November 10, 2020, under KRS 17.150(2) and KRS 61.878(1)(h), explaining that the investigation was not yet complete. This appeal followed.

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. 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.” SB 150 § 1(8)(a). The Department violated the Act by failing to respond to the Appellant’s request within ten days.

After the appeal was initiated, the Department completed its investigation and provided the Appellant most of the requested records. However, the Department relied on KRS 61.878(1)(a) to redact birth dates, telephone numbers, and Social Security numbers to protect personal information. In addition, the Department denied access to the Medical Examiner's written autopsy report and autopsy photographs under KRS 61.878(1)(a) and 61.878(1)(k), explaining that "the release of said information constitutes an unwarranted invasion of personal privacy without a HIPAA authorization" executed by the decedent's administrator or a court order.

Under KRS 72.031(1), autopsy photographs and recordings are not "open to the public unless the spouse or personal representative of the decedent provides an express waiver to the state medical examiner, coroner, or other public official in lawful possession of those materials to make those materials public."<sup>1</sup> Because neither the spouse or personal representative of the decedent provided such a waiver, the Department properly withheld the autopsy photographs, even though it did not expressly rely on KRS 72.031(1).

However, KRS 72.031(1) only applies to certain records of the Medical Examiner.<sup>2</sup> Therefore, the Department's redactions, and its decision to withhold other records maintained by the Medical Examiner, may only be sustained if KRS 61.878(1)(a) applies.<sup>3</sup>

KRS 61.878(1)(a) exempts "[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly

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<sup>1</sup> KRS 72.031(1) authorizes disclosure of autopsy photographs and recordings to certain categories of persons, none of which includes the Appellant.

<sup>2</sup> See 2017 Ky. Acts ch. 78, § 4 ("This Act [which creates KRS 72.031] is not meant to alter or change in any way the current law in the Commonwealth relating to the availability of autopsy records that are not otherwise specifically provided for in this Act.").

<sup>3</sup> The Department also claims that the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") requires the written autopsy report to be withheld. However, the Medical Examiner is not a "health plan, health clearinghouse, or healthcare provider" — the "covered entities" to which HIPAA applies. 42 U.S.C § 1320d-6(a); 45 CFR § 160.103. And there is no evidence that the Medical Examiner is a "business associate" of such covered entities, thus making it subject to HIPAA requirements as well. 45 CFR § 160.103. Therefore, HIPAA does not apply to the Medical Examiner to prevent the release of the written autopsy report.

unwarranted invasion of personal privacy[.]” In reviewing an agency’s denial of an open records request based on the personal privacy exemption, the courts and this Office balance the public’s right to know what is happening within government against the personal privacy interest at stake in the record. *See Zink v. Commonwealth, Dept. of Workers’ Claims*, 902 S.W.2d 825, 828 (Ky. App. 1994). However, the Kentucky Supreme Court has held that certain categories of information about private individuals provide minimal insight into governmental affairs and may be categorically redacted under KRS 61.878(1)(a). *Kentucky New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76, 89 (Ky. 2013). These categories include personal phone numbers, birth dates, and Social Security numbers. *Id.* Accordingly, the Department properly redacted that information from the responsive records. *See* KRS 61.878(4).

Although KRS 72.031 controls the inspection of autopsy photographs or recordings, KRS 61.878(1)(a) applies to the Medical Examiner’s other records. As stated previously, this Office must weigh the competing interest in privacy against the public’s interest in government oversight to determine whether KRS 61.878(1)(a) permits an agency to withhold a record. *See Zink*, 902 S.W.2d at 828. In the context of autopsy reports, this Office has previously weighed the competing interests at stake and has concluded that the public interest outweighs any competing privacy interest.

In 14-ORD-090, this Office found that written autopsy records must be disclosed to the public. When determining what personal privacy interests were at stake, this Office concluded that a decedent is unable to assert a cognizable privacy interest.<sup>4</sup> However, this Office also noted that the decedent’s family may have a cognizable privacy interest in the autopsy report. If the public agency provides proof of the surviving family members’ objections, then such objections may provide a compelling privacy interest that outweighs the public interest in the report. But the General Assembly has given

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<sup>4</sup> In doing so, this Office relied on OAG 81-149, in which the Attorney General opined that “a deceased person has no personal privacy rights and the personal privacy rights of living individuals do not reach to matters concerning deceased relatives.” This statement was made prior to Congress’ enacting HIPAA in 1996. Under federal law, a decedent maintains a privacy interest in health records for 50 years. 45 CFR § 160.103. Although HIPAA is not applicable here, because the Medical Examiner is not a “covered entity,” this Office notes that federal or state law may have created additional privacy rights for decedents that did not exist in the 1980s. *See, e.g.*, KRS 72.031.

heightened privacy protections to autopsy photographs under KRS 72.031, and denied similar protection to written autopsy reports. In doing so, the General Assembly has drawn a clear line demarking which portions of an autopsy report are subject to public inspection and which portions are not.

Here, the Department has presented no evidence that the decedent's family objects to release of the written autopsy report. Under KRS 61.880(2)(c), the public agency bears the burden of proof to support its denial of inspection. The Department has not met its burden that the Medical Examiner's records, other than autopsy photographs or recordings, are exempt under KRS 61.878(1)(a). For that reason, the Department violated the Act when it withheld the written autopsy reports.

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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/s/ James M. Herrick

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