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21-ORD-241

December 3, 2021

In re: Emily Corwin/Education and Workforce Development Cabinet

Summary: The Education and Workforce Development Cabinet ("the Cabinet") violated the Open Records Act ("the Act") when it failed to separate nonexempt material from exempt material under KRS 61.878(4), and provide the nonexempt material for inspection.

Open Records Decision

Emily Corwin (the "Appellant") requested a copy of "[a]ny database tracking Work Opportunity Tax Credit [('tax credit')] which is maintained by" the Cabinet.[1] The Appellant advised that she sought certain categories of information contained within the database related to the names of the businesses applying for the tax credits, the "category of employees" for which the tax credit was being sought, and the type of occupation in which the employees were employed. In response, the Cabinet asked the Appellant to clarify her request, and claimed that it did not "certify" eligibility for the tax credits. The Cabinet also stated that its database did not contain some of the information requested, and invited the Appellant to narrow her request because it would require "extensive redactions" to produce responsive records.

[1] The Cabinet responded to the Appellant on behalf of the Office of Employer and Apprenticeship Services, which, among other services, administers the Work Opportunity Tax Credit. "The Work Opportunity Tax Credit (WOTC) is a federal tax credit available to employers who invest in American job seekers who have consistently faced barriers to employment. Employers may meet their business needs and claim a tax credit if they hire an individual who is in a WOTC targeted group." United States Dept. of Labor, Work Opportunity Tax Credit, available at https://www.dol.gov/agencies/eta/wotc (last visited Dec. 3, 2021).

Although the Appellant responded to the Cabinet's own request for clarification, the Cabinet considered that response a "new request." This time, the Appellant provided more examples of the fields of information she sought to inspect from the database.[2] She sought the names of the businesses applying, the number of tax credits sought by each business, wages of the employees for whom the tax credits were sought, the "target groups being affected," and the "kind of work" for which each employee "was hired." The Appellant did not request the names or any other personally identifiable information about the employees for whom the tax credits were awarded to the employers.

The Cabinet then denied the Appellant's clarified request. The Cabinet claimed that, pursuant to state regulation, 787 KAR 2:020, the forms used to apply for the tax credits were confidential and exempt from inspection. The Cabinet claimed that state administrative regulations that make records confidential are incorporated into the Act under KRS 61.878(1)(k), as recently amended by the General Assembly. The Cabinet also claimed that the Appellant's request was denied under KRS 61.878(1)(c), which exempts from inspection records submitted in connection with applying for tax credits and which are "generally recognized as confidential or proprietary[.]" This appeal followed.

On appeal, the Cabinet explains that employers will complete federal tax forms, ETA Form 9061 and ETA Form 8850, to apply for the tax credit. The Cabinet has made these forms confidential under an administrative regulation, 787 KAR 2:020. *See* KRS 151B.280. Significantly, however, the Cabinet also explains that "[t]he information collected from [the forms] is entered into an internal system by [the Cabinet] to determine if the specific employer's request is certified." It is a copy of that "internal system" that the Appellant sought to obtain—not the forms used to populate the data into the "internal system."

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[2] Although the Act does not require a public agency to honor "requests for information," *see e.g.*, 21-ORD-014, there is a subtle distinction between the Appellant's request and most requests that can properly be characterized as "requests for information." The Act permits inspection of identifiable public records, and here, the Appellant specifically identified the public record she sought to inspect—the Office of Employer and Apprenticeship Services' database. The Cabinet did not claim that no such database exists, but rather, noted "extensive redactions" would have to be made to the identified public record. In an effort to assist the Cabinet, the Appellant then identified the fields of information she sought from the database. In other words, in clarifying her request, the Appellant identified portions of the record she believed to be "nonexempt" and asked the Cabinet to separate this nonexempt material from the exempt material in the records. *See* KRS 61.878(4).

The Cabinet has cited many exceptions in support of its denial, which will be discussed below. But even if those exceptions applied to portions of the database, or "internal system" used to "determine" eligibility for the tax credit, a public agency has a duty to "separate the excepted [material] and make the nonexcepted material available for examination." KRS 61.878(4); *see also Dept. of Ky. State Police v. Courier-Journal*, 601 S.W.3d 501, 507–508 (Ky. App. 2020) (holding that public agencies have a duty to maintain databases populated by public records such that nonexempt fields of information can be separated from exempt fields of information).

In response to the Appellant's original request, the Cabinet did not claim that it was incapable of redacting portions of the records contained in its database. Nor did the Cabinet formally deny the request as unreasonably burdensome, notwithstanding the "extensive redactions" that would be required.[3] Instead, the Cabinet invited the Appellant to clarify her request, and then seized the opportunity to declare the Appellant's subsequent correspondence a "new request" without having to formally deny her access to the Cabinet's database. But the Appellant sought a copy of the database, and has identified discrete fields of information that she believes are contained within the database and which she claims are nonexempt. Therefore, if none of the Cabinet's claimed exemptions apply to the fields of information sought, the Cabinet has a duty to separate the nonexempt fields of information from the exempt fields of information in the database. *Id*. If, on the other hand, the database does not already contain these fields of information, then the Cabinet is not required to gather such information and create a new record. *See Dept. of Revenue v. Eifler*, 436 S.W.3d 530, 534 (Ky. App. 2013) ("The ORA does not dictate that public agencies must gather and supply information not regularly kept as part of its records.").

As an initial matter, the Cabinet claims that the forms it uses to populate the data in the database are confidential under 787 KAR 2:020 and KRS 151B.280. Thus, there is a distinction between the database at issue here and the one at issue in *Department of Kentucky State Police v. Courier-Journal*. In *Department of Kentucky State Police v. Courier-Journal*, the uniform citations used to populate the database were not themselves exempt from inspection—only discrete fields of information on the forms were exempt, such

[3] That might be because the Court of Appeals has explicitly rejected the argument that separating exempt material in a database from nonexempt material in a database, and providing the latter, is not an unreasonable burden. *Id*.at 507.

as social security numbers. Here, in contrast, the Cabinet claims the entire form is confidential. According to the Cabinet, if the forms are exempt, then the database made from information contained in the forms are similarly exempt. But by that logic, *any* public record created by the Cabinet using data from these forms would likewise carry the same exempt status. Because the Cabinet has elected to create a public record that is separate and distinct from the forms which it claims are exempt—a database— this Office must decide whether the database that was specifically requested is itself exempt from inspection. And here, the Cabinet has not carried its burden of showing that this separate and distinct public record is exempt from inspection.

787 KAR 2:020 does not apply to the requested database.

First, the Cabinet has explicitly made the forms used to populate the database confidential under 787 KAR 2:020, a state administrative regulation. The Cabinet argues that state administrative regulations are incorporated into the Act under KRS 61.878(1)(k), which was recently amended. The Cabinet's argument fails to address the appropriate issue: whether the database has been made confidential. Quite simply, 787 KAR 2:020 does not specifically exempt the database at issue. Thus, it is unnecessary to decide whether KRS 61.878(1)(k), as recently amended, incorporates state administrative regulations as an independent basis to deny inspection of records.[4] Instead, the Cabinet must rely on a statute, incorporated into the Act under KRS 61.878(1)(l), or some other authority, to deny inspection of the records. And although the Cabinet does attempt to rely on such authorities, it has failed to carry its burden that these alternative authorities apply to the records requested.

KRS 151B.250(5)(a) does not apply to the requested database.

For express statutory authority, the Cabinet claims that KRS 151B.280(5)(a) makes these data fields confidential. That statute provides that "all records and reports of the Office of Unemployment Insurance, the Career Development Office, and the Office of Employer and Apprenticeship Services which directly or indirectly identify *a client or former client*" shall be made confidential. KRS 151B.280(5)(a) (emphasis added). The term "client" is not defined, and is not a word often used to describe the relationship between state agencies and the public. The Cabinet interprets the word "client" to "include individuals and employers that use the business services offered by the [Office

[4] Of course, we are skeptical of such a claim.

of Employer and Apprenticeship Services]. One of those services is to accept, process, and certify [tax credit] applications submitted by employers." The Cabinet does not explain how the act of submitting an application, and having it approved or denied by a state agency, creates a "client" relationship with the applicant. Such activity sounds like the ordinary function of government—taking applications for benefits or licensure and deciding whether to approve or deny them. For comparison, some of the other activities conducted by the Office of Employer and Apprenticeship Services may include more personalized educational services tailored to individuals, such as coordinating such individuals with apprenticeship programs and providing other types of training.[5] Such one-on-one personal attention could more closely resemble a "client" relationship than the mere acceptance or denial of applications.

The purpose of the Act is "that free and open examination of public records is in the public interest and the exceptions provided for by KRS 61.878 or otherwise provided by law shall be strictly construed[.]" KRS 61.871. Likewise, other statutes providing for confidentiality, which are incorporated under KRS 61.878(1)(l), must also be strictly construed, because KRS 61.878(1)(l) itself must be strictly construed. Although the Cabinet may provide many services to individuals who might be considered "clients," here, the Cabinet has not carried its burden that its mere review of an application for purposes of approving or denying it creates a "client" relationship with the applicant within the meaning of the statute on which it relies. Accordingly, the Cabinet has not carried its burden to demonstrate that KRS 151B.280(5) makes the data fields requested by the Appellant exempt from inspection under KRS 61.878(1)(l).[6]

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[5] *See generally* Apprenticeship, Kentucky Education and Workforce Development, available at https://educationcabinet.ky.gov/Initiatives/apprenticeship/Pages/default.aspx (last visited Dec. 3, 2021).

[6] However, KRS 61.878(1)(a) would certainly apply to some information contained in the form. For example, the tax credit is awarded to subsidize the cost to the employer for hiring individuals who might be difficult to employ, such as those previously convicted of a felony. Employers hiring individuals on the Supplemental Nutritional Assistance Program ("SNAP") are likewise eligible for the credit. The names of such employees, *in connection with* their sensitive economic or criminal history, as well as other personal identifying information about such employees, would clearly implicate the privacy of those employees. Nevertheless, the Appellant has never sought the identity of the employees for whom the employers have sought the tax credit.

The Cabinet has not carried its burden that the specific fields of information sought are generally recognized as confidential and proprietary.

Next, the Cabinet argues that the records are exempt from inspection under KRS 61.878(1)(c)2.b. That provision exempts from inspection "records confidentially disclosed to an agency or required by an agency to be disclosed to it, generally recognized as confidential or proprietary, which are compiled and maintained [in] conjunction with an application for or the administration of assessments, incentives, inducements, and tax credits as described in KRS Chapter 154." Under KRS 61.880(2)(c), the Cabinet carries the burden of justifying its denial. To carry that burden, the Cabinet must prove that the records were disclosed to it confidentially *and* that the records are generally recognized as confidential and proprietary.[7] Records that are "generally recognized as confidential and proprietary" include "information concerning the inner workings of a corporation" such as the "financial history of the corporation, projected cost of the project, the specific amount and timing of capital investment, copies of financial statements and a detailed description of the company's productivity, efficiency and financial stability." *Hoy v. Kentucky Indus. Revitalization Auth.*, 907 S.W.2d 766, 768 (Ky. 1995).

Here, the Cabinet has not met its burden in proving that the requested records contain information that is "generally recognized as confidential and proprietary." The Appellant has asked for five categories of information that might be contained in the database: the names of businesses that applied for the tax credit, the number of tax credits sought by each business, wages of the employees for whom the tax credits were sought, the "target groups being affected," and the "kind of work" for which each employee "was hired." None of this information would reveal anything about the "inner workings of a corporation." *Id*. First, no business keeps its name confidential. Second, the number of tax credits sought by a business reveals only that the business sought tax credits—tax credits that have been publicized and for which all businesses may apply if they hire employees from specified disadvantaged groups. Third, the "target groups being affected" would show only the basis on which the employee would qualify for the tax credit. Such information is about the employee, not the inner workings of the business. Fourth, the "kind of work" for which the employee was hired, *i.e.*, the type of employment tasks the employee would be performing, can typically be observed by any person

[7] The parties do not dispute that the information was provided to the Cabinet in connection with an application for a tax credit.

patronizing the business. It is unclear how a business would obtain a competitive advantage by knowing any of this information.

The only category of information that could potentially be considered proprietary is the wages the business pays to the employee. In general, a business that knows the wages its competitor is paying could use such information to offer higher wages and attract more employees, giving it a competitive advantage. But here, the whole purpose of the tax credit is to subsidize the wages paid to employees that have been historically difficult to hire. If these types of employees were highly sought after, with businesses offering higher and higher wages to attract them, then there would be no need for the tax credit to incentivize their employment in the first place. Moreover, knowledge of just a few employees' wages would not give a competitor substantial insight into the "inner workings" of the business applying for a tax credit. Therefore, the Cabinet has not met its burden that this information is "generally recognized as confidential and proprietary" under KRS 61.878(1)(c)2.b.

The Cabinet has not carried its burden that federal law requires the requested database to remain confidential.

Finally, on appeal, the Cabinet claims a new basis to withhold the records sought. The Cabinet now states that the requested information contained in the records is confidential under federal law, yet it does not cite to any specific federal statute or regulation. Instead, the Cabinet claims this information is made confidential under Training and Employment Guidance Letter 39-11, an advisory issued by the United States Department of Labor that guides state agencies on how to protect personally identifiable information.[8] Personally identifiable information means "information that can be used to distinguish or trace an individual's identity, either alone or when combined with other personally identifiable information that is linked or linkable to a specific person." It includes an individual's name, address, social security number, telephone numbers, financial account numbers, marital status, education status, and biometric information, and computer passwords. Simply put, none of the five categories of information sought by the Appellant identify any individual at all.[9]

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[8] Available at https://wdr.doleta.gov/directives/attach/TEGL/TEGL_39_11.pdf (last visited Dec. 3, 2021)

[9] In fact, on appeal, the Appellant provides evidence that other states have provided her with this information in response to open records requests submitted in those other states.

At bottom, the Appellant sought access to a database that all parties agree exists and must be (and is capable of being) redacted to some degree. And the Court of Appeals has held that a public agency must separate exempt information from nonexempt information contained in its databases, and provide the requester with the nonexempt information. *Dept. of Ky. State Police*, 601 S.W.3d at 507. The Appellant has identified what she believes are five categories of nonexempt information, and the Cabinet has not carried its burden that an exception applies to those categories of information. Thus, to the extent that these categories of information are contained within the database, the Cabinet must separate them and provide the same to the Appellant. The Cabinet can accomplish this by redacting every field in the database other than those specifically identified by the Appellant. If, however, the database does not already contain a category of information sought by the Appellant, then the Cabinet is not required to create a new field of information in response to the Appellant's request.

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 within 30 days from the date of this decision. 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. The Attorney General will accept notice of the complaint emailed to OAGAppeals@ky.gov.

Daniel Cameron
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/s/Marc Manley
Marc Manley
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Distributed to:

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Although the information provided by other states has no bearing on the meaning of Kentucky law, it is persuasive evidence that federal law does not prohibit the release of this information.