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Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000493-MR

COMMONWEALTH OF KENTUCKY,
DEPARTMENT OF KENTUCKY STATE
POLICE APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 18-CI-00527

THE COURIER JOURNAL APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; CALDWELL AND COMBS, JUDGES.

CLAYTON, CHIEF JUDGE: The Commonwealth of Kentucky, Department of Kentucky State Police (KSP) appeals from a Franklin Circuit Court opinion and order granting summary judgment to the Courier Journal newspaper. The circuit court found KSP violated the Open Records Act (Kentucky Revised Statutes

(KRS) 61.870 to 61.884, hereinafter "ORA" or "the Act") by failing to produce its entire Uniform Citation File database when requested by a Courier Journal reporter. KSP argued the redaction of exempt materials from the database would impose an unreasonable burden on the agency and would necessitate the creation of a new record, neither of which is countenanced under the Act. *See* KRS 61.872(6) and KRS 61.874(3). The Energy and Environment Cabinet has moved to file a tendered brief as *amicus curiae*. No response has been filed. We grant the motion via separate order and the tendered brief is hereby ordered filed. Having reviewed the record and the arguments of the parties, we affirm.

On August 3, 2017, Justin Price, a reporter for the Courier Journal, sent an open records request to KSP for the following:

> An electronic copy of the Uniform Citation File database and all its publicly available fields, which include name; alias; address or city of residence; date of birth; sex; race; vehicle make; vehicle type; vehicle year; color; miles per hour; miles per hour zone; radar violation code; resident status; victim's relationship to offender; ethnic origin; violation date; time; location; breathalyzer results; date of arrest; time; county of violation; violation code; statute; ordinance; charges; post-arrest complaint; name and address of witnesses; officer badge/identification number; assignment; additional offender information.

The Uniform Citation File database referred to by Price is contained in a record management system known as "KyOPS" that tracks KSP's issuance of criminal and traffic citations throughout the Commonwealth. Since 2003, KSP has

entered more than eight million individual records into KyOPS at a rate of approximately 1,800 per day.

On August 9, 2017, KSP denied Price's request under KRS 61.872(6) as imposing an unreasonable burden on the agency. KSP explained that due to the nature of the KyOPS system, private information protected by statute, such as Social Security numbers, driver's license numbers and information relating to juvenile offenders, could not be automatically redacted from the database. It stated that KSP did not have a mechanism in place to generate an electronic database, report or listing containing only the information subject to public disclosure. Instead, each record would have to be reviewed individually and information redacted from it if necessary. In addition to being onerous, KSP claimed that this process would result in the creation of new records and that KSP "is not required to create a list or record containing specific data sets to satisfy the parameters of an open records request."

Price responded by letter that KSP misunderstood the Courier Journal's request. He explained that the newspaper wanted the records in their original electronic format, not in paper form, and asked KSP's database administrator to simply remove the fields that contained exempt information.

On October 18, 2017, Price sent KSP a second formal open records request, stating:

> The Uniform Citation File Database. Please provide the copy of this record in its original electronic format. KSP is not obligated to convert this record into another format, including pdfs for printing. KSP is obligated to provide this record in its original form. Exclude fields, or "columns," that include the following personal information defined within the scope of KRS 61.931(6): Social Security and driver's license numbers. Please do not remove DOB or phone numbers, as state statutes do not indicate it is a personal record subject to redaction. Please only redact columns that contain information explicitly exempt under public records law.

KSP denied this second request for the same reasons it provided in its first response. Price sent another letter claiming that KSP misunderstood its obligations under ORA. KSP did not respond.

The Courier Journal then appealed to the Attorney General pursuant to KRS 61.880(2). In its response to the appeal, KSP included an affidavit from Steve Roadcap, the KyOPS Coordinator. Roadcap explained that KyOPS had not been planned to allow for the redaction of entire categories of information such as Social Security numbers, and opined that a redesign of the system to allow such categorical redactions would result in the creation of a new record:

> The citation module within the KyOPS statewide records management solution was designed and developed to be used strictly by law enforcement entities, because of the restrictive nature of the information collected. . . . Data extracts that would allow for personal information such as social security numbers and home addresses to be removed or redacted has never been incorporated into the solution. . . . A data extract that would allow for personal information such as social security numbers and home

> addresses to be removed or redacted would require new design and development work that would be considered a new project, resulting in the creation of a new record.

The Attorney General sought additional information regarding the technical aspects of KyOPS, including whether the protected information could be more easily redacted if the whole database was exported to a different format. The Attorney General inquired, "By what capability or mechanism can you currently export the data base, in whole or in part, and in which format, such as Excel or C.SV? Once exported, what redacting capability do you have?" KSP's response stated, "The option currently exists to export the entire uniform citation database in an XML data extract or a Microsoft SQL Server Backup file. Parts of the data repository can be extracted to Microsoft Access, XML, Excel file or Comma delimited text file. These extracts contain both exempted and non-exempted materials. There is no current way to export or extract just non-exempted records. As previously discussed, once exported, each citation would need to be individually examined to redact exempt information."

The Attorney General also inquired, "What kind of 'design and development' work would be required to enable KSP to export the database and then separate the exempt material from the non-exempt material per KRS 61.878(4)?" The response stated: "It would require those who work in KyOPS to conduct design and development meetings with the involved stakeholders to

determine exempt vs. non-exempt field elements, figure out the best delivery mechanism to distribute the extracts and determine the extract layout format. Once design sessions are complete, a specifications document would be created outlining the decisions made during the design sessions. Upon approval of the specifications document then development would begin. Extract layouts documents would be created and the extracts would be made available to production once development and extract layouts are complete."

On April 17, 2018, the Attorney General issued an opinion finding KSP had violated the Open Records Act because it had not fulfilled its duty to separate exempt material pursuant to KRS 61.878(4). The opinion stated that KSP had "chosen to maintain the uniform citations in such a way that exempt and non-exempt information is commingled," and that problems caused by the agency's "method of organizing its files" did not constitute a legitimate basis for denial of the Courier Journal's request. The Attorney General also rejected KSP's argument that it was being asked to create a record or to produce a record in a specially tailored or nonstandard format, which is not required by the Act. *See* KRS 61.874(3).

KSP then appealed to the Franklin Circuit Court. The Courier Journal filed a motion for summary judgment. In its response, KSP submitted an affidavit from Lieutenant Howard Blanton, who is the Acting Commander of the KSP

Criminal Identification and Records Branch. He works with Roadcap in administering the KyOPS record management system, which he confirmed has accumulated over 8 million entries since 2003, with approximately 1,800 new citations added each day. His affidavit stated that the system was designed and maintained "in a manner to best promote the investigative/enforcement goals of the Kentucky State Police[,]" and that "[i]t would cost over $15,000 to conduct the design and development work needed to create an electronic copy of KyOPS that removes or redacts exempt information (e.g. social security number, home address, etc.) from KyOPS." The affidavit concluded that "[w]ithout conducting the over $15,000 in design and development work, there is no way to remove or redact exempt information . . . without manually reviewing and redacting the records."

The Franklin Circuit Court affirmed the decision of the Attorney General and granted summary judgment to the Courier Journal, stating:

> When KSP created its data management system as opposed to a database, it chose to create a relationally related data identifying system rather than a linear system that would allow ease of redaction in the case of open records requests. The agency designed a system that clearly cannot comply with Kentucky Open Records Law. It is KSP's duty to provide information to the public as well as efficiently provide public safety to the citizens of the Commonwealth. To use an electronic records management system that does not allow KSP to complete both of these duties with which it is statutorily tasked is an irresponsible, and impermissible, abrogation of its duties. . . . The Court recognizes the burden of either tedious manual redaction or financial costs of

> creating a new database system. However, evidence does not exist, in accordance with statutes and Kentucky case law, that this burden outweighs the agency's duty to produce public records to requestors. Agency inefficiency cannot restrict the citizenry's liberty interest in accessing information to promote government transparency among all levels of state government.

This appeal by KSP followed.

The fundamental policy of the ORA "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, even though such examination may cause inconvenience or embarrassment to public officials or others." KRS 61.871. "The public's 'right to know' under the Open Records Act is premised upon the public's right to expect its agencies properly to execute their statutory functions. In general, inspection of records may reveal whether the public servants are indeed serving the public, and the policy of disclosure provides impetus for an agency steadfastly to pursue the public good." *Kentucky Bd. of Examiners of Psychologists and Div. of Occupations and Professions, Dep't for Admin. v. Courier-Journal and Louisville Times Co.*, 826 S.W.2d 324, 328 (Ky. 1992).

"Although the general policy [of the Act] favors broad availability of public records, that availability is not unlimited." *Commonwealth v. Chestnut*, 250 S.W.3d 655, 664 (Ky. 2008). "Perhaps the main exception to the general

presumption that public records are subject to public inspection is contained in KRS 61.872(6), which provides that an otherwise valid open records request may be denied if complying with it would cause 'an unreasonable burden[.]'" *Id.* Whether a request falls within this exclusion is a highly fact-specific determination. "The statute contemplates a case-specific approach by providing for *de novo* judicial review of agency actions[.]" *Bd. of Examiners*, 826 S.W.2d at 328 (italics added). In order to invoke this exception, the agency must sustain its refusal to comply with a request "by clear and convincing evidence." KRS 61.872(6).

"[T]he Act forbids *blanket* denials of ORA requests, *i.e.*, the nondisclosure of an entire record or file on the ground that some part of the record or file is exempt: 'If any public record contains material which is not excepted under this section [KRS 61.878], the public agency shall separate the excepted and make the nonexcepted material available for examination.' KRS 61.878(4)." *Kentucky New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76, 88 (Ky. 2013). The material contained in KyOPS which the parties agree is exempted from disclosure includes Social Security numbers and driver's license numbers under KRS 61.878(1)(a), and law enforcement records relating to juvenile offenders and children under KRS 610.320(3) and KRS 610.340(1)(a).

"On appeal, we review the circuit court's factual findings for clear error, and issues concerning the construction of the Open Records Act *de novo*." *Salinas v. Correct Care Solutions, LLC*, 559 S.W.3d 853, 856 (Ky. App. 2018) (citing *Chestnut*, 250 S.W.3d at 660). Under the circumstances of this case, when the trial court makes a finding of fact adverse to the party having the burden of proof, which is KSP, the test of whether the finding is clearly erroneous is "whether the evidence adduced is so conclusive as to compel a finding in [KSP's] favor as a matter of law." *Chestnut*, 250 S.W.3d at 660 (quoting *Morrison v. Trailmobile Trailers, Inc*., 526 S.W.2d 822, 824 (Ky. 1975)). In other words, we must determine if the evidence presented by KSP to the circuit court "was so conclusive as to compel a finding in its favor" that the production of the database presented an unreasonable burden. *Id*. (footnote omitted).

KSP argues that the Courier Journal's request imposed an unreasonable burden because it is overbroad, entailing the individual review and redaction of more than eight million records. It contends that the circuit court's reliance on *Chestnut*, 250 S.W.3d 655, to rule otherwise is misplaced because the cases are so factually dissimilar. In *Chestnut*, a prisoner sought a copy of his entire inmate file, excluding any documents that would be considered official. The Department of Corrections rejected the request, invoking the unreasonable burden exception. It explained that assembling the file would require tedious and time-

consuming work by DOC employees. The Kentucky Supreme Court rejected this argument, explaining that "the General Assembly has already mandated that all public agencies, such as the DOC, must separate materials exempted from disclosure in a document from materials that are subject to disclosure. Thus, the obvious fact that complying with an open records request will consume both time and manpower is, standing alone, not sufficiently clear and convincing evidence of an unreasonable burden." *Chestnut*, 250 S.W.3d at 665 (footnote omitted) (citing KRS 61.878(4)).

The Court also rejected the DOC's argument that it was an undue hardship to comply with the request because each inmate has numerous files which might be physically located at more than one spot across the Commonwealth, stating:

> [A]lthough the DOC's method of organizing its files is clearly beyond our purview, the DOC could . . . reorganize its materials in such a manner as to more easily facilitate open records review by inmates, the general public, and DOC personnel. . . . In other words, the DOC should not be able to rely on any inefficiency in its own internal record keeping system to thwart an otherwise proper open records request.
>
> Moreover, the fact that many inmates' files . . . are voluminous does not mean that it would necessarily be an unreasonable burden for a state agency such as the DOC to comply with an otherwise valid open records request. A record's length, standing alone, is an insufficient reason to exempt it from open records disclosure."

Id. at 665-66 (footnotes omitted).

KSP claims it is undisputed that the only way it can redact protected information from the over eight million records in KyOPS is by manually reviewing and redacting each one and that the request by an inmate in *Chestnut* for his entire record from the DOC is not remotely comparable in scope. KSP implies that the circuit court proceeded on the mistaken assumption that under *Chestnut* it can never be an unreasonable burden for an agency to separate protected information from non-protected information.

There is undisputed evidence in the record in the form of Lieutenant Blanton's affidavit that KSP could perform the necessary categorical redactions at a cost of $15,000. KSP dismisses this possibility by arguing that electronic redaction would require the creation of a "new record." As support for this contention, KSP maintains that the use of the past tense in the statutory definition of public records as records "which are prepared, owned, used, in the possession of or retained by a public agency[,]" indicates that agencies are required only to produce records which exist at the time of the request, not records created in response to the request. KRS 61.870(2). KSP also relies on numerous opinions of the Attorney General which hold that a public agency is not required to create a record in response to an open records request. *See, e.g.*, Ky. Op. Atty. Gen. 18-ORD-056 (2018).

But under KSP's expansive interpretation, an agency could refuse any open records request requiring even minimal redaction on the grounds that it necessitates the creation of a "new record." Modifying the KyOPS database to enable redactions by entire categories of information, as opposed to the tedious and time-consuming review of every individual entry, does not constitute creating a new record because the end product of either process would be exactly the same. Presumably, if the Courier Journal had requested only one specific citation from the database, which could have been manually redacted with minimal time and effort, KSP would not have objected on the grounds that it required the creation of a new record or requested costs. The scale of the request does not alter the character of the material requested. Separating exempt material is not equivalent to creating a new record and is mandated by KRS 61.878(4).

KSP further argues that the circuit court erred in relying on the recommendations of the Kentucky Electronic Records Working Group that databases should be designed to facilitate the separation of exempt and non-exempt data, arguing that these recommendations are non-binding and that in any event the recommendations also stated that an agency is not required to reformat existing databases. We agree that the recommendations of the Working Group are non-binding, but they do illustrate that public agencies have been made aware of the necessity of separating exempt and non-exempt information. Furthermore,

facilitating the electronic redaction of exempt information does not constitute reformatting.

Finally, KSP contends that the Courier Journal should bear the expense of the electronic redaction pursuant to KRS 61.874(3), which states: "If a public agency is asked to produce a record in a nonstandardized format, or to tailor the format to meet the request of an individual or a group, the public agency may at its discretion provide the requested format and recover staff costs as well as any actual costs incurred." Redaction is not the equivalent of a change in format. The Courier Journal has provided numerous references to opinions of the Attorney General holding that separating exempt material is not the equivalent to creating a new record and must be done at the agency's expense. For instance, the Attorney General has quoted with approval from *Long v. U.S. Internal Revenue Service*, 596 F.2d 362 (9th Cir. 1979), *cert. denied*, 446 U.S. 917 (1980), in which "the Ninth Circuit Court of Appeals held that the deletion of exempt information from a public record could not be equated with the creation of a new record, and that the agency must bear the cost of editing. . . . [T]he court reasoned: "We do not believe . . . that the mere deletion of names, addresses, and social security numbers results in the agency's creating a whole new record." Ky. Op. Atty. Gen. 95-ORD-82 (1995). KRS 61.878(4), which requires the separation of exempt and non-exempt materials, does not specify the costs must be borne by the requester.

In its *amicus* brief, the Energy and Environment Cabinet argues that affirming the decision of the circuit court would set a dangerous precedent with regard to public agencies, which already expend considerable funds in complying with numerous open records requests. It contends that Kentucky law does not require agencies to design databases that facilitate the separation of exempt and non-exempt data. The Cabinet maintains at least 44 electronic database programs that store official records and argues that requiring them to be upgraded or overhauled to various degrees would be costly and not contemplated by the General Assembly.

The Cabinet's valid concerns are not to be discounted but are more properly directed towards the General Assembly. It is a fundamental principle that "judicial decisions concerning . . . open record requests are to be made on a 'case-by-case basis.'" *Lexington H-L Services, Inc. v. Lexington-Fayette Urban County Government*, 297 S.W.3d 579, 585 (Ky. App. 2009) (citations and footnote omitted). "Questions which may never arise or which are merely advisory, academic, hypothetical, incidental or remote, or which will not be decisive of a present controversy do not present justiciable controversies." *Commonwealth, Kentucky Bd. of Nursing v. Sullivan University System, Inc.*, 433 S.W.3d 341, 344 (Ky. 2014) (citation and internal quotation marks omitted).

For the foregoing reasons, the opinion and order of the Franklin Circuit Court is affirmed. The motion by the Energy and Environment Cabinet to file an *amicus* brief is hereby granted by separate order.

ALL CONCUR.

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