04-ORD-141

August 17, 2004

In re: Linda Toler/City of Muldraugh

Open Records Decision

At issue in this appeal is whether the City of Muldraugh violated the Kentucky Open Records Act in denying the request of Linda Toler for copies of the employment applications submitted by the following City of Muldraugh employees: Caroline J. Cline, Siglinde Borchert-Lowe, Anthony Lee, and Craig Dawson. Because the Attorney General has consistently recognized the duty of public agencies to disclose the employment applications and résumés of their employees once "matters unrelated to the performance of public employment" have been redacted, it is the decision of this office that the City's reliance on KRS 61.878(1)(a) was misplaced. Having failed to satisfy its statutory burden of proof, the City should immediately permit Ms. Toler to inspect redacted copies of any existing records which are responsive to her request.

Responding on behalf of the City, Caroline J. Cline, City Clerk/Treasurer, denied Ms. Toler's request for copies of the specified employment applications "based upon KRS 61.878, which states that public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy."[1] By letter dated July 19, 2004, Ms. Toler initiated this appeal. In her view, Ms. Cline's reliance on KRS 61.878[(1)(a)] was improper because she "knows that in this small town, [they]

[1] Although the City failed to cite the specific statutory exception upon which it relied in denying Ms. Toler's request as mandated by KRS 61.880(1), the City evidently relied upon KRS 61.878(1)(a) as indicated by the quoted language.

live but a few houses from several of the workers." Citing OAG 91-21, Ms. Toler clarifies that she did not request nor does she want any personal information. As correctly observed by Ms. Toler:

> Education qualifications reported upon applications for employment and [résumés] submitted by those who are hired are subject to inspection, but the [C]ity may mask any information of a personal nature that appears on the document, i.e., home address, social security number, medical information, etc.

Upon receiving notification of Ms. Toler's appeal, Ms. Cline elaborated on the City's position in supplemental correspondence dated July 28, 2004. According to Ms. Cline, "Muldraugh being a very small town and Mrs. Toler knowing the location of residences of certain city workers is not relev[a]nt as far as [her] decision to withhold the records is concerned." Although Ms. Toler "did not specifically indicate what information she was seeking[,]considering the animosity between Ms. Toler and city employees," Ms. Cline feels that "releasing any information on [their] employment applications would be a violation of privacy." Upon consulting the City Attorney, therefore, Ms. Cline denied Ms. Toler's request for the specified employment applications.

In a facsimile dated August 5, 2004,[2] Michael A. Pike, City Attorney, responded on behalf of the City. Directing our attention to her original request, Mr. Pike emphasizes that "Ms. Toler did not specifically request education qualifications or [résumés] for these individuals." With respect to Caroline Cline, "there is no written application that was received or retained" by the City according to Mr. Pike.[3] In his opinion, "[t]he other individuals' applications do contain information of a personal nature" and "separating out any exempt material [would place] an unreasonable burden" on the City.[4] However, "if Ms.

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[2] As indicated on the "Notification to Agency of Receipt of Open Records Appeal," any supplemental response was supposed to be submitted by July 28, 2004.

[3] As long recognized by this office, a public agency cannot provide a requester with access to records that it does not have or which do not exist. 04-ORD-046, p. 4, citing 00-ORD-83; 02-ORD-120; 01-ORD-11; 98-ORD-71; 98-ORD-35; 96-ORD-190; OAG 97-ORD-17; OAG 91-112; OAG 83-111. An agency discharges its statutory duty by affirmatively so indicating as the City did here relative to Ms. Cline's application. 03-ORD-205, p. 3, citing 99-ORD-98.

[4] In making this argument, Mr. Pike is implicitly relying upon KRS 61.872(6), which provides:

Toler is requesting under a narrower focus non-exempt records, the [City] will be happy to provide" those records as required by law.[5] Consistent with governing precedent, the City must provide Ms. Toler with any existing records which are responsive to her request.

In denying Ms. Toler's request, the City relies upon KRS 61.878(1)(a), albeit implicitly. Absent a court order authorizing inspection, KRS 61.878(1)(a) authorizes a public agency to withhold:

> Public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy[.]

In construing this provision, the Attorney General has observed:

> KRS 61.878(1)(a) "applies . . . to matters entirely unrelated to the performance of public employment." OAG 78-133, p. 3. "The private rights of the public employee extend . . . to matters which are not related to the performance of his work." OAG 80-43, p. 3. Paraphrasing the [C]ourt's holding in *Board of Education of Fayette County v. Lexington-Fayette Urban County Human Rights Commission*, Ky. App., 625 S.W.2d 109 (1981), in OAG 85-88 we stated that

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> If the application places an unreasonable burden in producing public records or if the custodian has reason to believe that repeated requests are intended to disrupt other essential functions of the public agency, the official custodian may refuse to permit inspection of the public records or mail copies thereof. *However, refusal under this section shall be sustained by clear and convincing evidence.* (Emphasis added).

As consistently held by this office, an agency cannot sustain a refusal under KRS 61.872(6) "by the bare allegation that the request is unreasonably burdensome." 04-ORD-113, p. 10; 01-ORD-124. Only when the agency has adduced evidence which would warrant a finding that the burden imposed on the agency is unreasonable, will the Attorney General uphold its action. Id. No credible argument can be made that redacting exempt information from four specified employment applications would place an unreasonable burden on a public agency or interfere with its essential functions. Copies of 04-ORD-113 and 01-ORD-124, which are instructive as to the type of fact pattern and degree of specificity required to satisfy this intentionally high standard, are attached to this decision for the parties' reference.

[5] Although a requesting party must identify with "reasonable particularity" those documents to which he seeks access, where the records sought are of an identified, limited class, as is the case here, the requester satisfies this condition. 04-ORD-113, p. 10, citing OAG 89-81.

> "much of the information found in . . . personnel folders deals with items and facts of a personal nature and no public interest would be served by complete disclosure." OAG 85-88, p. 2.

00-ORD-090, p. 3, citing 97-ORD-66, pp. 6, 7.

In 03-ORD-012,[6] however, this office held that the Berea Independent School District improperly denied a request for the *complete personnel record*s of named employees, a request which necessarily encompasses employment applications like those in question, on the basis of KRS 61.878(1)(a). In so doing, the Attorney General reasoned that "a request for access to a personnel file requires no greater degree of specificity than any other open records request," and, therefore, the agency must "determine what is and is not subject to Open Records." Id., p. 7. More specifically, the "agency must disclose the nonexcepted records and identify, in writing, any responsive records withheld, [c]ite the statute(s) authorizing the withholding, and briefly explain how the statute applies to the record withheld" pursuant to KRS 61.878(4). Id. As this office observed, there is ample authority to guide an agency in making this determination. Quoting extensively from 97-ORD-66, the Attorney General held:

> A public employee's name, position, work station, and salary are subject to public inspection, as well as portions of the employee's [résumé] reflecting relevant prior work experience, educational qualifications, and information regarding the employee's ability to discharge the responsibilities of public employment. See, for example, OAG 76-717, OAG 87-37, OAG 91-41, OAG 91-48, OAG 92-59, 94-ORD-26. In addition, reprimands to employees regarding job-related misconduct, and disciplinary records generally, have traditionally been treated as open records. See, for example, OAG

[6] At issue in 03-ORD-213 was whether the Laurel County Sheriff's Department had violated the Open Records Act in its disposition of a request for personnel records, including disciplinary records, relating to specified officers, and records generated by an internal investigation regarding a named individual. In concluding that the Department had committed a substantive violation of the Act, this office emphasized that the request was for the entire personnel files of the named officers rather than just disciplinary records contained in those files. 03-ORD-213, p. 2. Relying upon 03-ORD-012, the Attorney General disagreed with the Department's characterization of the remaining information as "personal." Equally without merit is the blanket denial which prompted the instant appeal.

> 78-133, OAG 91-20, OAG 92-34, 95-ORD-123, 96-ORD-86. Letters of resignation submitted by public employees have also been characterized as open records.
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> Conversely, this office has affirmed agency denial of access to a public employee's home address, social security number, medical records, and marital status on the grounds that disclosure would constitute a clearly unwarranted invasion of personal privacy. See, for example, OAG 79-275, OAG 87-37, OAG 90-60, OAG 91-81, 94-ORD-91. Such matters are unrelated to the performance of public employment. Employee evaluations have also been held to fall within the parameters of KRS 61.878(1)(a) for the reasons stated in OAGs 77-394, 79-348, 80-58, 82-204, 86-15, and 89-90.

03-ORD-012, p. 8, citing 97-ORD-66, p. 5; 03-ORD-213. As previously recognized by the Attorney General, "these opinions are premised on the idea that a person does not typically work, or attend school, in secret, and[,] therefore[,] the employee's privacy interest in such information is outweighed by the public's right to know that the employee is qualified for public employment." 93-ORD-32, p. 3; 00-ORD-090.

As evidenced by the foregoing authorities, the City violated the Open Records Act in refusing to provide Ms. Toler with redacted copies of the specified employment applications. Because the requested records contain both excepted and nonexcepted material, the City may redact the excepted material and make the nonexcepted material available for inspection after articulating, in writing, the statutory basis for withholding the excepted information per KRS 61.878(4)[7] and KRS 61.880(1).[8] To clarify, "the alleged necessity of separating

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[7] KRS 61.878(4) provides: 'If any public record contains material which is not excepted under this section, the public agency shall separate the excepted and make the nonexcepted material available for inspection."

[8] In relevant part, KRS 61.880(1) provides:

> Each public agency, upon any request for records made under KRS 61.870 to 61.884, shall determine within three (3) days, excepting Saturdays, Sundays, and legal holidays, after the receipt of any such request whether to comply with the request and shall notify in writing the person making the request, within the three (3) day period, of its decision. An agency response denying, in whole or in part, inspection of any record shall include a statement of the specific exception

exempt and nonexempt material is *not* a sufficient reason for denying access to records." 03-ORD-128, p. 5, citing OAG 81-198, p. 4 (emphasis added). In order to fully discharge its duty under the Open Records Act, therefore, the City must, within three days of receiving this decision, permit Ms. Toler to inspect the requested records in their entirety, or separate the excepted material and make only the nonexcepted material available for inspection as mandated by KRS 61.878(4) and KRS 61.880(1).[9]

A party aggrieved by this decision may appeal it by initiating an 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 proceeding.

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authorizing the withholding of the record and a brief explanation of how the exception applies to the record withheld. The response shall be issued by the official custodian or under his authority, and it shall constitute final agency action.

[9] Because Ms. Toler apparently resides in the county where the requested records are located and there is no evidence of record indicating that her principal place of business is outside the county, the City may require her to inspect the records identified in her request as a precondition to acquiring copies pursuant to KRS 61.872(3)(b). If that is not the case, the City should immediately provide Ms. Toler with redacted copies of the requested records upon receiving "advance payment of the prescribed fee, including postage [if] appropriate" as mandated by KRS 61.874(1).

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