RENDERED: AUGUST 2, 2002; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000980-MR
AND
NO. 2001-CA-001063-MR

CHRISTOPHE G. STEWART; AND
SAMUEL T. DAVENPORT — APPELLANTS/CROSS-APPELLEES

v.

APPEAL AND CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN K. MERSHON, JUDGE
ACTION NO. 00-CI-003133

UNIVERSITY OF LOUISVILLE — APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING
** ** ** ** **

BEFORE: DYCHE, KNOPF, AND McANULTY, JUDGES.

McANULTY, JUDGE: This is an appeal of an open records dispute between Christophe G. Stewart and Samuel T. Davenport and the University of Louisville (hereinafter U of L). Appellants appeal the denial of disclosure of personal files of a U of L employee contained on a university-owned computer. We affirm.

Stewart is an attorney who represents Davenport in what appellants describe as acrimonious litigation with his former girlfriend, Brenda Lynn Overstreet. Ms. Overstreet is employed at U of L as a secretary. On January 20, 2000, Stewart filed an

open records request with U of L, seeking various records pertaining to her employment as well as personal information contained on her computer. The latter request, the basis for this appeal, was as follows:

> 6. A copy of any and all personal information on the computer used by Brenda Lynn Overstreet and any and all disks, hard drives, tape drives or otherwise recorded. The request is specifically not asking for any University of Louisville records or business or academic documents.

U of L's custodian of records initially responded to the request by inquiring of Stewart whether the request was made on behalf of Ms. Overstreet, and by informing him that the records were in the process of being identified and the request would take more time to complete because some were in off-site storage.

Stewart responded that U of L's response was inadequate and in violation of the Open Records Act. In addition, Stewart stated in the letter that he hoped Ms. Overstreet had not been informed regarding the request for her personal information. On January 31, 2000, the records custodian at U of L responded to the open records request. He stated which portions of the request would be granted and which would be denied, and the bases for denial. With regard to request number 6, above, dealing with Ms. Overstreet's personal information, he stated:

> If Ms. Overstreet happened to have any personal files on her office computer, I strongly believe they would not be accessible under the statute. For one thing, it is difficult for me to see such records as "public records" under the statute. And in any case, the "public disclosure" of such records, it seems to me, "would constitute a clearly unwarranted invasion of personal privacy" (KRS 61.878(1)(a)). Therefore I am

> denying your request to inspect any personal records that may have been created by Ms. Overstreet.

The next day, the records custodian was informed by Ms. Overstreet's attorney that she was in litigation with Davenport who was represented by Stewart. The records custodian then informed Stewart that he was denying the request in its entirety because the Open Records Act could not be used by a party to litigation.

Stewart appealed U of L's decision to the Attorney General pursuant to KRS 61.880(2). On April 30, 2000, the Attorney General issued an Open Records Decision (00-ORD-97) and concluded that U of L's reliance on KRS 61.878(1), the exemption dealing with litigation, and KRS 61.878(1)(a), the privacy exemption, was misplaced. With regard to Ms. Overstreet's personal files, the Attorney General found no privacy right. Solely referencing prior Attorney General opinions, the Attorney General concluded that a "compelling public interest" was served by disclosure of personal files on University-owned computers. The Attorney General stated that U of L might withhold some files if it identified a privacy interest superior to the public's interest in disclosure "after reviewing Ms. Overstreet's personal files on her office computer." The Attorney General stated that "wholesale nondisclosure" of the files was not authorized and it was incumbent on U of L to articulate a basis for denying access to Ms. Overstreet's individual personal files.

U of L appealed this decision by initiating action in the Jefferson Circuit Court pursuant to KRS 61.880(5). KRS

61.882(3) provides that in an appeal of a determination by the Attorney General's office, an agency has the burden of proof to resist disclosure. U of L moved for summary judgment. U of L argued in a memorandum supporting the motion that the appellants' open records requests had nothing to do with a public interest in government accountability, that the Attorney General relied not on the law but on inconsistent opinions from his office, and that his opinion rendered the privacy exemption meaningless. U of L argued that requests for personal matters require a balancing of the privacy interest versus the public's right to know. U of L stated that there was no reason to believe that Ms. Overstreet was violating any University policy regarding computer use.

On November, 30, 2000, the trial court entered an order denying the motion for summary judgment and affirming the Open Records Decision, 00-ORD-97. The court determined that U of L could not rely on a litigation exception to deny all of the open records request.[1] With regard to the personal information on Ms. Overstreet's computer, the court ordered U of L to review the information to determine if the release of her personal information would constitute a clearly unwarranted invasion of privacy.

U of L filed a motion to reconsider with regard to the personal files only. U of L argued that requiring agencies to search employee's personal files for personal matters in response

[1] U of L does not appeal the trial court's determination with regard to a litigation exception in the Open Records Act, following the Kentucky Supreme Court's February 2001 opinion, Kentucky Lottery Corp. v. Stewart, 41 S.W.3d 860 (2001), which was dispositive of the issue.

to an open records request was unduly burdensome as well as a "terrible invasion of the privacy of public employees." U of L argued that the search ordered was not required by the applicable case law, which only required courts to take an overview of the material rather than an individual determination. U of L asserted that it had no express policy to forbid an employee's use of "a University computer to create, send or store a personal record." U of L argued, therefore, that employees have a legitimate expectation of privacy where no workplace rule was violated. On March 15, 2001, the trial court entered an order in which it determined that appellants' request was beyond the scope of the Open Records Act. The court held that it would not require agency employees to "go on a fishing expedition" into Ms. Overstreet's personal files. Appellants appeal this order.

Appellants argue simply that if Ms. Overstreet used state-owned equipment for personal matters, the Open Records Act affords no protection from disclosure. Appellants cite only an Attorney General opinion, 99-ORD-112, in which the Attorney General asserted that records obtained on public time and on public equipment were in his view public records. 99-ORD-112 dealt with an issue whether pornographic material obtained by a public employee via a state-owned computer was subject to disclosure.

We do not think that the position taken by the Attorney General adequately addresses the law regarding personal matters in public records. The Attorney General's conclusion that any

files on the computer are public records[2] does not complete the inquiry. Moreover, appellants' reliance on that opinion is misplaced because the case law regarding open records is controlling over the opinions of the Attorney General.

Under the privacy exemption of KRS 61.878(1)(a), public records "containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy" are excluded from the disclosure requirements of the Open Records Act.

> A plain reading of subsection (1)(a) reveals an unequivocal legislative intention that certain records, albeit they are "public," are not subject to inspection, because disclosure would constitute a clearly unwarranted invasion of personal privacy.

Kentucky Bd. of Examiners of Psychologists v. Courier-Journal, Ky., 826 S.W.2d 324, 327 (1992). Therefore, the first issue to determine is whether the items requested are "of a personal nature." In this case, the trial court correctly determined that the information requested was personal in nature. The request only asked for any personal files Ms. Overstreet may have created, and specifically excluded any files relating to the business of the university. Appellants have not shown that the records are in any way not "personal." They merely state that the records would have been created with public equipment. That

[2] "Public record" is defined in the Open Records Act as, "all books, papers, maps, photographs, cards, tapes, discs, diskettes, recordings, software, or other documentation regardless of physical form or characteristics, which are prepared, owned, used, in the possession of or retained by a public agency." KRS 61.870(2). KRS 61.872(1) provides, in pertinent part, that "All public records shall be open for inspection by any person, except as otherwise provided by KRS 61.870 to 61.884[.]"

has nothing to do with the nature of the files themselves. Therefore, we agree with the trial court that this part of the inquiry was met.

Next, the Kentucky Supreme Court established in Board of Examiners that the exemption for personal matters involves a balancing test. The Court stated that the Open Records Act reflects an interest in the protection of personal privacy as well as a general bias in favor of disclosure of public records. Id. at 327. To give effect to these interests, the Court found that the only mode of decision is "by comparative weighing of the antagonistic interests." Id. The Court explained:

> Necessarily, the circumstances of a particular case will affect the balance. The statute contemplates a case-specific approach by providing for de novo judicial review of agency actions, and by requiring that the agency sustain its action by proof. Moreover, the question of whether an invasion of privacy is "clearly unwarranted" is intrinsically situational, and can only be determined within a specific context.

Id. at 327-328. The Court held that the public's "right to know" under the Open Records Act is premised upon the public's right to expect public agencies properly to execute their statutory functions. Id. at 328.

While it is true that the analysis "does not turn on the purposes for which the request for information is made or the identity of the person making the request," it is relevant to consider the extent to which disclosure would serve the principal purpose of the Open Records Act. Zink v. Commonwealth, Dep't of Workers' Claims, Labor Cabinet, Ky. App., 902 S.W.2d 825, 828 (1994). The citizens' right to be informed as to what their

government is doing forms the basic purpose of disclosure. Id. The purpose of disclosure is not fostered, however, by disclosure of information about private citizens accumulated in various government files that reveals little or nothing about an agency's conduct. Id.

The trial court found that there was no evidence that Ms. Overstreet was abusing her public time or public resources. Additionally, the court found that there was no allegation that she was told that she was prohibited from using her computer for non-governmental purposes, particularly when she was not on the clock. The court found that the request for personal information was "beyond the scope and purpose of the Open Records Act."

We agree with the trial court's weighing of the interests in this case. There was no public interest shown in the materials sought. There is no issue of misuse of public equipment or time; U of L has stated that it has no policy against the use of its state owned equipment for personal reasons. In the absence of any indication that Ms. Overstreet misused public equipment, appellants' claim on appeal that the public has a right to know how Ms. Overstreet is using public equipment rings hollow.

Appellants have expressed no genuine public interest in Ms. Overstreet's files. However, U of L has articulated a personal privacy interest on behalf of Ms. Overstreet. We agree with the trial court that these circumstances did not require a search by U of L as to their content. Given the fact that no public interest has been shown, we find no statutory basis for appellants' argument that the trial court should have inspected

those records to see what they contain. Therefore, we affirm the trial court's decision to deny the disclosure of the documents.

Cross-Appeal

U of L cross-appeals as to the trial court's determination of an award of costs against it for "willful" withholding of records. KRS 61.882(5) permits an award of costs, including reasonable attorney's fees, to a party who prevails against an agency in an action in the courts regarding a "willful" violation of the Open Records Act. Additionally, that section gives the court discretion "to award the person an amount not to exceed twenty-five dollars ($25) for each day that he was denied the right to inspect or copy said public record." The trial court in this case denied costs as to the materials exempted by the privacy exception, but awarded costs as to the materials which U of L denied pursuant to a litigation exception. The trial court granted appellants $12.50 per day from November 30, 2000 — the date that the trial court issued its opinion that there was no such basis to deny the records. The trial court found that for U of L to continue to deny the records after that date was "willful."

U of L argues that this determination was erroneous because its right to appeal that determination was still running at the time the court imposed its award. We find no basis in the statute for excluding costs during the pendency of motions for rehearing, of which there were several in this case, or an appeal. We do not find that this impinges on an agency's right

to appeal. Moreover, an agency may ask the appellate court to review the order of costs.

On the other hand, appellants argue that having made a finding of willfulness, the trial court erred in imposing costs from the date of its order rather than the date of the denial of the request. We disagree. The trial court has discretion under the statute in its award of costs even after making a finding of willfulness. Lang v. Sapp, Ky. App., 71 S.W.3d 134, 135 (2002). Furthermore, the trial court has no authority to award costs in the absence of a finding of willfulness. Id. Here, the trial court found that U of L's action in withholding the materials was not willful until after it issued its opinion. Therefore, it would have been improper for the trial court to award costs any earlier. Furthermore, we believe that it was within the trial court's discretion to structure the award of costs in the way that it did.

For the foregoing reasons, we affirm the order of the Jefferson Circuit Court.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANTS:

Keith B. Hunter
Louisville, Kentucky

BRIEF FOR APPELLEE:

William H. Hollander
Deborah H. Patterson
Wyatt, Tarrant & Combs, LLP
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLEE:

William H. Hollander
Louisville, Kentucky