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**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2017-CA-000750-MR

COMMONWEALTH OF KENTUCKY,  
DEPARTMENT OF THE KENTUCKY  
STATE POLICE (KSP)

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE THOMAS D. WINGATE, JUDGE  
ACTION NO. 16-CI-00689

LAWRENCE TRAGESER

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, KRAMER, AND TAYLOR, JUDGES.

ACREE, JUDGE: Appellant, the Department of the Kentucky State Police (KSP),  
appeals the Franklin Circuit Court's order allowing the public disclosure of certain

disciplinary recommendations and opinions contained within Trooper First Class Richard “Jason” Woodside’s personnel file. After careful review, we affirm.<sup>1</sup>

### **FACTS AND PROCEDURE**

On January 4, 2016, Lawrence Trageser<sup>2</sup> filed an open records request with KSP to review the disciplinary portions of TFC Woodside’s file pursuant to the Kentucky Open Records Act (KORA), KRS<sup>3</sup> 61.884.<sup>4</sup> KSP notified Trageser that it would grant the majority of his request but withhold all Internal Affairs (IA) investigative records containing preliminary materials pursuant to the exceptions to KORA listed in KRS 61.878(1)(i) and (j).<sup>5</sup> Trageser appealed to the Office of the

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<sup>1</sup> The Court elected not to publish this opinion. Either party may, by filing a timely petition for rehearing or modification under Kentucky Rules of Civil Procedure (CR) 76.32(1)(a), move the Court of Appeals to publish the opinion notwithstanding the Court’s designation, “Not To Be Published.” *Commonwealth v. Crider and Rogers, Inc.*, 929 S.W.2d 179, 180 (Ky. 1996). The petition should state the reasons for urging publication.

<sup>2</sup> Trageser is a political blogger and self-styled “Watchdog of Spencer County.” He posts information pertaining to Spencer County politics on his website but keeps his sources of information confidential. In 2015, the Spencer County Sheriff’s Department issued an arrest warrant for Trageser due to alleged “hacking into a county computer.” TFC Woodside and another law enforcement officer cut the lock on the gate to Trageser’s farm, entered Trageser’s residence, arrested him, and seized his computer. No probable cause was found for the warrant and all charges against Trageser were dismissed.

<sup>3</sup> Kentucky Revised Statutes.

<sup>4</sup> KRS 61.884 states: “Any person shall have access to any public record relating to him or in which he is mentioned by name, upon presentation of appropriate identification, subject to the provisions of KRS 61.878.”

<sup>5</sup> In pertinent part, KRS 61.878 states:

The following public records are excluded from the application of KRS 61.870 to 61.884 and shall be subject to inspection only upon order of a court of competent

Attorney General. He specifically requested access to the IA investigative files from 2002 and 2012 in TFC Woodside's file.

The OAG conducted an in-camera review of the documents withheld in TFC Woodside's file.<sup>6</sup> KSP supplied the OAG with both the specific records withheld by KSP and an explanation of the IA records in TFC Woodside's file. After review, the OAG issued 16-ORD-106, which ruled that KSP improperly withheld certain portions of the IA files.

In 2015, the OAG reviewed a very similar request by Trageser for information from the Hopkinsville Police Department (HPD) concerning a police officer. In this request, the Hopkinsville city clerk also withheld preliminary materials pursuant to KRS 61.878(1)(i) and (j).<sup>7</sup> The OAG utilized its decision,

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jurisdiction, except that no court shall authorize the inspection by any party of any materials pertaining to civil litigation beyond that which is provided by the Rules of Civil Procedure governing pretrial discovery:

...

(i) Preliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency;

(j) Preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended . . . .

<sup>6</sup> This was done pursuant to KRS 61.880(2)(c) and 40 Kentucky Administrative Regulations (KAR) 1:030, §6.

<sup>7</sup> The Hopkinsville city clerk disclosed the documents requested but redacted personal information contained therein pursuant to KRS 61.878(1)(a) and withheld preliminary materials pursuant to KRS 61.878(1)(i) and (j).

15-ORD-067, in its analysis of KSP's denial of Trageser's request. In 15-ORD-067, the OAG made a finding that recommendations and opinions *not* relied upon "in the agency's final action" maintained their preliminary characterization and were not subject to public disclosure.

Based on this analysis, the OAG determined that "records containing the opinions and recommendations pertaining to discipline that were *not* relied upon or adopted by the Commissioner in that instance can be properly withheld."

16-ORD-106 (internal citations omitted) (emphasis added). The OAG ultimately concluded that certain portions of the 2012 IA investigative file could be properly withheld because the Commissioner did not rely on the disciplinary recommendation in the final decision. The OAG did not make the same finding concerning the 2002 IA file because the Commissioner had relied upon disciplinary recommendations and opinions contained therein.

KSP then filed a petition for review with the Franklin Circuit Court. The circuit court reviewed the preliminary status of the IA files under KRS 61.878(1)(i) and (j). The circuit court's April 28, 2017 opinion and order affirmed the OAG's ruling for the 2002 IA file and agreed with the exception for the 2012 IA file's disciplinary recommendations and opinions:

Regarding the 2002 IA investigation of TFC Woodside, the [Kentucky State Police] Commissioner agreed with the IA unit's conclusion that the allegations were substantiated and followed the IA unit's recommended

disciplinary action. Regarding the IA Unit's 2012 investigation, the Commissioner agreed with the IA unit that the allegations were substantiated but disagreed with the IA unit's recommended disciplinary action. Records containing the opinions and recommendations pertaining to discipline that were not relied upon or adopted by the Commissioner in the 2012 investigation can be properly withheld. Any records, statutes, policies, checklists, etc. from both the 2002 and 2012 IA investigation files of TFC Woodside that cannot be properly characterized as drafts, notes, recommendations, or which contain any opinions or recommendations even if characterized as memoranda are deemed non-exempt by *City of Louisville* were also improperly withheld from Mr. Trageser.

KSP disagreed with the circuit court regarding any public disclosure of the IA files in TFC Woodside's file. This appeal followed.

### **STANDARD OF REVIEW**

Whether an agency has complied with the disclosure requirements of the Open Records Act is a question of law subject to *de novo* review. *Hahn v. University of Louisville*, 80 S.W.3d 771, 773 (Ky. App. 2001). The circuit court's findings of fact which underlie its legal conclusions will be reversed only if they were clearly erroneous. CR 52.01. "[C]learly erroneous means not supported by substantial evidence. Substantial evidence is evidence which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the minds of reasonable persons." *Hughes v. Kentucky Horse Racing Auth.*, 179 S.W.3d 865, 871 (Ky. App. 2004) (citations and internal quotation marks omitted).

## ANALYSIS

KSP presents three arguments for excluding TFC Woodside's IA files: (1) that it should be able to exclude from disclosure files that did not lose preliminary status under KRS 61.878(1)(i) and (j); (2) that under KRS 61.878(1)(a), it should be able to exclude "information of a personal nature" to avoid invasion of personal privacy by the public; and (3) that it should be able to exclude public records protected by an enactment of the General Assembly, pursuant to KRS 61.878(1)(l).

KSP used only KRS 61.878(1)(i) and (j) as the basis for withholding purportedly preliminary IA files from Trageser's request. KSP added KRS 61.878(1)(a) and (l) as statutory bases on which it could withhold the IA files when it petitioned the circuit court for review. KSP properly preserved its arguments concerning KRS 61.878(1)(i) and (j), but the circuit court did not address the latter two arguments in its April 28, 2017 opinion and order. We now review all three of KSP's arguments.

### **A. KRS 61.878(1)(i) and (j)**

First, KSP argues KRS 61.878(1)(i) and (j) provide the authority to exclude IA documents as exceptions to the Kentucky Open Records Act. KSP asserts that because its Office of Internal Affairs has no power to issue a binding

decision concerning trooper discipline, its preliminary investigative materials can only be considered preliminary.

Both the circuit court and the OAG applied *City of Louisville v. Courier-Journal & Louisville Times Co.*, 637 S.W.2d 658 (Ky. App. 1982), and 15-ORD-067 to support the finding that the 2002 and 2012 IA files are not indefinitely preliminary, rejecting that as the basis for KSP's withholding of IA materials as not having been relied upon by the Commissioner in his final decision.

The Kentucky Open Records Act states: “[a]ny person shall have access to any public record relating to him or in which he is mentioned by name, upon presentation of appropriate identification, subject to the provisions of KRS 61.878.” KRS 61.884. The statutory exception lists preliminary materials that can be withheld from public records:

- (i) Preliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency;
- (j) Preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended . . . .

KRS 61.878(1)(i) and (j).

We addressed these statutory exceptions in *City of Louisville* and held “that the investigative files of [the IA Unit] are exempt from public inspection as

preliminary under KRS 61.878(1)(g) and (h).”<sup>8</sup> *City of Louisville*, 637 S.W.2d at 660. However, we also noted that “if the [Commissioner] adopts its notes or recommendations as part of his final action, clearly the preliminary characterization is lost to that extent.” *Id.* at 659.

The OAG and the circuit court relied on 15-ORD-067 for guidance in their respective reviews. Although we do not have to follow the guidance of the OAG, its opinions on this topic are considered highly persuasive. “An attorney general’s opinion is highly persuasive, but not binding on the recipient.” *York v. Commonwealth*, 815 S.W.2d 415, 417 (Ky. App. 1991) (citation omitted). We are also mindful of *Kentucky Board of Examiners of Psychologists & Division of Occupations & Professions, Department for Administration v. Courier-Journal & Louisville Times Company*, 826 S.W.2d 324, 327 (Ky. 1992), which under KORA encouraged “free and open examination of public records,” and advised that “all exceptions must be strictly construed.”

In 15-ORD-067, the OAG allowed for public disclosure: “not only any preliminary documents that were expressly incorporated into the [agency’s final action,] but any documents that formed the basis of the final agency action.” Such a determination does not allow KSP to classify the 2002 and 2012 IA files as

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<sup>8</sup> The KORA exceptions for preliminary matters were codified as KRS 61.878(1)(g) and (h) when this opinion was rendered.



preliminary and prevent their disclosure. However, 15-ORD-067 did permit KSP to “[withhold] opinions and recommendations of the IA Unit relating to discipline” not relied upon by the Commissioner. April 28, 2017 opinion and order at \*5.

Here, *City of Louisville* and 15-ORD-067 both demonstrate that IA files do not maintain an indefinite preliminary status. The OAG and the circuit court correctly determined that KSP cannot rely on KRS 61.878(1)(i) and (j) as its basis for withholding the entirety of TFC Woodside’s IA investigative files. However, that same statutory authority does provide KSP with a limited authority to withhold portions of the IA file concerning any disciplinary recommendations or opinions not relied upon by the Commissioner in his final decision.

We affirm the circuit court’s finding that the analysis of documents under KORA does not end once the documents have been classified under the preliminary exception. We also affirm the finding that records containing the opinions and recommendations pertaining to discipline that were not relied upon by the Commissioner in the 2012 investigation can be properly withheld by KSP.

**B. KRS 61.878(1)(a)**

Next, KSP argues that KRS 61.878(1)(a) permits it to withhold the entirety of the 2002 and 2012 IA files, which contain personal information relating to civilians, TFC Woodside, and the family of TFC Woodside. We disagree.

However, we agree that certain redactions of personal information by the Hopkinsville city clerk were appropriate.

KSP contends that *Kentucky Board of Examiners of Psychologists*, 826 S.W.2d 324, extends privacy rights to parties who are not the direct subject of an open records inquiry. Public records that contain information of a personal nature can be properly withheld under KRS 61.878(1)(a):

(1) The following public records are excluded from the application of KRS 61.870 to 61.884 and shall be subject to inspection only upon order of a court of competent jurisdiction, except that no court shall authorize the inspection by any party of any materials pertaining to civil litigation beyond that which is provided by the Rules of Civil Procedure governing pretrial discovery:

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

There is a two-part analysis to disclosable information under KRS 61.878(1)(a) contained in *Palmer v. Driggers*, 60 S.W.3d 591 (Ky. App. 2001). The first requires “a determination as to whether the information in question is of a personal nature.” *Id.* at 598 (internal quotation marks omitted). If such a finding is made, the second part of the analysis requires a determination as to whether public disclosure “would constitute a clearly unwarranted invasion of personal privacy.” *Id.* (internal quotation marks omitted).

*Kentucky Board of Examiners of Psychologists, supra*, held that privacy rights extend even to parties who are not the subject of an open records investigation. 826 S.W.2d at 327. More recently, *Kentucky New Era, Inc. v. City of Hopkinsville*, established that public disclosure of social security numbers, driver's license numbers, home addresses, and phone numbers of victims, witnesses, and uncharged suspects appearing in a police department's "arrest and incident reports . . . would constitute a clearly unwarranted invasion of personal privacy[.]" 415 S.W.3d 76, 88 (Ky. 2013). The Kentucky Supreme Court also held that redacting personal information before disclosing the reports is in accordance with KORA. *Id.* at 89.

Applying the first prong of the *Palmer* analysis, the record shows there is information of a personal nature in the 2002 and 2012 IA files regarding TFC Woodside, his family members, and civilians who cooperated with the IA's investigation. We find that any information such as social security numbers, driver's license numbers, home addresses, and phone numbers is personal in nature. The public disclosure of any such items contained within the 2002 or 2012 IA files is prohibited under KRS 61.878(1)(a) and would constitute an unwarranted invasion of privacy.

In 15-ORD-067, Trageser requested disclosure of information concerning a Hopkinsville police officer. The city complied but redacted personal

information contained therein pursuant to KRS 61.878(1)(a) and withheld preliminary materials pursuant to KRS 61.878(1)(i) and (j). Trageser did not appeal the redaction of personal information, only the preliminary materials. In its review concerning the preliminary materials, OAG affirmed the HPD's proper use of KRS 61.878(1)(a). The OAG cited a previous review in 07-ORD-090, and stated that the HPD, "may review the records in dispute for the purpose of identifying and redacting information that implicates protected privacy interests" under KRS 61.878(a). 07-ORD-90 at \*6.

While not binding, we find 15-ORD-067 and its adherence to *Kentucky New Era* to be highly informative and persuasive. We reject KSP's argument under KRS 61.878(1)(a) to the extent it would have this Court hold the statute properly exempts from public disclosure the entirety of either the 2002 or 2012 IA files. 15-ORD-067 very clearly demonstrates that KSP may redact personal information from publicly disclosed documents, but the statute does not allow KSP to withhold the entirety of the files.

By redaction, KSP may prevent the public disclosure of social security numbers, driver's license numbers, home addresses, and phone numbers in accordance with KRS 61.878(1)(a). In so concluding, we note that KSP rejected Trageser's open records request in reliance on the preliminary exceptions contained in KRS 61.878(1)(i) and (j), not KRS 61.878(1)(a). That appears to be

an afterthought argument. The record indicates KSP made no attempt to redact personal information from TFC Woodside's files pursuant to KRS 61.878(1)(a). It may do so.

We also note that Trageser appealed KSP's decision concerning only preliminary materials, not redacted personal information. As we concluded above concerning KRS 61.878(1)(i) and (j), the exception that KSP seeks applies only in part for the purpose of redaction as allowed pursuant to KRS 61.878(1)(a), not to withhold the files in their entirety.

### **C. KRS 61.878(1)(l)**

Finally, KSP argues that the General Assembly's enactment of KRS 16.140(1) inherently prevents the disclosure of preliminary materials created by disciplinary investigations of the Office of Internal Affairs (OIA). We disagree.

KSP's approach to this argument is notably attenuated. KSP asserts that the General Assembly intended to protect the authority of the OIA to conduct disciplinary investigations contained in KRS 16.140(1) by including KRS 61.878(1)(l) within the exceptions to KORA. The overarching impact of the statute is that the following will be excluded from public disclosure: "[p]ublic records or information the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly . . . ." KRS

61.878(1)(l). The OIA's statutory authority to conduct disciplinary investigations states:

With the exceptions specified in this section, KRS 16.150, 16.160, and 16.196 to 16.199, no officer of the department shall be removed, suspended, reduced in grade or pay for any reason except inefficiency, misconduct, insubordination, or violation of law or of any administrative regulation promulgated by the commissioner. Any person may prefer charges in writing against any officer or individual employed as a Trooper R Class, which shall be filed in the Office of Internal Affairs, which shall be designated by the commissioner as the recipient of charges and shall be administratively responsible for the maintenance of good order within the department through the collection and investigation of charges and the retention of their dispositions. The charges shall be signed by the person making the same, and shall set out with clarity and distinction each and every charge.

KRS 16.140(1).

KSP asserts that disclosure of the OIA investigations has a chilling effect upon those civilians who cooperated with the investigation and whose information is contained therein. This argument is indistinguishable from KSP's argument concerning personal information under KRS 61.878(1)(a). KSP calls our attention to the privacy interests of civilians, TFC Woodside, and TFC Woodside's family, but provides no insight as to whether the General Assembly intended to protect the OIA by enacting KRS 61.878(1)(l).

As the analysis above shows, KRS 61.878(1)(a) provides privacy protections for those individuals whose personal information is contained in the 2002 and 2012 IA files. We see no connection between the privacy interests of individuals within an IA file and the legislative intent of the General Assembly with its enactment of KRS 61.878(1)(l). We find no basis under KRS 61.878(1)(l) to prevent the disclosure of the 2002 and 2012 IA investigative files.

### **CONCLUSION**

For the foregoing reasons, we affirm the Franklin Circuit Court's April 28, 2017, order allowing public disclosure of disciplinary recommendations and opinions relied upon by the KSP Commissioner in its final decision concerning TFC Woodside.

ALL CONCUR.

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