



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

DANIEL CAMERON
ATTORNEY GENERAL

CAPITOL BUILDING, SUITE 118
700 CAPITAL AVENUE
FRANKFORT, KENTUCKY 40601
(502) 696-5300
FAX: (502) 564-2894

21-ORD-076

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In re: Lawrence Trageser/Kentucky State Police

Summary: Kentucky State Police (“KSP”) violated the Open Records Act (“the Act”) when it improperly invoked KRS 61.872(5) and did not provide a detailed explanation of the cause for delay or the earliest date on which records would be made available for inspection. KSP did not violate the Act when it redacted certain information under KRS 61.878(1)(a) or when it did not provide records that do not exist in its possession.

Open Records Decision

On February 3, 2021, Lawrence Trageser (“Appellant”) requested records relating to a retired KSP officer.¹ Specifically, the Appellant asked for the retired officer’s personnel file, including “any complaints, reprimands, disciplinary actions, [and] internal investigations,” as well as records related to the officer’s sexual harassment complaint against a former KSP commissioner. In a timely response, KSP requested additional time under KRS 61.872(5), citing “inclement weather conditions” that had required personnel to work from home. KSP further stated that it expected to complete its search for records by March 2, 2021, and would then review any responsive records for “necessary redactions.” After receiving no further response from KSP by March 24, 2021, the Appellant initiated this appeal.

¹ The Appellant also sought records relating to another officer, but KSP’s response to that portion of the request is not in dispute.

Normally, a public agency must make a final disposition of an open records request within three business days. KRS 61.880(1).² But when a record “is in active use, in storage or not otherwise available,” an agency may delay inspection under KRS 61.872(5). If the agency delays inspection, it must provide “a detailed explanation of the cause” for delay and the “earliest date upon which the public record will be available for inspection.” KRS 61.872(5).

Here, KSP delayed inspection because certain personnel were working from home due to inclement weather. However, KSP did not state that the requested records were in active use, in storage, or otherwise unavailable. Furthermore, even if weather conditions were a proper basis for delay under KRS 61.872(5), KSP did not give a detailed explanation for why it would take three weeks to locate responsive records. Finally, KSP failed to honor its commitment to make the records available for inspection on the date it promised, March 2, 2021.³ Therefore, KSP violated the Act. *See, e.g.*, 21-ORD-011 (finding that KSP violated the Act when it failed to provide records on the promised date); 20-ORD-196 (same).

On appeal, KSP states that it has now provided the retired officer’s personnel file to the Appellant with certain redactions under KRS 61.878(1)(a), including Social Security numbers, driver’s license numbers, home addresses, personal phone numbers, and dates of birth. Additionally, KSP has withheld high school and college transcripts and employee evaluations under KRS 61.878(1)(a).

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.

² To address the novel coronavirus public health emergency, 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, “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).

³ KSP cannot avoid this fact by claiming March 2 was merely an estimated date on which it would conclude its search. KRS 61.872(5) requires agencies to state the earliest date upon which records will be available, not the earliest date upon which the agency will conclude its search.

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 home addresses, personal phone numbers, driver's license numbers, and Social Security numbers. *Id.* This Office has also recognized birth dates as personal information that may be routinely redacted under KRS 61.878(1)(a). *See, e.g.*, 15-ORD-095. Accordingly, the Department properly redacted that information from the responsive records. *See* KRS 61.878(4).

This Office has consistently recognized the asserted privacy interest in educational transcripts. *See, e.g.*, 06-ORD-145 (noting that the Attorney General “has long recognized a significant privacy interest in transcripts, GPA, and test scores that is superior to any public interest in disclosure previously articulated”). Because the Appellant has not shown an overriding public interest in disclosure of the former officer's transcripts, the Department properly withheld those records.

As to performance evaluations of public employees, the courts have recognized the existence of a significant privacy interest in such records:

The confidentiality of performance evaluations allows evaluators to speak more frankly about an employee than they might if the evaluations were known to be open to public disclosure. In addition, performance evaluations certainly can contain a great deal of personal information, and should not be subject to disclosure without the most pressing of public needs.

Cape Publications v. City of Louisville, 191 S.W.3d 10, 13 (Ky. App. 2006). One example of such a “pressing public need” is when the public employee is charged with “committing a criminal act made possible by his position at a public agency[.]” *Id.* at 14. In *Cape Publications*, the public employee was charged with such an offense, which also led to the administrative suspension, and eventual resignation, of his supervisor. *Id.* Therefore, the Court found that the employee had “to some extent forfeited his privacy interest” by engaging in criminal activity and both his evaluation and that of his supervisor were subject to disclosure. *Id.*

Here, however, the Appellant has presented no facts to support a claim that the public interest in disclosure of these evaluations outweighs the

significant personal privacy interest in records containing frank discussions between an employer and employee. *See id.* at 13. Therefore, this Office finds that KSP did not violate the Act when it denied the Appellant's request in this regard. *See, e.g.*, 16-ORD-185; 07-ORD-125 (both finding performance reviews were exempt from inspection under KRS 61.878(1)(a)).

KSP states that the personnel file contains all the existing records responsive to the Appellant's request. Therefore, KSP claims that it does not possess records relating to the complaint or investigation of sexual harassment. 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 requested records relating to a grievance and investigation that was finally resolved with the former KSP commissioner's resignation more than 20 years ago. *See* 02-ORD-231. In a previous appeal by the Appellant, KSP stated that it believed any related records had been destroyed.⁴ *See* 21-ORD-038. However, even if the Appellant had made a *prima facie* showing that additional records should exist, KSP explains that staff in its Internal Affairs Branch, Human Resources Branch, and Commissioner's Office, as well as the Kentucky Department for Libraries and Archives, all searched for additional responsive records, but none were found.

Because the Appellant has not made a *prima facie* case that records relating to this grievance exist or should exist, and KSP has explained the adequacy of its search, this Office finds that KSP did not violate the Act when it did not provide such records.

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.

⁴ This is a reasonable conclusion under the applicable records retention schedules. Under that schedule, grievance files may be destroyed five years after resolution of the grievance. *See* General Schedule for State Agencies, "Grievance File," Series P0041, *available at* <https://kdla.ky.gov/records/retentionschedules/Documents/State%20Records%20Schedules/kystateagency.pdf> (last accessed April 21, 2021). Grievances are not to be kept in an employee's personnel file unless they support an employment action. *See id.*, "Personnel Folder – Agency Copy," Series P0001. Furthermore, investigation files for complaints against KSP officers are to be destroyed 10 years after the officer's separation from employment. *See* Kentucky State Police Records Retention Schedule, "Chapter 16 Sworn Personnel Complaint Investigation File," Series 00102, *available at* <https://kdla.ky.gov/records/retentionschedules/Documents/State%20Records%20Schedules/kystatepolice.PDF> (last accessed April 23, 2021).

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.

Daniel Cameron
Attorney General

/s/ James M. Herrick

James M. Herrick
Assistant Attorney General

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Distributed to:

Mr. Lawrence Trageser
Michelle D. Harrison, Esq.
Ms. Stephanie Dawson