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21-ORD-117

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In re: Andy Russell/Louisville Metro Police Department

Summary: Louisville Metro Police Department (the “Department”) violated the Open Records Act (“the Act”), as modified by Senate Bill 150, when it failed to respond to a request to inspect records within ten calendar days. The Department did not violate the Act when it denied a request to inspect a photograph of an employee under KRS 61.878(1)(a).

Open Records Decision

On April 21, 2021, Andy Russell (“Appellant”) requested numerous records from the Department related to a specific police officer. On May 14, 2021, the Department responded and provided some records, but denied other portions of the Appellant’s request. Specifically, at issue in this appeal, the Department denied the Appellant’s request for a “Department issued photograph” of a specific police officer under KRS 61.878(1)(a) as an “unwarranted invasion of personal privacy.” The Appellant then appealed to this Office, and challenged the Department’s refusal to provide a copy of the photograph.¹

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

¹ The Appellant does not challenge the Department’s denial of his other requests.

receipt.” SB 150 § 1(8)(a). Here, the Appellant submitted his request on April 21, 2021, but the Department did not respond until May 14, 2021, more than ten calendar days later. Therefore, it violated the Act, as modified by SB 150.

The Department did not violate the Act, however, when it denied the Appellant’s request for the photograph of the specified officer. Under KRS 61.878(1)(a), public records that contain “information of a personal nature where the disclosure thereof would constitute a clearly unwarranted invasion of personal privacy” are exempt from inspection. In determining whether information may be properly withheld from inspection under this exemption, the Kentucky Supreme Court has established a balancing test where “the public’s right to expect its agencies properly to execute their functions” is measured against the “countervailing public interest in personal privacy” *Ky. Board of Examiners of Psychologists v. Courier-Journal and Louisville Times Company.*, 826 S.W.2d 324, 328 (Ky. 1992). Whether a public agency has properly relied on KRS 61.878(1)(a) is “intrinsically situational.” *Id.*; *see also Cape Publications v. City of Louisville*, 191 S.W.3d 10, 14 (Ky. App. 2006) (holding that “bright-line rules permitting or exempting disclosure are at odds with controlling precedent” and “case-by-case analysis” is required).

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).

This Office has held that public employees have a privacy interest in their photographs. *See e.g.*, 20-ORD-005; 11-ORD-139; 08-ORD-014. And an ordinary photograph of an employee, which does not depict the employee engaging in any type of governmental activity, would shed little light on “what [the] government is doing.” *Zink*, 902 S.W.2d at 829.

Here, the Appellant presents no countervailing public interest in disclosure of the officer’s photograph. The Appellant did not seek photographs of the officer while the officer was engaging in police conduct. Rather, the Appellant seeks the officer’s “Department-issued photograph.” On the other hand, the Department claims that there has been substantial media coverage of an incident that allegedly involved this particular officer. As a result, this officer’s name and home address have been widely circulated on social media.

It may be true that the Department “has routinely sent photographs of officers” to the Appellant in response to requests to inspect records, as the Appellant claims. But the Department has provided evidence that, in this case, the officer’s “Department-issued photograph” would shed little light on what the government is doing. Coupled with the fact that the officer’s identity and personal address have been circulated on social media, this Office finds that the officer’s personal privacy interest in the requested photograph outweighs the public interest in this particular photograph. Therefore, the Department did not violate the Act when it withheld the photograph under KRS 61.878(1)(a).

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.

Daniel Cameron
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/s/Matthew Ray
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Distributed to:

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