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22-ORD-228

October 25, 2022

In re: Ronald Duke/Kentucky Board of Nursing

Summary: The Kentucky Board of Nursing (“the Board”) violated the Open Records Act (“the Act”) when it failed to explain how a specific exemption applied to the records withheld. However, the Board did not violate the Act when it withheld private e-mail addresses that were exempt from disclosure under KRS 61.878(1)(a).

Open Records Decision

On September 28, 2022, Ronald Duke (“Appellant”), an Army recruitment officer, requested a list of e-mail addresses for all of the Board’s licensees. The Board replied that it “cannot distribute” e-mail addresses because they are “protected” under the Act. After the Appellant requested the specific statute upon which the Board relied, the Board cited an administrative regulation, 201 KAR 20:085 § 4(3), which provides that “[t]he email address provided [by a licensed nurse to receive communications from the Board] shall be exempt from disclosure pursuant to KRS 61.878(1)(a).” The Appellant then asked the Board to explain how the privacy interests of nurses would be implicated by disclosing their e-mail addresses. In reply, the Board stated that it did “not need to specify how privacy interests are implicated [because] email addresses are exempt from disclosure by regulation.” This appeal followed.

When a public agency denies a request under the Act, it must give “a statement of the specific exception authorizing the withholding of the record and a brief explanation of how the exception applies to the record withheld.” KRS 61.880(1). Here, in its initial response, the Board did not state a specific exception to the Act. Moreover, when it later cited KRS 61.878(1)(a), the Board did not explain how that exception applied to the requested records, but instead claimed that its own administrative regulation relieved it of the duty to explain how the exception applied.

Under KRS 13A.120(2)(i), however, “[a]n administrative body shall not promulgate administrative regulations [t]hat modify or vitiate a statute or its intent.” Thus, an administrative regulation cannot, on its own authority, “amend, alter, enlarge, or limit the terms of legislative enactment.” *Camera Center, Inc. v. Revenue Cabinet*, 34 S.W.3d 39, 41 (Ky. 2000) (citing *Brown v. Jefferson Cnty. Police Merit Bd.*, 751 S.W.2d 23 (Ky. 1988)). Accordingly, the Board’s administrative regulation cannot exempt it from its obligations under KRS 61.880(1) to provide “a brief explanation of how the exception applies.”

Nor can the Board, by administrative regulation, create a specific exception to the Act for a particular record. An agency “shall not promulgate administrative regulations [o]n any matter that is beyond the statutory authorization of the administrative body to promulgate administrative regulations or that is not clearly authorized by statute.” KRS 13A.120(2)(h). The statutes 201 KAR 20:085 cites for its authority are KRS 314.071 and KRS 314.131, neither of which grants the Board authority to exempt records from disclosure under the Act. Thus, 201 KAR 20:085 § 4(3) does not exempt the requested e-mail addresses from disclosure. Instead, the Board must rely on one of the statutory exemptions to the Act. *See* KRS 61.878(1). The Board implicitly relied on KRS 61.878(1)(a) by citing its own administrative regulation. But the Board did not explain how KRS 61.878(1)(a) applied to the requested e-mail addresses. For that reason, it violated the Act. KRS 61.880(1).

KRS 61.878(1)(a) exempts from disclosure “[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. Com., Dept. of Workers’ Claims*, 902 S.W.2d 825, 828 (Ky. App. 1994). This Office has recognized a significant privacy interest in personal e-mail addresses. *See, e.g.*, 14-ORD-197; 07-ORD-120; 06-ORD-131. Furthermore, in 14-ORD-197, this Office determined that “[t]he private e-mail addresses of licensed nurses have no manifest bearing on how the Board of Nursing performs its public duties,” and thus the privacy interest outweighed the negligible public interest in disclosure. Here, likewise, disclosure of the e-mail addresses requested by the Appellant does not advance the public interest in monitoring government activities and they are therefore exempt from disclosure under KRS 61.878(1)(a).

The Appellant argues that he should be able to obtain the e-mail addresses under KRS 61.878(5) because he wishes to contact nurses for Army recruitment purposes. KRS 61.878(5) provides that the exemptions under KRS 61.878(1) “shall in no way prohibit or limit the exchange of public records or the sharing of information between public agencies when the exchange is serving a legitimate governmental

need or is necessary in the performance of a legitimate governmental function.” However, this Office has consistently stated that disclosure of exempt records under KRS 61.878(5) is within each agency’s discretion. *See, e.g.*, 19-ORD-185; 05-ORD-133; 96-ORD-177. Therefore, the Board did not violate the Act when it denied the Appellant’s request for licensees’ e-mail addresses.

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 e-mailed to OAGAppeals@ky.gov.

Daniel Cameron
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s/ James M. Herrick
James M. Herrick
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Distributed to:

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