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**21-ORD-189**

October 13, 2021

In re: State Journal/City of Frankfort

**Summary:** The City of Frankfort (the “City”) violated the Open Records Act (“the Act”) when it entirely withheld correspondence authored by a public official raising various complaints with the conduct of City and other public officials. However, portions of the correspondence may be redacted under KRS 61.878(1)(a).

***Open Records Decision***

On July 13, 2021, the State Journal (“Appellant”) asked the City for a copy of the email or letter “that the [City] elected to send to the CEO of the [Kentucky Capital Development Corporation (“KCDC”)]<sup>1</sup> at the Monday July 12 city commission meeting.” The Appellant also sought any “letters [or] emails that the [City] received from the CEO of KCDC starting June 28.”

In a timely response, the City denied the Appellant’s request for three reasons. First, the City claimed that the letter was authored by the CEO in her individual capacity, and thus the City claimed that the letter was exempt as “correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency” under KRS 61.878(1)(i). Second, the City claimed that the letter it received and its response thereto were “preliminary,” that no final action had occurred, and

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<sup>1</sup> The KCDC is a non-profit organization under a Board of Directors who are appointed by the Franklin County Judge/Executive and the Mayor of the City. See Frankfort Code of Ordinances 36.195 et seq. available at <http://www.frankfort.ky.gov/DocumentCenter/View/576/Frankfort-Title-III-Administration-PDF> (last visited Oct. 5, 2021). As such, KCDC appears to be a “public agency” under the Act. See KRS 61.870(1)(i). The City has never claimed that KCDC is not a public agency under the Act.

thus the records were exempt under KRS 61.878(1)(j). Finally, the City claimed that “certain portions of the records” will “remain exempt from production” after final action is taken as those portions would “constitute a clearly unwarranted invasion of personal privacy” and are exempt under KRS 61.878(1)(a). By invoking KRS 61.878(1)(a), the City claimed that it “has weighed the privacy interest in nondisclosure against the general rule of inspection.” The City did not explain what factors it weighed or provide any context other than to state that a balancing test must occur to determine whether KRS 61.878(1)(a) applied. This appeal followed.

On appeal, both parties requested for this Office to review the withheld records under KRS 61.880(2)(c). This Office accepted the parties’ request and has reviewed the withheld correspondence. However, under KRS 61.880(2)(c), this Office may not disclose the contents of the records except to the extent necessary to explain whether a claimed exemption applies. Moreover, upon requesting such records from the City, this Office asked the City to further explain whether it has taken “final action” in response to the correspondence such that KRS 61.878(1)(j) would still apply. Having reviewed all documents in the record, this Office finds that the City violated the Act, and the correspondence is not exempt, except that the identities of a few individuals in certain discrete portions may be redacted under KRS 61.878(1)(a). *See* KRS 61.878(4).

As an initial matter, the City has essentially abandoned its argument under KRS 61.878(1)(j) that the records are “preliminary” and that it has not taken final action. In response to this Office’s question, the City sent a letter to the author of the correspondence in dispute and informed her that “the preliminary status of the correspondence cannot be maintained indefinitely under state law. Therefore, on October 15, 2021, it will be necessary for the City to consider both documents as final for purposes of Open Records law disclosure.” Accordingly, the City’s reliance on KRS 61.878(1)(j) is moot. *See* 40 KAR 1:030 § 6.

The City still maintains on appeal, however, that the correspondence is from a “private individual” and it is thus exempt under KRS 61.878(1)(i). As grounds, the City claims that the correspondence it received was sent by the CEO complainant in her individual capacity rather than as the CEO. Specifically, the City claims the CEO did not send the letter “on KCDC letterhead, [she] did not sign it as KCDC CEO, and made no statement that the letter was intended to be written in her official capacity as KCDC CEO.” Having reviewed the correspondence, this Office disagrees.

It is true, as the City alleges, that the letter at issue is approximately 12 pages, does not appear on letterhead, and is signed by the complainant without reference to her official title. However, the content of the letter is almost entirely about official acts taken, or experienced, by the CEO in her capacity as CEO and by other public officials. Moreover, and significant to this Office's conclusion, is that the complainant *did* send the letter via official channels. Specifically, the letter was attached to an email sent by the CEO from her official KCDC email account. At the bottom of that email, the CEO's signature block identifies her as the CEO of KCDC. Because the letter was actually delivered to the City by the CEO through official public email accounts, and the contents of the letter largely discuss matters of public concern for both the KCDC and the CEO in her official capacity thereof, the correspondence was not sent by a "private individual" within the meaning of KRS 61.878(1)(i). Accordingly, the City violated the Act when it withheld the correspondence in its entirety under KRS 61.878(1)(i).

Finally, the City argues that, even if the correspondence cannot be withheld entirely, certain portions must still be redacted under KRS 61.878(1)(a). 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.

In its original response, the City violated the Act when it merely claimed that the exception applied and that it had weighed these factors, without explaining the factors themselves or providing any other context. Such a "limited and perfunctory response" did not remotely comply with the requirements of the Act. *Edmondson v. Alig*, 926 S.W. 2d 856, 858 (Ky. App. 1996); *see also* KRS 61.880(1) (An agency denying inspection must provide the requester within five business days a response and "a brief explanation of how

the exception applies to the record withheld.”). On appeal, the City provides more context, and explains that certain portions of the correspondence “accuse certain individuals of possible sexual crimes or depict certain individuals engaging in sexual activity.” And as the City further acknowledges, there is no evidence in this record that such salacious allegations are true.

Having reviewed the correspondence, this Office can confirm that certain portions of the letter moved beyond complaints of alleged discrimination that the CEO claims to have experienced and into the realm of accusations of serious criminal conduct. The best way to preserve the personal privacy rights of the individuals who are the subject of these accusations, and which no evidence in this record can verify, is to redact the names of those individuals. The allegations made against those individuals, however, may be inspected. So long as there are no details that could positively identify the subject of these criminal accusations, those individuals’ privacy interests can be preserved while the public is granted the ability to inspect what its government is doing. *See Ky. Bd. of Examiners of Psychologists*, 826 S.W.2d at 328.<sup>2</sup> Therefore, subject to the redactions required under KRS 61.878(1)(a) and KRS 61.878(4), the disputed correspondence may be inspected by the public.

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**  
**Attorney General**

/s/Marc Manley  
Marc Manley  
Assistant Attorney General

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<sup>2</sup> Specifically, the identities of the individuals listed under date entries: Jan. 8, 2018; Sept, 24, 2018; Jan. 28, 2019; Jan. 31, 2019; Feb. 26, 2019; and those same identities may be redacted from any other entry if similar accusations are made against those individuals in other such entries.

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