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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002453-MR

WLEX COMMUNICATIONS, LLC — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 04-CI-04126

LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT — APPELLEE

OPINION
DISMISSING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; MOORE AND NICKELL, JUDGES.

COMBS, CHIEF JUDGE: WLEX Communications, LLC, appeals from a summary judgment of the Fayette Circuit Court entered November 1, 2005, in favor of the Lexington-Fayette Urban County Government (LFUCG). WLEX, a local television news broadcaster, alleged that the government had violated provisions of Kentucky's Open Records Act (KRS 61.870- 61.884) by failing to make available a copy of the recording of a 911 telephone call placed to the Division of Police. For the reasons that follow, we dismiss this appeal.

In a note dated April 27, 2004, Leigh Searcy, a reporter for WLEX, requested LFUCG's Chief of Police to prepare copies of "a call to the Lexington Police 911 Center concerning a student with a medical problem on a school bus on April 21, 2004 at around 3:30 PM." Searcy directed the Chief of Police to notify Mike Taylor at WLEX once the copies were made available.

By correspondence addressed to Mr. Taylor dated May 4, 2004, the Division of Police formally denied Searcy's request. LFUCG stated two reasons for declining to authorize release of the material: (1) because the telephone call was made by a juvenile whose privacy it was required to protect and (2) because the matter had been transferred to the Division of Fire: "... we do not have a dispatch record. You will need to contact the Division of Fire for your Request." The correspondence was prepared by a Communications Unit Assistant, who noted that he was available to address any questions with respect to the request. WLEX made no response nor did it pursue the matter further with LFUCG.

Nearly two months later, the Office of the Attorney General notified LFUCG that Taylor had appealed the decision to deny Searcy's request for a copy of the 911 recording. In its correspondence, the attorney general requested a copy of the disputed recording and asked whether it was LFUCG's position that the public disclosure of 911 recordings was unauthorized as a matter of law.

By letter dated July 6, 2004, LFUCG responded to the attorney general and explained that Searcy's request for material had been denied pursuant to relevant

statutory and case law. Citing our holding in *Bowling v. Brandenburg*, 37 S.W.3d 785 (Ky.App. 2001), LFUCG noted that the public's right to know the contents of the 911 recording must yield to the legitimate privacy interests of the person who had called for emergency assistance. LFUCG argued that a release of the requested information could not only have an adverse affect upon the person (in this case, a juvenile) who placed the disputed call but that it could also be expected to have a chilling effect upon citizens' use of the 911 system. LFUCG indicated that it was willing to provide a summary of the 911 call dispatch with all the collected personal data redacted.

As noted earlier, LFUCG initially believed that no such record existed. Since the call was of a medical nature, standard operating procedure would dictate that it be forwarded to the Division of Fire and Emergency Services. Normally under such circumstances involving a medical situation with no criminal activity alleged, a summary of a 911 call would not be made. However, further research indicated that police officers were in fact dispatched to the scene. Thus, after discovering this additional fact, LFUCG attached a copy of the summary to the correspondence and forwarded another copy directly to Taylor as a supplemental response to Searcy's request on behalf of WLEX. LFUCG argued that this redacted information gave WLEX proper insight into the government's response as contemplated by the Open Records Act by protecting the privacy of the individual caller and not compromising recourse to the 911 system.

In separate correspondence to the attorney general, dated July 7, 2004, LFUCG explained that it could not provide a copy of the 911 call recording as requested

by that office because the computer-generated material had been destroyed -- pursuant to a regular retention schedule -- nearly two weeks before LFUCG received any indication that WLEX would challenge its decision. (As noted earlier, nearly two months passed between LFUCG's first correspondence denying the request before Taylor challenged that denial before the attorney general.)

On September 9, 2004, the attorney general issued its Open Records Decision. The attorney general concluded that while LFUCG had articulated a good-faith argument in support of its position to decline to disclose the information, it had nonetheless **improperly denied** Searcy's request for access to the material. The attorney general found as follows:

> While we agree that LFUCG may present proof, on a case-specific basis, to sustain its denial of a request for a particular 911 recording, the question of "whether an invasion of privacy is 'clearly unwarranted' is intrinsically situational, and can only be determined within a specific context," *Kentucky Board of Examiners of Psychologists v. The Courier-Journal and Louisville Times Co.*, Ky., 826 S.W.2d 324 (1992) cited in *Bowling* at 787. The proof presented by LFUCG, in the instant appeal, does not sustain its denial of WLEX-TV's request.
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> The decision of the Court of Appeals in *Bowling* turned, in large part, on the context of domestic violence out of which it arose, and the likelihood that in that context the caller would be subject to retaliation, harassment, or public ridicule. Neither of these factors is present in the instant appeal. Assuming arguendo that the caller's identity could be determined through voice identification technology, he need not be concerned with the potential for retaliation, harassment, or public ridicule. His were the actions of a

> quick-thinking youth who courageously responded to a serious medical emergency, and are more likely to result in accolades than insults. Accordingly, his privacy interest is reduced. Conversely, the public's interest in the actions of the bus driver, as a public servant discharging his or her public function, the 911 operation, as a public servant discharging his or her public function, and the responding police officers, as public servants discharging their public function, which are captured on the 911 recording, are significant indeed. The written summary which LFUCG belatedly offers as an alternative to the actual tape only dimly reflect[s] what transpired in the course of the 911 call and is subject to editing. While the summary is the preferred alternative to total nondisclosure, in cases where a heightened privacy interest outweighs the public's interest in disclosure, it is not an adequate substitute for the actual tape in the case on appeal. In this case, the public's right to know the contents of the 911 tape recording outweighs the minimal privacy interest of the student who placed the call to obtain emergency assistance. We therefore find that LFUCG improperly withheld the tape.

04-ORD-161 at 4-6.

With respect to destruction of the computer-generated recording of the 911 call, the attorney general observed as follows:

> We are obligated to note that the requested record was apparently destroyed in the regular course of business after WLEX-TV submitted its open records request but before WLEX-TV initiated this open records appeal. Unfortunately, the record is no longer available for inspection.

The attorney general found no evidence to suggest that LFUCG had willfully concealed a public record.

On October 8, 2004, LFUCG filed an action in Fayette Circuit Court to appeal the decision of the attorney general. LFUCG alleged that the attorney general had

erred in concluding that it had improperly withheld the contents of the 911 recording from public disclosure. WLEX answered the complaint. Pursuant to KRS 61.882(3), the trial court undertook a *de novo* review of the matter.

On August 5, 2005, LFUCG filed a motion for summary judgment and argued that it had properly resisted WLEX's request for disclosure of the recording of the 911 call on various grounds. LFUCG observed that the call to the Division of Police did not report any criminal activity or conduct; did not result in any police assistance; and was not the subject of any official written report. As a result, it concluded, the 911 call recording was exempt from disclosure under the provisions of KRS 61.878(1)(i).

LFUCG also addressed its destruction of the computer-generated recording. The government contended that state library and archives officials had investigated the matter and had concluded that LFUCG had acted in accordance with its regular retention schedule and had properly destroyed the recording after sixty (60) days.

In its prompt response to LFUCG's motion, WLEX disagreed that LFUCG had acted properly in withholding the 911 call recording. While resisting LFUCG's motion for summary judgment, WLEX nonetheless expressly regarded the destruction of the tape as "tangential" and "non-critical."

The trial court granted LFUCG's motion for summary judgment on November 1, 2005. This appeal followed.

On appeal, WLEX presents several arguments for reversal of the trial court's judgment. It argues that the trial court erred by concluding that the 911 call

recording was exempt from disclosure pursuant to the provisions of KRS 61.878(1)(i). It also concludes that the juvenile caller's privacy interest is *de minimus* and should be disregarded in favor of disclosure. Finally, WLEX believes that our decision in *Bowling v. Brandenburg, Id.* should be overruled. WLEX also maintains that LFUCG ought to be subjected to a civil fine for willfully failing to produce the 911 call recording and that LFUCG should be ordered to pay its legal fees. "Particularly this is true because after proceeding to seek an opinion of the Attorney General in 04-ORD-161 which was favorable to it, WLEX was involuntarily made a party to this litigation, thus requiring it to incur additional fees and expenses, all over an audiotape LFUCG had already destroyed." Brief at 23.

WLEX acknowledges in its brief that the destruction of the disputed recording poses an obstacle to our review. Since the recording no longer exists, we clearly cannot compel LFUCG to produce it for public inspection. Yet, while the controversy is no longer a "live" one, WLEX encourages the court to review the matter on the grounds that it "significantly affects the public interest" and is likely to recur. We do not agree.

Unless there is an actual case involving a present, ongoing controversy, the issues surrounding it become moot. Our courts are not at liberty to give advisory opinions -- even on important public issues. *Philpot v. Patton* 837 S.W.2d 491 (Ky. 1992). Indeed, our courts lack **jurisdiction** to decide issues that do not arise from a live controversy. *See Commonwealth v. Hughes,* 873 S.W.2d 828 (Ky. 1994), *citing In Re*

Constitutionality of House Bill No. 222, 90 S.W.2d 692 (Ky. 1936)("Power to render advisory opinions conflicts with Kentucky Constitution Section 110 and thus cannot be exercised by the Court").

However, as WLEX duly notes, a dispute that is said to be "capable of repetition, yet evading review" presents an exception to the mootness doctrine. We agree that where such an exception applies, courts do have the discretion to consider issues otherwise regarded as nonjusticiable. However, this exception is quite limited and narrowly-drawn.

> The decision whether to apply the exception involves two questions: whether (1) the challenged action is too short in duration to be fully litigated prior to its cessation or expiration and (2) there is a reasonable expectation that the same complaining party would be subject to the same action again.

Philpot, 837 S.W.2d at 493, *citing In re Commerce Oil Co.*, 847 F.2d 291, 293 (6th Cir. 1988).

This case falls squarely within the mootness doctrine. If we were to reverse the court's order with respect to LFUCG's decision not to release the copy of the 911 call recording, the reversal would have no effect as the recording has been destroyed and is no longer subject to public disclosure. Although the matter arguably involves an issue of public importance, it is not subject to "capable of repetition, yet evading review" exception to the mootness doctrine. There is no reasonable expectation or possibility that the same complaining party will be subject to the same action again or even that the precise factual scenario could ever be duplicated. We note parenthetically that WLEX

has contributed to the applicability of the mootness doctrine and that our review is precluded at least in part by its own delay in seeking a legal opinion from the attorney general.

As we held in *Bowling*, the determination of whether the public has the right to examine particular materials as balanced against individual privacy rights necessarily entails a case-by-case, fact-specific inquiry to determine whether the individual involved has a reasonable expectation of privacy -- and if so, whether that expectation of privacy supersedes the interests of public disclosure of the requested materials **under the circumstances**.

Bowling, 37 S.W.3d at 788, remains good law, and we find no justification to consider overruling it. Its balancing test is not of its own fabrication but is founded upon *Zink v. Commonwealth*, 902 S.W.2d 825 (Ky.App. 1994), which also employed a meticulous analysis of the countervailing rights of personal privacy *versus* public disclosure:

> *Zink* ..., following the *Board of Examiners* standard, stated that upon a finding that the sought-after information was of a personal nature, the analysis proceeds to a determination of whether public disclosure constitutes a clearly unwarranted invasion of personal privacy. "This latter determination entails a 'comparative weighing of antagonistic interests' in which the privacy interest in non-disclosure is balanced against the general rule of inspection and its underlying policy of openness for the public good." *Zink*, 902 S.W.2d at 828. The competing interests here are the 911 caller's right to privacy when seeking police assistance versus the public's right to know about the conduct of government agencies.

Id.

In pursuing judicial review of this matter, LFUCG was availing itself of its legitimate constitutional right of access to the courts. In addition, § 115 of the Constitution of Kentucky guarantees this appeal as a matter of right. We find no basis in this case for assessment of a civil fine, costs, or attorneys' fees. WLEX has acknowledged that there was no willful or wrongful conduct on the part of LFUCG in the destruction of the tape. And we find no bad faith or frivolous conduct in LFUCG's decision to resort to the courts for a binding interpretation of an opinion of the attorney general which – regardless of how persuasive it may be – is not binding as a matter of law as is a court opinion and order.

As we have concluded that the issue in this case is nonjusticiable and not subject to the "capable of repetition, yet evading review" exception to the mootness doctrine, we dismiss this appeal.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
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ORAL ARGUMENT FOR APPELLANT:	ORAL ARGUMENT FOR APPELLEE:
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