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21-ORD-069

April 14, 2021

In re: Matthew Snyder/Northern Kentucky Independent District Health Department

Summary: The Northern Kentucky Independent District Health Department (the “Department”) did not violate the Open Records Act (“the Act”) when it redacted the name of a private citizen from internal emails, or when it denied inspection of emails protected by the attorney-client privilege.

Open Records Decision

Matthew Snyder (“Appellant”) asked the Department to provide copies of email communications exchanged between Dr. Steven Stack and the Department concerning Our Lady of the Assumption Church between March 1, 2020 and December 31, 2020. In a timely response, the Department provided the Appellant with seven pages of responsive records. However, the Department redacted the name of a private citizen appearing in one email under KRS 61.878(1)(a). The Department also redacted two pages of emails, claiming that the contents of those emails involved communications between the Department and its attorneys concerning litigation, and therefore the communications were exempt from inspection under the attorney-client privilege. This appeal followed.

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.” The “unambiguous purpose of the Open Records Act is the disclosure of public records even though such disclosure ‘may cause inconvenience or embarrassment to public officials or others.’” *Beckham v. Bd. of Educ. of Jefferson Cty.*, 873 S.W.2d 575, 577 (Ky. 1994) (quoting KRS 61.871).

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.

In *Kentucky New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76 (Ky. 2013), the Kentucky Supreme Court recognized that private citizens' addresses, telephone numbers, social security numbers, and driver's license numbers rarely provide insight regarding whether a public agency is properly executing its functions, and that information may be categorically redacted. *See also Zink v. Com., Dept. of Workers' Claims, Labor Cabinet*, 902 S.W.2d 825 (Ky. App. 1994). Significantly, however, the *Kentucky New Era* Court did not authorize the categorical redaction of private citizens' names.

In 20-ORD-185, this Office examined the Department's practice in redacting the names of citizens who reported to the Department suspected violations of the Governor's executive orders during the current state of emergency. The Department explained that it did not take action against individuals suspected of violating the executive orders based on unverified citizen complaints. Rather, the Department would independently inspect business locations for violations and only institute administrative proceedings based upon its inspectors' visual observations. This Office contrasted the Department's implementation of procedures to ensure due process with the actions of the Labor Cabinet. *See* 20-ORD-184. Unlike the Department, the Labor Cabinet had no mechanism to protect the due process rights of suspected violators. In fact, in 20-ORD-091, the Labor Cabinet had ordered a business owner to close his business without providing him with any means to challenge that order or explaining the basis of the complaint. The Labor Cabinet ultimately withdrew that closure order without explanation.

The distinction between the conclusions in each previous decision turns on the relevance of the private citizen's identity to the government's actions in executing its functions. The relevance of the person's identity is a component

of the balancing test required under *Kentucky Board of Examiners of Psychologists*, 826 S.W.2d at 328.¹ When the government is taking action against a private citizen, that person has a right to challenge the validity of the action. This is called due process, and it is constitutionally guaranteed. U.S. Const. Amend. XIV. If the testimony of another person is the basis of the government's action, then the defendant has the right to know the identity of that person. *See, e.g.*, 20-ORD-091; 20-ORD-184. If the testimony of a private citizen is not the basis of the government's action and the government instead relies on the independent observations of an employee, then the identity of a complaining private citizen is likely irrelevant. 20-ORD-185.

Here, a private individual complained about a church's decision to remain open despite the Governor's church closure order. That individual's name appears in an email between a Department employee and Dr. Steven Stack. The Department employee explained that Our Lady of the Assumption Church planned to remain open to in-person worship despite the Governor's order. The Department employee attached to the email a letter from the pastor of the church in which the pastor explains why the church would remain open to in-person worship, and explained, "We learned about this from [redacted] last night." Dr. Stack responded, "Sigh. No cure for ignorance or obstinacy. Thanks for letting me know. I wish I had an answer to offer. One thing, certainly don't send in any armed officers. That would undermine our efforts to inspire people to be good citizens and do the right thing."²

On appeal, the Department explains that it took no action in this case. Moreover, it explained that the church had publicly stated that it would remain open, and advertised its decision on its website. According to the Department, there were more sources of evidence to support a finding that the church would remain open other than the tip provided by the citizen. And although this

¹ Other circumstances are also relevant. For example, the identity of a victim of sexual assault is just as relevant to the criminally accused as the identity of the complainants are relevant to those they accuse of violating executive orders. But there is no question that a sexual assault victim has a high interest in maintaining his or her privacy due to the very nature of the offense. *See Cape Publications v. City of Louisville*, 147 S.W.3d 731, 735 (Ky. App. 2003). And the criminally accused will learn the victim's identity through the criminal discovery process. The accused also has a constitutional right to face that accuser at trial.

² Apparently, there had been no similar order on April 12, when "Maryville Baptist Church held a drive-in Easter service. Congregants parked their cars in the church's parking lot and listened to a sermon over a loudspeaker. Kentucky State Police arrived in the parking lot and issued notices to the congregants that their attendance at the drive-in service amounted to a criminal act." *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 611 (6th Cir. 2020) (granting injunction pending appeal).

private individual's name appears in this email exchange, there is no evidence that the individual would have consented to his or her identity in this context. *Cf. Cape Publ'n., Inc. v. Univ. of Louisville Found., Inc.*, 260 S.W.3d 818, 823-24 (Ky. 2008) (finding that donors to the University who actively sought to remain anonymous had a greater interest in privacy than those donors who did not seek anonymity). For all of these reasons, the Department was justified in redacting the person's name under KRS 61.878(1)(a).

The Department also redacted two pages of emails based on the attorney-client privilege. The attorney-client privilege shields from disclosure communications between a client and a lawyer "made for the purpose of facilitating the rendition of professional legal services to the client[.]" KRE 503(b). The privilege also shields from disclosure communications between lawyers and representatives of their clients. KRE 503(b)(1). For the privilege to apply, the communication must be confidential, i.e. "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." KRE 503(a)(5). The privilege is incorporated into the Act by KRS 61.878(1)(l). *Hahn v. Univ. of Louisville*, 80 S.W.3d 771, 774 (Ky. App. 2001).

Here, the Department explained that the emails were exchanged between Department staff and its attorneys concerning active litigation between the Department and the church in Boone Circuit Court. Therefore, the Department has explained that the emails were exchanged in confidence for the purpose of rendering legal services in a specific civil suit. Accordingly, the Department did not violate the Act in redacting these communications.

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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