

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000816-MR
AND
NO. 2011-CA-000817-MR

KENTUCKY COMMUNITY
& TECHNICAL COLLEGE
SYSTEM, "KCTCS"

APPELLANT

v. APPEAL FROM WOODFORD CIRCUIT COURT
HONORABLE PAUL F. ISAACS, JUDGE
ACTION NOS. 09-CI-00369 & 09-CI-00515

PAXTON MEDIA GROUP d/b/a
OWENSBORO MESSENGER-
INQUIRER, INC.

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, DIXON, AND VANMETER, JUDGES.

COMBS, JUDGE: Kentucky Community and Technical College System
(KCTCS) appeals from the order of the Woodford Circuit Court which granted

summary judgment to Paxton Media Group d/b/a Owensboro Messenger-Inquirer, Inc. (Paxton). After our review, we affirm the order.

In May 2009, the president of KCTCS dismissed Paula Gastenveld from her position as President of Owensboro Community and Technical College (OCTC) and reassigned her to the KCTCS office in Versailles to work as “special projects coordinator” in the chancellor’s office. Alleging that she was wrongfully dismissed, Gastenveld filed a lawsuit in August 2009 against KCTCS and its President, Michael McCall; Vice-Presidents of OCTC, Kevin Beardmore and Cindy Fiorella; and several other OCTC employees and local officials. In her complaint, Gastenveld asserted claims of defamation, tortious interference with contractual relations, conspiracy, outrage, and violation of the whistle-blower statute.

Fewer than three weeks later, Paxton requested KCTCS to produce several documents,¹ including: 2007-2009 performance evaluations for Beardmore and Fiorella; a performance improvement plan for Fiorella from 2008; and a letter from John Hager, a private donor, to McCall (the Hager letter). The letter purportedly expressed Hager’s concern about alleged mismanagement of an endowment that his family had established for the college.

Citing Kentucky’s Open Records Act, KCTCS denied Paxton’s request for the documents at issue. Paxton appealed to the Office of the Attorney General. In October 2009, the Attorney General reversed the decision of KCTCS, concluding

¹ Paxton requested additional documents which are not the subject of this appeal.

that the documents were not protected and that they should be disclosed. KCTCS then filed a complaint in the Woodford Circuit Court, appealing and seeking a reversal of the decision of the Attorney General. On August 20, 2010, after an *in camera* review of the disputed documents, the trial court entered an order granting summary judgment to Paxton, upholding the Attorney General and imposing attorneys' fees upon KCTCS. KCTCS filed a motion to alter, amend, or vacate the judgment. The trial court granted the motion in part relating to the attorneys' fees. On April 7, 2011, it entered an order that denied Paxton's request for attorneys' fees, but it did not change the disposition of the substantive portion of the Open Records decision. KCTCS filed this appeal regarding the Hager letter and the performance evaluations.

Case law expresses the purpose of the Open Records Act as fulfilling "the public's right to expect its agencies properly to execute their statutory functions." *Kentucky Bd. of Examiners of Psychologists v. Courier-Journal & Louisville Times Co.*, 826 S.W.2d 324, 328 (Ky. 1992).

The General Assembly has enacted exceptions, two of which are pertinent to this appeal. KRS 61.878(1)(a) exempts "[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." KRS 61.878(i) excludes private correspondence with individuals that is for a purpose other than giving notice of a final action: "[p]reliminary drafts, notes, correspondence with private individuals

other than correspondence which is intended to give notice of final action of a public agency[.]”

If a public agency denies an open records request, the complaining party can seek review by the Office of the Attorney General, who then shall review the complaint and issue a decision within 10 working days. KRS 61.8462. A private party may then appeal an adverse opinion of the Attorney General within 30 days.

However, KRS 61.882(2) provides: “A person alleging a violation of [the Open Records Act] **shall not** have to exhaust his [administrative] remedies . . . before filing suit in Circuit Court.” (Emphasis added.) If an agency appeals a decision of the OAG to a circuit court, the agency bears the burden of proof. KRS 61.882(3). Our standard of review is a *de novo*, case-by-case analysis. *Kentucky Board of Examiners, supra*.

The Employment Records

This Court has recognized that employment records are inherently personal in nature. *Cape Publications v. City of Louisville*, 191 S.W.3d 10, 12 (Ky. App. 2006). In that case, we emphasized that it is important for both employees and evaluators to have the assurance of privacy for the sake of candor in their communications, emphatically stating that “performance evaluations . . . should not be subject to disclosure without the most pressing of public needs.” *Id.* at 13. Therefore, the appropriate balancing test is whether the individuals’ privacy interest outweighs the public interest in disclosure. *Id.*

The *Cape Publications* court provided some guidance for determining whether private or public interests should prevail. If a person heads a public agency, his performance evaluations are presumably of greater public interest. *Id.* If the evaluations are those of “an ordinary employee or even one of comparatively high rank,” they are “not of such significant public interest that [they] should be subject to disclosure.” *Id.* The *Cape Publications* court concluded that redacted evaluations could be appropriately disclosed because the employees in question had forfeited their heightened interest in privacy by committing criminal acts.

As distinguished from *Cape Publications*, no criminal conduct was at issue in the case before us that could indicate that the KCTCS employees had forfeited their privacy interests in their evaluations. On the contrary, KCTCS has vigorously asserted the personal privacy interest inherent in the performance evaluations.

In seeking to avoid disclosure of these records, KCTCS relied on KRS 61.878(1)(a), which as noted above, exempts from disclosure: “Public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy[.]”

Like the Attorney General, the trial court conducted its own *in camera* review of the documents and also determined that there was nothing embarrassing or humiliating in the evaluations – such as comments about personal grooming or appearance. Thus, the court concluded that these evaluations were not inherently private either under the statute or pursuant to the precedent of *Cape Publications*

because there was nothing that touched upon the private lives of the individuals involved. But conceding that even if the matter were capable of being deemed private in nature, the court held that the balancing test of *Cape Publications* tipped the scales in favor of disclosure.

The KCTCS is a public institution supported by public funding. As president, Gastenveld allegedly came under fire – at least in part – because of her performance evaluations of Beardmore and Fiorella. Her removal as president was clearly linked to those documents, thus subjecting them to a heightened public interest. The lawsuit that Gastenveld filed naming Beardmore and Fiorella as defendants underscored their involvement in the highly public matter of her termination as college president.

The circuit court presented an excellent analysis that merits repetition:

The information is the type in which the public has a legitimate interest. More specifically, it is the type of information that sheds light on the operation of a public agency. Paula Gastenveld was the president of a local college and was removed from that position without explanation. A fundamental issue in her removal was an intra-organizational dispute involving Gastenveld, Beardmore, and Fiorella. Several community leaders and organizations were involved – either directly or indirectly – with her removal or protest of her removal. At least some of those leaders and organizations were aware of the fact that Gastenveld's removal was related to the performance evaluations at issue. Eventually, Gastenveld filed a lawsuit challenging her removal. That lawsuit names Beardmore and Fiorella as defendants and focuses on the performance evaluations.

It is a long standing principal that the public has a right to be informed as to matters relating to the operation of government. *City of St. Matthews v. Voice*

of St. Matthews, Inc., 519 S.W.2d 811, 815 (Ky. 1974). Certainly the basis on which the president of a public university is removed from her position is a matter relating to the operation of government. In this case, there is an issue of transparency regarding the dismissal of Paula Gastenveld from her position as president of OCTC. The circumstances surrounding the situation suggest that **the performance evaluations at issue are directly related to Gastenveld’s removal**. Thus, it is likely that “the public interest in the details of the operation of a public agency could be advanced by the disclosure of non-personal information contained in the evaluation.” *Cape Publications* at 14. (Emphasis added.)

(Opinion of the court at pp. 6-7.)

As noted by this Court in *Cape Publications*, the outstanding law on the Open Records Act requires a case-by-case analysis. *Id* at 14. In light of the particular facts of this case, we hold that the circuit court properly balanced the competing interests of individual privacy *versus* the public interest and that it correctly determined that disclosure of the performance evaluations was appropriate.

The Hager Letter

In addition to the employment records discussed above, KCTCS also challenged the disclosure of the letter² of October 2008 written by John Hager, a member of the OCTC Foundation’s Board of Directors, to Dr. Michael McCall, the President of KCTCS. In denying Paxton’s request for the Hager letter, KCTCS

² The Hager letter apparently has been published – or at least publicized – and has become part of the public domain. Arguably, its relevance in this litigation may have been rendered moot. Nonetheless, we have addressed the merits of the issue since it was directly placed in issue and the source of its disclosure has not been determined – nor has the issue been conceded by Paxton.

relied upon KRS 61.878(1)(i), which exempts from disclosure: preliminary drafts, notes, **correspondence with private individuals**, other than correspondence which is intended to give final action of a public agency[.] (Emphasis added.)

KCTCS argues that Hager wrote the letter as a private individual rather than in his capacity as a Foundation board member. It emphasizes that he wrote his letter on plain paper rather than a letterhead revealing any official status.

Cognizant of the unofficial format of the letter, the trial court scrutinized its contents carefully *in camera*. We have also examined the letter in the course of our review. It noted Hager's references to his service on the Foundation of OCTC and its predecessor, OCC (Owensboro Community College). Furthermore, its subject matter concerned the proper administration of private funds and gifts and his concern that "the intent of the donor is honored and the integrity of the college is not compromised." (Hager letter.) The court concluded that the letter did not meet the criterion of a private correspondence; nor were any of the other criteria of KRS 61.878(1)(i) implicated. Consequently, the court ruled that it was not exempt from disclosure.

We agree. Hager clearly alluded to his official involvement with the Foundation, discussed a matter of serious and legitimate concern to OCTC, and communicated that concern in writing to the highest official in the system. Since the letter does not come within the exemptions set forth by the statute, it was subject to disclosure to Paxton. We conclude that the trial court ruled correctly in finding that the Hager letter was subject to disclosure.

Therefore, we affirm the entry of summary judgment by the Woodford
Circuit Court.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT
FOR APPELLANT:

Melissa Norman Bork
Brent R. Baughman
Louisville, Kentucky

BRIEF AND ORAL ARGUMENT
FOR APPELLEE:

Jon L. Fleischaker
Jeremy S. Rogers
Louisville, Kentucky