



COMMONWEALTH OF KENTUCKY
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21-ORD-033

February 23, 2021

In re: Lawrence Trageser/Anchorage Middletown Fire and EMS Department

Summary: Because the public interest outweighs the personal privacy interest in certain information that the Anchorage Middletown Fire and EMS Department (Department) redacted from certain records, the Department violated the Open Records Act (“the Act”) in redacting such information.

Open Records Decision

Lawrence Trageser (“Appellant”) requested from the Department copies of all correspondence that the Department has exchanged with Kentucky Retirement Systems as part of an investigation into claims that the Department “spiked” a specific employee’s salary.¹ In a timely written response, the Department provided the requested correspondence, but redacted several portions that it claimed constituted private “medical information,” which is exempt from disclosure under KRS 61.878(1)(a). Thereafter, the Appellant initiated this appeal. On appeal, he claims that the Department failed to produce all responsive records and that KRS 61.878(1)(a) does not permit the redactions the Department had made.²

¹ The Appellant also sought any records reflecting Kentucky Retirement Systems’ final disposition of the investigation. At the time the Appellant made the request, no final disposition had been reached, and the Department denied the request on that basis. The Appellant does not challenge this aspect of the Department’s denial.

² The Department objects to the Appellant’s delay in bringing this appeal. The Appellant’s request and the Department’s denial were exchanged in June of 2020, but the Appellant did not initiate this appeal until January 28, 2021. The General Assembly has specified that some appeals

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.” 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.

Both parties invited this Office to review the records to determine the propriety of the Department’s redactions. *See* KRS 61.880(2)(c); 40 KAR 1:030 § 3. Specifically, this Office reviewed correspondence between the Department and the Kentucky Retirement Systems in which the Department had made certain redactions. Having reviewed the correspondence in its unredacted form, this Office concludes that the redacted material is not exempt from production for the reasons that follow.

Under KRS 61.598(2)(b), a county employee who receives an increase in creditable compensation exceeding ten percent from the previous fiscal year may not use that increased compensation as “creditable compensation used to calculate the retiring employee's monthly retirement allowance,” unless an exception applies. The exceptions are provided in KRS 61.598(4). To oversimplify, a pension “spike” occurs when an employee’s retirement allowance increases due to a salary increase of more than ten percent that does not qualify for one of the exceptions.

In 2019, Kentucky Retirement Systems sent correspondence to the Department in which it had identified a Department employee who had received

must be brought to the Attorney General within a specific period of time. KRS 197.025(3) (inmates must bring an appeal challenging a denial of a request within twenty days). However, there is no similar statutory provision that requires an appeal be made to this Office within a certain amount of time.

more than a ten percent increase in salary twice in a five-year period. Kentucky Retirement Systems requested that the Department show that the increases in salary qualified for one of the exceptions in KRS 61.598(4) to authorize the employee's increase retirement allowance. If the Department was unable to meet its burden of proof, Kentucky Retirement Systems would order the Department to make an actuarial accounting and reimburse Kentucky Retirement Systems.

On June 26, 2019, the Department sent a letter to Kentucky Retirement Systems in which it attempted to explain why the employee's salary had increased. This is the letter that contains the disputed redactions. The Department argued that the employee's increase in salary during the years in question was the result of receiving certain types of disability insurance. Importantly, the Department's letter does not identify the specific disability that resulted in the employee obtaining the insurance payments. Rather, the Department referenced the employee's "short-term disability" and "long-term disability," and provided a chart identifying the time the employee claimed under each type of disability and the benefits the employee received. For the uninitiated, "short-term disability" and "long-term disability" are legal terms of art used to classify the effects of various injuries on a person and the benefits to which an individual is entitled under certain disability compensation programs.

Ultimately, Kentucky Retirement Systems rejected the Department's proffered reasoning for the increase in employee salary and found that such increase did not qualify as an exception to the pension spiking statute.

Although this is a close case, on balance, this Office finds that the public interest in the redacted information outweighs the employee's personal privacy interest. Again, the purpose of the Open Records Act is to provide transparency and provide the public a method to engage in governmental oversight. *See Zink v. Com., Dept. of Workers' Claims, Labor Cabinet*, 902 S.W.2d 825, 828-29 (Ky. App. 1994). The public has a significant interest in information that sheds light on whether a public agency is complying with the law. *Id.* The public also has a significant interest in knowing how public funds are spent. *See Courier-Journal and Louisville Times Co. v. Peers*, 747 S.W.2d 125, 130 (Ky. 1988). Therefore, the public interest in this information is significant, but the Department's redactions obscured that information.

On the other hand, the employee does have a privacy interest in the fact that he or she had a short-term or long-term disability. The Department was not wholly unjustified in seeking to protect this information and, in most contexts, the public interest may not be so high as to warrant its disclosure. But here, the employee's disability was *the* reason the Department used to justify its actions. Moreover, the letter does not specify the employee's actual disability or any protected health information. Rather, the correspondence uses only legal terms of art: "short-term disability" and "long-term disability." Therefore, on these facts, this Office concludes that the public interest outweighs any personal privacy interest under KRS 61.878(1)(a). *See, e.g.*, 09-ORD-167 (finding that an employee's use of sick leave could not be withheld under KRS 61.878(1)(a)). While the Department exercised understandable caution in redacting the information that this Office reviewed, those redactions are not justified under KRS 61.878(1)(a).³

The Appellant also claims that the Department has not provided all correspondence between it and Kentucky Retirement Systems. The Department claims to have provided all responsive records that existed at the time of the request. Once a public agency states affirmatively that it does not possess any responsive records, the burden shifts to the requester to present a *prima facie* case that the requested records do exist. *Bowling v. Lexington-Fayette Urban Cty. Gov't*, 172 S.W.3d 333, 341 (Ky. 2005). Here, the Appellant has not established a *prima facie* case that additional correspondence with Kentucky Retirement Systems exists. The Department claims to have searched all possible locations for the correspondence and has provided all that it could find. The Act requires nothing more. *See, e.g.*, 06-ORD-042.

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.

³ The Department also redacted certain personal identifying information, including employee personnel number, personal addresses, and dates of birth. Those redactions are justified and comply with the Act. *See Kentucky New Era v. City of Hopkinsville*, 415 S.W.3d 76, 89 (Ky. 2013).

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