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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2018-CA-000290-MR

CITY OF TAYLORSVILLE,
CLERK STEVE BIVEN — APPELLANT

v.

APPEAL FROM SPENCER CIRCUIT COURT
HONORABLE CHARLES R. HICKMAN, JUDGE
ACTION NO. 15-CI-00107

LAWRENCE TRAGESER — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, TAYLOR, AND L. THOMPSON, JUDGES.

TAYLOR, JUDGE: The City of Taylorsville [Kentucky] (the City), Clerk Steve Biven, appeals from a February 9, 2018, Opinion and Order of the Spencer Circuit Court directing Biven to provide a lightly redacted police incident report to Lawrence Trageser pursuant to the Kentucky Open Records Act (the Act). We affirm.

On November 17, 2013, Trageser filed an open records request with the City's police chief. The request read as follows:

> Comes [Trageser] seeking any and all documents reflecting a City of Taylorsville Police Report filed and or created, concerning a domestic abuse call complaint involving Nathan Nation and Abigail Nation at 290 Sycamore Drive. The date of the incident should be late night September 12 or early morning September 13, 2013.[1]

Biven, in his role as City Clerk, responded with a short letter dated November 20, 2013, stating that the open records request was being evaluated by the city attorney to "determine whether or not any part of your request falls under the exemptions as listed in [Kentucky Revised Statutes] KRS 61.878(1)."

Pursuant to KRS 61.880(2)(a) Trageser then immediately lodged a complaint for review with the Kentucky Attorney General, arguing the City's response failed to present a legitimate reason for not responding substantively within the three days as required under the Act. On November 25, 2013, Biven sent Trageser a second letter which stated the City "does possess a JC-3 Form regarding the complaint in question" and further added that "[a]ccording to the Kentucky State Police, JC-3 Forms under KRS 620.050, are confidential reports and are only available through the Cabinet for Health and Family Services." KRS

[1] Apparently, at the time Nathan Nation was serving as a member of the Taylorsville City Commission (City).

620.050 generally makes reports of suspected child abuse, neglect or dependency confidential.

Dissatisfied with the City's responses, on December 5, 2013, Trageser sent a second letter to the Kentucky Attorney General, arguing that KRS 620.050 was inapplicable because the report involved only adults. On December 6, 2013, the City's attorney sent the Attorney General's office a response to Trageser's request for review contending a "[p]olice [report] involving allegations of abuse between a husband and wife, . . . is a confidential report pursuant to KRS 620.030 and KRS 620.050"[2] and was thus exempt from disclosure pursuant to "KRS 61.878(1)(2)(L)." Since there exists no such statutory subsection as cited by the City, presumably the City meant KRS 61.878(1)(l), which exempts from disclosure "public records or information the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly."

On February 18, 2014, the Attorney General issued opinion 14-ORD-038 opining that the City had improperly denied Trageser's record request, although he could not determine if the City's response was untimely because it was unclear when the City received the request. Substantively, the Attorney General criticized the City for failing to comply with its statutory duties to list reasons for

[2] Generally, Kentucky Revised Statutes (KRS) 620.030 mandates reporting suspected child abuse to the authorities.

nondisclosure by failing to cite specific exceptions authorizing the withholding of the document. *See* KRS 61.880(1) (requiring a public agency denying an open records request to "include a statement of the specific exception authorizing the withholding of the record and a brief explanation of how the exception applies to the record withheld"). To the extent the City was invoking KRS 61.878(1)(l) as an exception to provide the police report, the City failed to meet its burden to support the exception. The Attorney General held that KRS 620.030 and 620.050, cited by the City for its exception, were inapplicable to this request as "[t]he mere fact that a JC-3 form *can* be used to report child abuse as well as adult abuse does not extend the reach of a confidentiality provision in the Unified Juvenile Code to include cases not involving children." Thus, the Attorney General concluded that the City failed to meet its burden to show the report was exempt from disclosure and thus violated the Act in disposition of Trageser's request. The City declined to appeal and so the decision gained "the force and effect of law" under KRS 61.880(5)(b).

Nonetheless, on March 5, 2014, the City's attorney sent Trageser a letter saying the City would only provide a redacted copy of the report to Trageser pursuant to KRS 61.878(1)(a), which exempts from disclosure "[p]ublic records containing information of a personal nature where the public disclosure thereof

would constitute a clearly unwarranted invasion of personal privacy[.]"[3] The City also asserted the redactions were proper under KRS 61.878(1)(i), which exempts from disclosure "[p]reliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency[.]"[4] On April 28, 2014, Trageser sent the City a letter demanding an unredacted copy of the report, arguing the City's new stance contravened both the Open Records Act and the Attorney General's decision. The City promptly responded to Trageser by letter asserting the Attorney General's opinion did not address whether the redactions were proper. On May 7, 2014, the City denied the request for an unredacted copy of the police report relying upon KRS 61.880(1) and KRS 61.878(1)(a).[5]

On June 17, 2015, some thirteen months later, Trageser filed a *pro se* complaint in Spencer Circuit Court asserting the City's refusal to provide him with an unredacted copy of the police report violated the Attorney General's decision. Thereafter, upon answering the complaint, the City on July 7, 2015, filed a motion

[3] KRS 61.878(4) requires a public agency responding to an open records request involving documents containing a mix of disclosable and exempt information to "separate the excepted and make the nonexcepted material available for examination."

[4] As we understand the City's rambling brief, it has abandoned its unfounded argument that the police report is exempt from disclosure under that subsection.

[5] The City did not assert the exceptions set out in KRS 61.878(1)(a) in its initial response to the Kentucky Attorney General.

for judgment on the pleadings, arguing the Attorney General's opinion did not entitle Trageser to an unredacted copy of the police report. In September 2015, the circuit court granted the City's motion, but later vacated that order by order entered December 11, 2015. The court concluded it had rendered the judgment in error before Trageser's time to respond to the City's motion had expired. The parties then engaged in extended procedural posturing for several months. During this time, the court allowed Trageser to amend his complaint, in which he again demanded an unredacted copy of the report.[6] The City argued Trageser had waited too long to file the action and sought dismissal. The circuit court disagreed and denied the City's motion to dismiss.

Trageser ultimately filed a motion for summary judgment and the City immediately filed another motion to dismiss. By Opinion and Order entered October 5, 2017, the circuit court ruled that the City's redactions in the report "created a new issue" which had to be resolved since the Attorney General's opinion had not dealt with the redactions. The court denied again the City's motion to dismiss and ordered the City to provide an unredacted copy for the court's *in camera* inspection, with which the City complied. Thereafter, in an

[6] Attached to the amended complaint was a December 1, 2015, letter to Lawrence Trageser from the Attorney General stating in relevant part that the Attorney General could not grant Trageser's request to opine on the redactions because it could not revisit open records decisions under 40 Kentucky Administrative Regulations 1:030 Section 4.

Opinion and Order entered on February 9, 2018, the circuit court found the City properly redacted juvenile names and the addresses, phone numbers, Social Security numbers and driver's license numbers of adults mentioned in the report, but the rest of the redactions were improper. The circuit court ordered the City to provide the report to Trageser subject only to the limited redactions permitted by the circuit court. This appeal follows.

The City's first argument on appeal is procedural: the circuit court erred by not granting the City's Kentucky Rules of Civil Procedure (CR) 59 motion to alter, amend or vacate the order granting Trageser's CR 59 motion to alter, amend or vacate the order initially dismissing the action on September 11, 2015. We review a trial court's decision regarding a motion to alter, amend or vacate under CR 59.05 for abuse of discretion. *Bailey v. Bailey*, 399 S.W.3d 797, 801 (Ky. App. 2013).

The circuit court did not abuse its discretion by vacating its order of dismissal. As explained by the court, the September order was entered before the expiration of the time allotted by the court in its scheduling order for Trageser to respond to the City's motion for judgment on the pleadings. As the court clearly explained in its order of December 11, 2015, the earlier order dismissing had been entered in error, in contravention of the scheduling order. Fairness required the circuit court to abide by its own briefing schedule, even though Trageser did not

explicitly raise the issue in his CR 59.05 motion. Because the order vacating the order of dismissal entered in error was not an abuse of discretion, the court likewise did not abuse its discretion when it denied the City's motion to reinstate the dismissal order.

The City also infers that the circuit court erred by permitting Trageser to amend his complaint during the course of the litigation. Of course, CR 15.01 provides that a court should freely grant leave to file amendments when justice so requires. And, a court has discretion in deciding whether to permit the filing of an amended complaint. *Seeger Enterprises, Inc. v. Town & Country Bank and Trust Company*, 518 S.W.3d 791, 797 (Ky. App. 2017). The core of the City's argument, as we interpret it, is that the original and amended complaints were fatally flawed because Trageser asked for an unredacted copy of the police report which was not addressed by the Attorney General's opinion and, as such, Trageser's complaint should have been dismissed, not amended, since he was asking for relief not granted by the Attorney General's opinion.

It is true that the Attorney General did not order the City to provide an unredacted copy of the report to Trageser. However, the Attorney General had no reason to address the redaction issue because the City did not timely raise the issue before the Attorney General when responding to Trageser's complaint for review. Unless raised by the City, the Attorney General would have had no knowledge of

any purported redactions when issuing its opinion on February 18, 2014. The redaction issue was created by the City after the Attorney General's opinion was rendered. And the City likewise did not appeal the opinion.

The City's failure to timely raise the redaction issue before the Attorney General thus presented Trageser with a procedural Catch-22. On the one hand, the Attorney General could not revisit the issue but on the other hand, according to the City, Trageser could not seek to contest the redactions in circuit court because he could not ask the circuit court to address matters not resolved in the Attorney General's decision.

Like the court below, we cannot condone the City's evasive tactics which are prevalent throughout the history of this case. The City declined its opportunity to argue for redactions in either its initial response to Trageser or its letter to the Attorney General in response to Trageser's initial review request. We decline to let the City gain an advantage from its dilatoriness and apparent gamesmanship in practicing this case. *See Cabinet for Health and Family Services v. Todd County Standard, Inc.*, 488 S.W.3d 1, 8 (Ky. App. 2015) ("Upon review of the Attorney General's Opinion, it is true that the Attorney General did not determine that the records were, in fact, accessible under the [Act]. However, the Attorney General was prevented by the Cabinet from reaching this issue. . . . The Cabinet cannot benefit from intentionally frustrating the Attorney General's review

of an open records request; such result would subvert the General Assembly's intent behind providing review by the Attorney General . . . .”). Moreover, the City’s perfunctory argument to the contrary notwithstanding, the complaint(s) gave the City fair notice of the essential nature of Trageser’s claims. In short, the circuit court did not abuse its discretion in allowing the amended complaint.

The next issue raised by the City is that Trageser’s complaint was untimely. The City concedes that there is no statutory time limit for filing a complaint to enforce an open records decision by the Attorney General. Instead, the City relies on an extension of the holding in *Department of Revenue, Finance and Admin. Cabinet v. Wyrick*, 323 S.W.3d 710, 712-713 (Ky. 2010), that a court may generally require an initial action to review an agency’s denial of an open records request to be filed within a reasonable time. As noted, Trageser filed his complaint some thirteen months after the City’s final refusal to provide an unredacted report, pursuant to KRS 61.880(5)(b). The statute sets no deadline for filing an action to enforce an opinion. Even if we extend *Wyrick* to also allow a court to require an action to enforce an Attorney General’s opinion to be filed within a reasonable time, the City has not shown any error in the circuit court’s determination that Trageser’s complaint was timely filed. Thus, we find no error or abuse of discretion in the circuit court’s conclusion that Trageser’s filing of a

complaint roughly thirteen months after the City offered him a heavily redacted version of the police report was reasonable and timely.

We now address the City's final issue on appeal, the merits of the redactions. As a prefatory note, we disagree with the City's baseless conclusion that the circuit court erred by addressing the redactions. As discussed before, we refuse to limit the circuit court to either leaving the redactions unexamined or ordering the report to be given to Trageser with no redactions. A circuit court cannot simply order a public agency to provide materials via an open records request as a sanction for the agency's inadequate responses to the Attorney General. *See Edmondson v. Alig*, 926 S.W.2d 856, 859 (Ky. App. 1996).

A circuit court reviews an open records decision of the Attorney General *de novo* and the public agency bears the burden to show that its decision to withhold portions of the requested materials comports with the Act. *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 848 (Ky. 2013). A court may *sua sponte* examine withheld records *in camera*, which was done in this case. *Id.* at 849. We review a circuit court's factual findings for clear error but review the court's construction of the Act *de novo*. *Id.* Because the relevant facts are not contested here, our review is entirely *de novo*. We begin by presuming all public records are open for inspection, subject only to the strictly construed statutory exceptions. *Id.*

The circuit court's conclusion in this case aligns precisely with the facts and holding in *Kentucky New Era, Inc. v. City of Hopkinsville,* 415 S.W.3d 76 (Ky. 2013). In *Kentucky New Era*, the Court addressed whether the privacy exception from the Open Records Act found at KRS 61.878(1)(a) permitted nondisclosure of some personal information in police reports and arrest citations. The test for whether information is exempt under the privacy exception requires balancing the person's interest in personal privacy with the public interest in disclosure. *Id.* at 82. Because private citizens "have a compelling interest in the privacy of law enforcement records pertaining to them" the Court permitted a public agency to redact the addresses, phone numbers, social security numbers and driver's license numbers of witnesses, victims and uncharged suspects. *Id.* at 83-88. The circuit court here properly permitted redaction of the same information, as well as the names of juveniles listed in the report. *Id.* at 85.

The City has not met its burden to justify further redactions. We agree with the City that the Kentucky Supreme Court did not intend to limit permissible redactions under the privacy exception to only those discussed in *Kentucky New Era, Inc.* But the City has presented no substantive evidence other than its own self-serving, belated speculation, as to why it should be able to further redact the report. And, we note that mere embarrassment or inconvenience to the

persons listed in the report is insufficient as a basis to limit an open records request. *See* KRS 61.878.

For the foregoing reasons, the Opinion and Order of the Spencer Circuit Court entered on February 9, 2018, is affirmed.

THOMPSON, L., JUDGE, CONCURS.

COMBS, JUDGE, CONCURS IN RESULT ONLY.

| BRIEFS FOR APPELLANT: | BRIEF FOR APPELLEE: |
| --- | --- |
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