16-ORD-188

August 31, 2016

In re: Kentucky Center for Investigative Reporting/University of Louisville

Summary: University of Louisville made permissible redactions of names of students and private individuals, addresses, telephone numbers, and birth dates under KRS 61.878(1)(a), but failed to make a timely response to the open records request under KRS 61.880(1).

Open Records Decision

The question presented in this appeal is whether the University of Louisville violated the Open Records Act in its disposition of Brendan McCarthy's December 18, 2015, requests, as Managing Editor for the Kentucky Center for Investigative Reporting, for records relating to requests from the NCAA. We find no substantive violation of the Act, but find excessive delay in fulfilling the requests under KRS 61.880(1).

Mr. McCarthy submitted the following four requests on December 18, 2015:

(1) Any/all documents/materials issued by the University of Louisville in response to a request by the NCAA from 1/1/2014 through present date
(2) Any/all University of Louisville documents/materials requested by the NCAA from 1/1/2014 through present date

(3) Any/all documents/materials issued by the University of Louisville Athletic Association in response to a request by the NCAA from 1/1/2014 through present date
(4) Any/all University of Louisville Athletic Association documents/materials requested by the NCAA from 1/1/2014 through present date

On December 23, 2015, records custodian Sherri Pawson made an initial response to these and three other requests from Mr. McCarthy:

> I have asked the appropriate university officials to identify all responsive records and send them to me for review. The University is closed tomorrow, reopening on January 4, 2016. I will respond to those requests in the new year.

On January 13, 2016, Mr. McCarthy followed up with Ms. Pawson, indicating that he had still received no records. Ms. Pawson responded on January 14, 2016: "I will check on the status of these pending requests and get back with you." Mr. McCarthy initiated an appeal on February 5, 2016, on the grounds that he still had not received any records, nor even received a date by which the records would be available.

Finally, on February 16, 2016, Ms. Pawson informed Mr. McCarthy that no responsive records existed in regard to requests 3 and 4 (numbered by the University as 15-618 and 15-616 respectively). Regarding requests 1 and 2 (numbered respectively as 15-623 and 15-621), she stated:

> UofL's Athletic department corresponds with the NCAA on a wide ranging array of topics in the regular course of business. In response to your request, I directed Athletics personnel to send me any/all records that fell outside these usual, every-day communications. My interpretation of your request was that you were looking for records regarding unique, out-of-the-ordinary situations. To complete the task, officials had to review ALL communications with the NCAA which was a very time consuming process. If compiled, I expect these records could number in the

> thousands. I erred in not keeping you up to date with the process to identify, review and respond. The delay was unavoidable but I should have kept you in the loop as to the status.
>
> I have identified records responsive to your requests 15-621 and 15-623. Upon receipt of payment of the attached invoice I will mail you the documents. If you prefer, you can pay for and pick up copies in person, but please let me know so I can have the documents available. Please note, I redacted names of students and private individuals, addresses, phone numbers, and birth dates. I relied on KRS 61.878(1)(a) exempts "Public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy."

A public agency cannot afford a requester access to a record that it does not have or that does not exist. 99-ORD-98. The agency discharges its duty under the Open Records Act by affirmatively so stating. 99-ORD-150. In general, it is not our duty to investigate in order to locate documents which the public agency states do not exist.[1]

As to the redactions made to the documents for the first two requests under KRS 61.878(1)(a), Ms. Pawson represents that these were limited to names of students and private individuals, addresses, telephone numbers, and birth dates. KRS 61.878(1)(a) excludes from the application of the Open Records Act "[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." This language "reflects a public interest in privacy, acknowledging that personal privacy is of legitimate concern and worthy of protection from invasion by unwarranted public scrutiny," while the Open Records Act as a whole "exhibits a general bias favoring disclosure" and places the burden of

[1] There is nothing in the record to contradict the University's assertion that any records in its possession related to the recently publicized investigation concerning the men's basketball team would fall outside the scope of Mr. McCarthy's request. The University contends that the NCAA had not asked for any such records as of the time of the request. The plain language of Mr. McCarthy's request supports this interpretation.

establishing an exemption on the public agency. *Kentucky Board of Examiners of Psychologists v. Courier-Journal and Louisville Times Co.,* 826 S.W.2d 324, 327 (Ky. 1992). This necessitates 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.

The public interest in open records has been analyzed as follows by the Kentucky Court of Appeals:

> At its most basic level, the purpose of disclosure focuses on the citizens' right to be informed as to what their government is doing. That purpose is not fostered however by disclosure of information about private citizens that is accumulated in various government files that reveals little or nothing about an agency's own conduct.

Zink v. Com., Dept. of Workers' Claims, Labor Cabinet, 902 S.W.2d 825, 829 (Ky. App. 1994). In *Zink,* the privacy interest of injured workers in their home addresses, telephone numbers, and Social Security numbers was found to outweigh the interest of an attorney seeking the information for marketing purposes where disclosure "would do little to further the citizens' right to know what their government is doing and would not in any real way subject agency action to public scrutiny." 902 S.W.2d at 829.

In *Kentucky New Era, Inc. v. City of Hopkinsville,* 415 S.W.3d 76, 83 (2013), the Supreme Court of Kentucky found that "[p]rivate citizens … have a compelling interest in the privacy of law enforcement records pertaining to them." "To implicate an individual's privacy interest, … the adverse repercussions of public disclosure need not be severe." *Id.* On the other hand, "any private interest the requester may have in the information is irrelevant." *Id.* at 85. In *Kentucky New Era,* the newspaper was seeking address, telephone, Social Security numbers, and other identifying information on crime victims, witnesses, and uncharged suspects, purportedly in the interest of assuring the public that the police department was "providing equal protection to all parts of the community." *Id.* at 86. While the Court found this interest legitimate, it did not

agree "that that interest can only be vindicated by sacrificing the privacy interests of all those with whom the police come in contact." *Id.* at 86-87. Therefore, the identifying information was properly withheld.

We find nothing to distinguish this case from the result in the *Kentucky New Era* case. The addresses, telephone numbers, and birth dates of private individuals have no manifest bearing on how the University performed its public duties, and therefore this identifying information was properly subjected to categorical redaction under KRS 61.878(1)(a). Furthermore, it has not been demonstrated or alleged that the names of students and private individuals, data which are subject to recognized privacy interests, are demonstrably necessary to a full examination of the University's performance of its duties. *See* 12-ORD-227. We therefore do not find a substantive violation of the Open Records Act in regard to the redactions made.

We do find, however, that the University's response was not timely under the requirement of KRS 61.880(1) to issue a disposition of an open records request within three (3) days after receipt of the request, excluding Saturdays, Sundays, and legal holidays. From the date of the request to the date of final disposition was 60 calendar days, and the University admits in its February 17, 2016, response to the appeal that it "erred in not keeping Mr. McCarthy up to date with the process." KRS 61.872(5) provides:

> If the public record is in active use, in storage or not otherwise available, the official custodian shall immediately notify the applicant and shall designate a place, time, and date for inspection of the public records, not to exceed three (3) days from receipt of the application, unless a detailed explanation of the cause is given for further delay and the place, time, and earliest date on which the public record will be available for inspection.

The University does not allege that the records were "in active use, in storage or not otherwise available"; nor did it provide Mr. McCarthy with "a detailed

explanation of the cause … for further delay" or a time when the records would be available. Therefore, we necessarily find that the University committed a procedural violation of KRS 61.880(1) by failing to issue a timely response to the 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. Pursuant to KRS 61.880(3), the Attorney General should be notified of any action in circuit court, but should not be named as a party in that action or in any subsequent proceedings.

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Distributed to:

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