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21-ORD-048

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In re: *The Courier-Journal*/Department of Corrections

Summary: The Department of Corrections ("Department") violated the Open Records Act ("the Act") when it redacted the race and sex of formerly incarcerated individuals on grounds of personal privacy. The Department did not violate the Act when it redacted dates of birth under KRS 61.878(1)(a).

Open Records Decision

On December 7, 2020, *The Courier-Journal* ("Appellant") requested a copy of the Department's database showing "all people housed in state custody" since January 1, 2018. The Department provided the requested record, but redacted the fields that included dates of birth, race, and sex of individuals who had been released, on grounds of personal privacy under KRS 61.878(1)(a). This appeal followed.

KRS 61.878(1)(a) exempts "[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly 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 dates of birth. *Id.*[1] Therefore, the Department did not violate the Act when it redacted the dates of birth.

However, this Office must weigh the competing interests in determining whether the other demographic information, such as race and sex, was appropriately redacted under KRS 61.878(1)(a). The Appellant argues that it is searching for possible "disparities" in age, race, or sex among persons formerly incarcerated by the Department, and that therefore its interest should override the privacy interests of formerly incarcerated individuals. It is true that access to public records "does not turn on the purpose for which the request is made or the identity of the requester." *Zink,* 902 S.W.2d at 828. And "[t]he public's 'right to know' under the Open Records Act is premised upon the public's right to expect its agencies properly to execute their statutory functions." *Kentucky Bd. of Examiners of Psychologists v. Courier-Journal & Louisville Times Co.,* 826 S.W.2d 324, 328 (Ky. 1992). But the public also has a heightened interest in ensuring that public agencies are following the law. *See, e.g.*, 21-ORD-033 (finding that the public interest in ensuring a public agency was complying with KRS 61.598 outweighed the private interest in an employee's status as being disabled). And it is unlawful to discriminate on the basis of race, sex, or religion. *See* U.S. Const. amend. XIV, § 1.

The Department concedes, to a degree, that an individual's race and sex may be disclosed in some cases. After all, it did not redact those fields of information for those individuals still incarcerated. Moreover, in *Kentucky New Era*, the law enforcement agency had categorically redacted demographic information, such as race, but the trial court found such information could not be redacted under KRS 61.878(1)(a). 415. S.W.3d at 80. That decision was not challenged on appeal, so the Kentucky Supreme Court has not spoken directly on the subject of categorically redacting information related to race under KRS 61.878(1)(a). *Id.*

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[1] But this Office has noted that sometimes the public interest in the *year* of birth may be heightened in the context of allegations of disparate government treatment on the basis of age. *See* 20-ORD-102, n. 1. In an appropriate case, it may be proper to carefully determine whether birth *years* may be shielded under KRS 61.878(1)(a).

In 96-ORD-232, this Office declined to accept, as a categorical rule, that information related to race is protected under KRS 61.878(1)(a). Rather, this Office weighed the competing interests under the facts of that case, and isolated its holding to those facts. Because the public agency provided a "computer printout with the statistical data of the specific number of salaried and hourly employees, by race and gender," the public agency could satisfy the public interest in ensuring equal opportunity employment compliance. *Id*. Therefore, it was not necessary to provide information that would disclose any particular individual's race or sex. Since this Office's decision in 96-ORD-232, this Office has drifted some, and applied this rule categorically, instead of on the individual facts of the case. *See, e.g.*, 15-ORD-162; 13-ORD-110. But sometimes, this Office has engaged in the appropriate balancing test, and concluded that information related to race must be disclosed. *See, e.g.*, 10-ORD-129 (finding that the public's interest in ensuring the agency complied with the terms of a contract, which required minority hiring, outweighed the privacy interest in the race of individuals and that statistical information was no substitute).

Here, there is no evidence in the record that the Department has provided a statistical compilation of information based on race or gender. Presumably then, the only way for a person to consider the racial demographics of the prison population is to piece together the information from the requested database. And the Department has no reservations in providing that information for individuals currently incarcerated. Under these facts, this Office sees little difference in disclosing the race of those currently incarcerated, but declining to do the same for those previously incarcerated. The same is true for the sex of the individuals. Thus, the Department violated the Act when it redacted the race and sex of the individuals released from custody.

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.

Daniel Cameron
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/s/Marc Manley
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Assistant Attorney General

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Distributed to:

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