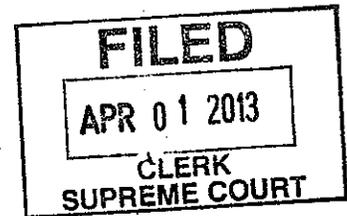


COMMONWEALTH OF KENTUCKY  
SUPREME COURT OF KENTUCKY  
CASE NO. 2012-SC-000290



KENTUCKY NEW ERA, INC.,

APPELLANT

VS.

**BRIEF FOR APPELLEE**

CITY OF HOPKINSVILLE, KENTUCKY

APPELLEE

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On Appeal from the Kentucky Court of Appeals  
Case No. 2010-CA-001742-MR & 2010-CA-001773-MR

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*City of Hopkinsville, Kentucky*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of this Brief for Appellee has this the 29<sup>th</sup> day of March, 2013 been served by first class U.S. mail, postage prepaid, on the following: Jon L. Fleischaker and Jeremy S. Rogers, DINSMORE & SHOHL LLP, 101 South Fifth Street, 2500 National City Tower, Louisville, Kentucky 40202; Honorable Andrew C. Self, Judge, Christian Circuit Court, Division I, 100 Justice Way, Hopkinsville, KY 42240; and Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601. I further certify that no part of the record was withdrawn by, or on behalf of, Appellee.

A handwritten signature in black ink, appearing to be "H. Douglas Willen" and "J. Foster Cotthoff" combined.

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*Counsel for Appellee*

## INTRODUCTION

This is an appeal from a Court of Appeals Opinion that correctly held the Kentucky Open Records Act permits municipalities, such as the City of Hopkinsville, to redact certain personal identifiers from arrest citations and incident reports due to the privacy interest of the individual named in said documents. The Court of Appeals also correctly held that the personal privacy exemption of the Kentucky Open Records Act allows municipalities to withhold certain documents pertaining to juveniles. Lastly, the Court of Appeals correctly found that municipalities may make certain blanket redactions under the Kentucky Open Records Act and that it is the purview of the court system to ultimately decide the appropriateness of said redactions.

## STATEMENT CONCERNING ORAL ARGUMENT

Despite the protestations of the Appellant, the Court of Appeals clearly followed established Kentucky in deciding this matter. Therefore, the Appellee states that oral argument is unnecessary in this case as the briefs of the parties, along with the rationale of the Court of Appeals Opinion, are sufficient for the Court to decide this case. However, the Appellee would be more than willing to appear at oral argument should the Court desire to hear additional arguments from the parties.

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## COUNTERSTATEMENT OF THE CASE

In September of 2009, Julia Hunter (“Ms. Hunter”), staff writer with the *Kentucky New Era* (“*New Era*”), requested “unredacted (with the exception of social security numbers)” arrest citations and police department reports from January 1, 2009 to August 31, 2009. (See RA at 14-16.)

The City responded to Ms. Hunter’s request on September 9, 2009 by letter from records custodian, Christine Upton (“Ms. Upton”), indicating that the City was in the process of compiling the requested records, and due to the volume of the request, it would likely take additional time to provide the documents.

Five days later, on September 14, 2009, Ms. Upton corresponded with Ms. Hunter and informed her that the requested records would be provided upon receipt of payment for the copies. Ms. Upton indicated that reports regarding juveniles would be withheld from disclosure under KRS 610.320 and the personal information of victims, subjects, and/or witnesses would be redacted where “the privacy of those individual outweighs the public interest served by disclosure.” Ms. Upton also informed Ms. Hunter that records related to ongoing investigations of the Hopkinsville Police Department would not be released, citing the exemption provided in KRS 61.878(1)(h). (See RA 18-23.)

Ms. Hunter appealed the city’s decision to the Kentucky Office of the Attorney General (“Attorney General”). In an opinion dated December 3, 2009, the Attorney General held that the City “failed to meet its statutorily assigned burden of proof in withholding, in their entirety, all uniform citations and KYIBRS reports that related to open investigations or that involved a juvenile, and in redacting, as a matter of policy,

certain personal identifiers that appeared in those records.” See 09-ORD-201. (See RA 25-32.)

The City promptly filed its Complaint in Christian Circuit Court on December 30, 2009. (RA at 1, *et seq.*, Compl.) Subsequently, the parties each filed Motions for Summary Judgment as to the issues of law in this matter. Judge Andrew C. Self, Christian Circuit Court, Division I, entered an Order on May 20, 2010 with regard to issues surrounding (1) records and reports pertaining to open investigations, (2) reports regarding juveniles, and (3) personal identifying information. (RA at 90-96.) The Court found a violation of the Open Records Act, with regards to open investigation, for a public agency “to issue a blanket denial or to unilaterally determine which records are to be withheld based on its own subjective interpretation of the statutory exceptions.” (RA at 93.) As to juveniles, the Court found that KRS 610.320 applied to juvenile offenders only and not to juvenile victims or witnesses. Absent an exception under KRS 61.878, the Court urged that the proper approach to records including juvenile witnesses or victims “would be to simply redact the name of the juvenile victim or witness, or any other identifying information, and still disclose the remainder of the record.” (RA at 94.)

With regards to personal identifying information, the Court held that the City, while acting in good faith, did not meet “its statutory burden of proof in withholding the personal identifying information from the requested records.” (RA at 95.) On May 27, 2010 the City timely filed a CR 59.05 Motion to Alter, Amend, or Vacate the Court’s May 20, 2010 Order. (RA at 97-100.) In its motion, the City stated:

A technical reading of the Court’s Opinion and Order would lead one to the conclusion that the City will be required to obtain Court approval prior to responding to any request for records where the City is relying on any exception to the Kentucky

Open Records Act. The City respectfully submits that such an interpretation is contrary to existing law, would pose an undue hardship on cities across the Commonwealth, and would burden the Courts with needless litigation. The City fully agrees that unresolved disputes regarding Open Records requests can only be decided by the Court, and not the public agency. However, the City maintains that judicial review is the appropriate function of the Circuit Court in cases of this nature.

To the extent the Court's Opinion and Order requires a public agency to obtain preapproval of the withholding of any documents protected by an exception to the Kentucky Open Records Act, the City maintains that said interpretation is contrary to the Kentucky Open Records Act and existing Kentucky law. In this regard, the City requests the Court for clarification as to the proper procedure to follow in cases of this nature. (RA at 98.)

On August 25, 2010, after reviewing *in camera* certain unredacted records at issue, the Court held as follows:

In the case at bar, the disclosure of social security numbers, driver's license numbers, home addresses, and telephone numbers does little or nothing to reinforce or support the underlying purpose of the Open Records Act. While some or all of this information may make it easier for the media to contact these persons, any such legitimate interest in the information is substantially outweighed by the substantial privacy interests of private citizens. (footnote omitted) (RA 165.)

The Court further adopted and incorporated its Opinion and Order of May 20, 2010 and, thus, denied the City's CR 59.05 Motion. (RA at 166.)

The New Era appealed the trial court's August 25, 2010 Order to the Kentucky Court of Appeals. (RA at 168, Notice of Appeal) Specifically, the New Era asked the Court of Appeals to overturn the Circuit Court's holding that driver's license numbers, home addresses, and telephone numbers of witnesses and victims could be redacted from copies of Hopkinsville Police Department arrest citations and other reports requested under the Kentucky Open Records Act. The City cross-appealed the part of the trial court's August 25, 2010 Order which stated that the City failed to meet its burden to

withhold records requested by the New Era which contained the names of juvenile witnesses or victims.

The Court of Appeals issued its Opinion on April 20, 2012. The Court of Appeals affirmed the part of the Circuit Court's ruling appealed by the New Era and reversed the part of the Circuit Court's ruling appealed by the City. In essence, the Court of Appeals gave credence to the personal privacy exception of the Open Records Act found in KRS 61.878: "Public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy[.]" KRS 61.878(1)(a).

Specifically, the Court of Appeals found that the requested information relating to the victims, subjects, and witnesses of/to the crimes of stalking (various degrees), harassing communications, harassment, and terroristic threatening (various degrees) was subject to the personal privacy exemption to the Open Records Act. The Court of Appeals found that "home addresses, telephone numbers, and driver's license numbers at issue amount to personal information and satisfy the first prong our analysis." (Ct. of App. Op., p. 5) Next, the Court of Appeals found the personal privacy interest of the individuals involved outweighed the public interest in obtaining the information sought.

The Court of Appeals stated:

Here, the release of specific contact information would make it easier for the New Era to contact the witnesses or victims named in the police reports, but the public interest in this information is minimal since its disclosure reveals nothing about the Hopkinsville Police Department's execution of its statutory functions.

(Id. at 6.).

Next, the Court of Appeals addressed the issue of whether the City could redact the names of juvenile victims or witnesses from the police records requested by the New Era. Basically, the Court of Appeals found that, “we hold that along with the telephone numbers, home addresses, and drivers’ license numbers, the names of juveniles may also be redacted in accordance with KRS 61.878(1)(a).” (*Id.*) The Court of Appeals noted in a footnote that the City had argued KRS 610.320 precluded the disclosure of arrest records containing names of juveniles. The Court of Appeals declined to address the City’s argument pertaining to KRS 610.320 as the Court found that 61.878(1)(a) applied to the facts at issue. (*Id.*, footnote 4). However, the Court of Appeals did state, “We do note that disclosing the names of juvenile victims and witnesses of the crimes at issue, while protecting the names of juvenile perpetrators, seems to produce a perverse and absurd result.” (*Id.* at pp. 6-7, footnote 4)

The Court of Appeals went on to discuss the Commonwealth’s commitment to children and the nature of the crimes in the records requested. The Court stated:

Due to the nature of these crimes, as well as the heightened privacy interest afforded juveniles, we are compelled to find that the potential adverse impact on juvenile victims or witnesses outweighs any benefit to the public from releasing the juveniles’ names contained in these reports.

(*Id.* at 7.) Thus, the Court of Appeals correctly reversed the Circuit Court on the issue of releasing the names of juvenile victims/witnesses.

Lastly, the Court of Appeals addressed the issue of whether the Open Records Act allows for a municipality to make blanket redactions of certain types of information. The Circuit Court found a blanket redaction to be a violation of the Open Records Act. However, the Court of Appeals rightly found the Circuit Court to be in error. The Court

of Appeals held that “blanket redactions do not necessarily violate the Open Records Act.” (*Id.* at 8.) The Court of Appeals cited to Cape Publications v. City of Louisville, 147 S.W.3d 731, 735 (Ky. App. 2003) to support its conclusion. Cape Publications involved the City of Louisville’s blanket redaction of certain information involving sexual assault victims. The Court of Appeals in Cape Publications stated:

We cannot agree with the Courier–Journal’s contention that the City failed to take into account a situational analysis in redacting the victim’s identifying information. The circuit court explained that the case-by-case analysis referred to in Board of Examiners “**is a determination to be used by the Courts not the City.**” That is consistent with our interpretation of Board of Examiners. “Judicial review of a disclosure decision must be approached on a case-by-case basis.”

Cape Publications v. City of Louisville, 147 S.W.3d 731, 735 (Ky. App. 2003) (citing Kentucky Board of Examiners of Psychologists v. Courier–Journal & Louisville Times Co., Ky., 826 S.W.2d 324 (1992) and Palmer v. Driggers, Ky.App., 60 S.W.3d 591, 597 (2001)) (emphasis added)

In the present case, the Court of Appeals correctly followed the mandates of Cape Publications. The Opinion herein states that “a proper interpretation of the law allows the public agency to redact records from an open records request at their discretion, but it must meet the burden set forth in KRS 61.878 when challenged.” (Ct. of App. Op., p. 8) The Court of Appeals concluded that the City could make a blanket denial of production based on the City’s interpretation of the exception to KRS 61.878. *Id.* The Court of Appeals in no way “flipped the Open Records Act’s statutory burdens” in rendering its Opinion in this matter. (See Appellant Brief, Page 10). Rather, the Court of Appeals correctly allowed the City to apply an exception at its discretion as called for in the Open Records Act. The Court of Appeals’ decision only illuminated the state of the law as it currently exists: the City can redact pursuant to an Open Records Act exception and the

Courts can then determine (on a case-by-case basis) whether said redaction was warranted.

### ARGUMENT

The Court of Appeals decision should be upheld in this matter. Contrary to the New Era's argument, the Court of Appeals opinion in no way "effectively reverses the Supreme Court's decision in Board of Examiners of Psychologists, 826 S.W. 2d 324..." (See Appellant Brief, Page 10) This statement is hyperbolic at best and disingenuous at worst. The Supreme Court clearly stated:

The language of subsection (1)(a) implies a number of other conclusions as well. First, it reflects a public interest in privacy, acknowledging that personal privacy is of legitimate concern and worthy of protection from invasion by unwarranted public scrutiny. We are therefore spared debate (or deprived of it) on privacy as a matter of natural right or constitutional law. Second, the statute exhibits a general bias favoring disclosure. An agency which would withhold records bears the burden of proving their exempt status. KRS 61.882(3). The Act's "basic policy" is to afford free and open examination of public records, and all exceptions must be strictly construed. KRS 61.882(4), *supra*. Third, given the privacy interest on the one hand and, on the other, the general rule of inspection and its underlying policy of openness for the public good, there is but one available mode of decision, and that is by comparative weighing of the antagonistic interests. 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.

Kentucky Bd. Of Examr's v. Courier-Journal, 826 S.W.2d 324, 327-328 (Ky. 1992).

This case has been handled exactly in the manner called for in Kentucky Bd. Of Examr's. While the New Era decries the withholding of information, the City points to a

very real and important **exemption** to the disclosure of information. The New Era cries “foul” on the City for withholding information by “blanket redaction” yet calls for the information sought to be turned over in every case, thus, asking for a blanket providing of information. The City is mindful of its responsibilities under the Kentucky Open Records Act. However, much to the chagrin of the New Era, one of those responsibilities is determining when an exemption to disclosure exists and applying said exemption to a request for information.

The New Era basically states that there is no privacy in the types of information discussed in this case. “There is no significant personal privacy interest in the kind of routine identifying and contact information of individuals listed in police reports.” (See Appellant Brief, Page 11) The Circuit Court and the Court of Appeals, using logic found in Kentucky precedent, disagreed with the New Era. Admittedly, the public has an interest in the **legitimate** scope of an agency’s work; however, the public also has an interest in maintaining privacy with regards to personal, sensitive information. The New Era’s quest for obtaining information in this case could trample on an individual’s privacy rights. In its review of the facts, the Court of Appeals opinion simply balanced the request for information versus the privacy rights of individuals and came out on the side of the individual. That is all this case is about. It is not a nefarious attempt by the City to allow its police department to “operate with an unprecedented level of automatic and irrefutable secrecy.” (See Appellant Brief, Page 12) This Court should affirm the Court of Appeals Opinion.

I. **THE ENTIRE OPEN RECORDS ACT, INCLUDING THE EXCEPTIONS FOUND IN KRS 61.878, IS TO BE UTILIZED WHEN REVIEWING A REQUEST FOR RECORDS.**

The New Era's arguments for release of personal identifying information advocate a mandate of full access to public records under the Open Records Act. The New Era premises its argument on its interpretation of the legislative policy behind the Open Records Act articulated in KRS 61.871. There is no dispute that "free and open examination of public records is in the public interest," or that the exceptions should be "strictly construed." This is the declaration of the Kentucky General Assembly which is clearly stated by statute and which the City mindfully considers each time it receives an open records request.

It should be noted that the Kentucky Legislature has seen fit to include multiple exceptions to the Kentucky Open Records Act. The City must keep these exceptions in mind when responding to requests under the Kentucky Open Records Act. Those exceptions are as follows:

(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;

(b) Records confidentially disclosed to an agency and compiled and maintained for scientific research. This exemption shall not, however, apply to records the disclosure or publication of which is directed by another statute;

(c) 1. Upon and after July 15, 1992, records confidentially disclosed to an agency or required by an agency to be disclosed to it, generally recognized

as confidential or proprietary, which if openly disclosed would permit an unfair commercial advantage to competitors of the entity that disclosed the records;

2. Upon and after July 15, 1992, records confidentially disclosed to an agency or required by an agency to be disclosed to it, generally recognized as confidential or proprietary, which are compiled and maintained:

a. In conjunction with an application for or the administration of a loan or grant;

b. In conjunction with an application for or the administration of assessments, incentives, inducements, and tax credits as described in KRS Chapter 154;

c. In conjunction with the regulation of commercial enterprise, including mineral exploration records, unpatented, secret commercially valuable plans, appliances, formulae, or processes, which are used for the making, preparing, compounding, treating, or processing of articles or materials which are trade commodities obtained from a person; or

d. For the grant or review of a license to do business.

3. The exemptions provided for in subparagraphs 1. and 2. of this paragraph shall not apply to records the disclosure or publication of which is directed by another statute;

(d) Public records pertaining to a prospective location of a business or industry where no previous public disclosure has been made of the business' or industry's interest in locating in, relocating within or expanding within the Commonwealth. This exemption shall not include those records pertaining to application to agencies for permits or licenses necessary to do business or to expand business operations within the state, except as provided in paragraph (c) of this subsection;

(e) Public records which are developed by an agency in conjunction with the regulation or supervision of financial institutions, including but not limited to, banks, savings and loan associations, and credit unions, which disclose the agency's internal examining or audit criteria and related analytical methods;

(f) The contents of real estate appraisals, engineering or feasibility estimates and evaluations made by or for a public agency relative to acquisition of property, until such time as all of the property has been acquired. The law of eminent domain shall not be affected by this provision;

(g) Test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examination before the exam is given or if it is to be given again;

(h) Records of law enforcement agencies or agencies involved in administrative adjudication that were compiled in the process of detecting and investigating statutory or regulatory violations if the disclosure of the information would harm the agency by revealing the identity of informants not otherwise known or by premature release of information to be used in a prospective law enforcement action or administrative adjudication. Unless exempted by other provisions of KRS 61.870 to 61.884, public records exempted under this provision shall be open after enforcement action is completed or a decision is made to take no action; however, records or information compiled and maintained by county attorneys or Commonwealth's attorneys pertaining to criminal investigations or criminal litigation shall be exempted from the provisions of KRS 61.870 to 61.884 and shall remain exempted after enforcement action, including litigation, is completed or a decision is made to take no action. The exemptions provided by this subsection shall not be used by the custodian of the records to delay or impede the exercise of rights granted by KRS 61.870 to 61.884;

(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;

(k) All public records or information the disclosure of which is prohibited by federal law or regulation;

(l) Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly;

(m) 1. Public records the disclosure of which would have a reasonable likelihood of threatening the public safety by exposing a vulnerability in preventing, protecting against, mitigating, or responding to a terrorist act and limited to:

a. Criticality lists resulting from consequence assessments;

b. Vulnerability assessments;

- c. Antiterrorism protective measures and plans;
- d. Counterterrorism measures and plans;
- e. Security and response needs assessments;
- f. Infrastructure records that expose a vulnerability referred to in this subparagraph through the disclosure of the location, configuration, or security of critical systems, including public utility critical systems. These critical systems shall include but not be limited to information technology, communication, electrical, fire suppression, ventilation, water, wastewater, sewage, and gas systems;
- g. The following records when their disclosure will expose a vulnerability referred to in this subparagraph: detailed drawings, schematics, maps, or specifications of structural elements, floor plans, and operating, utility, or security systems of any building or facility owned, occupied, leased, or maintained by a public agency; and
- h. Records when their disclosure will expose a vulnerability referred to in this subparagraph and that describe the exact physical location of hazardous chemical, radiological, or biological materials.

KRS 61.878(1). Although this particular matter revolves exclusively around KRS 61.878(1)(a), the entire list of exemptions has been given to illustrate the fact that there are **multiple** reasons for municipalities to withhold information sought pursuant to an Open Records request.

The Court of Appeals has not departed from the basic tenets of the Open Records Act. Rather, both the Circuit Court and the Court of Appeals agreed with the City that the privacy exemption called for in KRS 61.878(1)(a) was applicable to the facts at hand. The New Era argues that the Court of Appeals “assumes a personal privacy interest in certain information which is not private”. (See Appellant Brief, Page 13) That is simply not the case as the courts have long held that the type of information sought by the New Era is of a private nature. The privacy issue will be addressed in this brief. Again, the

New Era simply desires all information that it requests and is willing to ignore the privacy of an individual. Had the New Era gotten its way, a departure from the true intent of the Kentucky Open Records Act would have occurred as the exemption(s) to the Open Record Act, and the proper application thereto, would have been forgotten. Instead, the Kentucky Open Records Act, including the use of exemptions, was followed by the City and by the Courts. As such, the Court of Appeals Opinion should be affirmed.

**II. THE COURT OF APPEALS APPROPRIATELY APPROVED A BLANKET REDACTION OF CERTAIN PRIVATE INFORMATION.**

The New Era argues that the City has violated the Open Records Act via the use of a blanket redaction of private information. The New Era states that “A fundamentally incorrect, and dangerous, aspect of the Court of Appeals decision in this case is its approval of the City’s blanket policy of withholding categories of information without any showing of a privacy interest and without any regard for the public interest in disclosure in a particular circumstance. Such an absolute blanket nondisclosure policy is anathema to the Open Records Act.” (See Appellant Brief, Page 14) The New Era’s interpretation of the Court of Appeals Opinion, concerning KRS 61.878(1)(a) is not supported by recent Kentucky case law. The City originally relied in part on the Kentucky Court of Appeal’s holding in Lexington H-L Serv., Inc. v. Lexington-Fayette Urban County Government, 297 S.W.3d 579 (Ky. App. 2009) to support its blanket redaction policy for personal information. The Attorney General would not address this case in forming their opinion, as it was at the time a “non-final opinion to which we cannot accede unless the petition for discretionary review is denied and that opinion becomes final...” (09-ORD-201 at 3.) However, the Supreme Court of Kentucky has

since denied the request for discretionary review, and the case is now a binding judicial opinion which must be considered if the present issue is to be lawfully resolved.

The court in Lexington H-L Services used a series of cases clarifying the open records law personal privacy exemption to conclude broadly that “the open records act does not generally prohibit a blanket redaction policy.” *Id.* at 586. While this case specifically dealt with a blanket policy of identity redaction where suspects had been investigated but not arrested, the court did not limit its holding to a certain class of blanket redaction policies. The Court of Appeals in Lexington H-L Services stated:

The Herald–Leader also contends that LFUCG has a “blanket policy of identity redaction in all cases where a suspect was investigated but not arrested” and such blanket policy violates the open records act. In particular, the Herald–Leader asserts that LFUCG must perform a case-by-case analysis before redacting information under the personal privacy exemption of KRS 61.878(1)(a). We reject this assertion and view Cape Publications v. City of Louisville, 147 S.W.3d 731 (Ky.App.2003), as dispositive. In Cape Publications, the Court squarely held that such blanket policies do not violate the open records act and specifically upheld a blanket policy redacting the identity of rape and sexual assault victims:

We cannot agree with the Courier–Journal's contention that the City failed to take into account a situational analysis in redacting the victim's identifying information. **The circuit court explained that the case-by-case analysis referred to in Board of Examiners “is a determination to be used by the Courts not the City.” That is consistent with our interpretation of Board of Examiners. “Judicial review of a disclosure decision must be approached on a case-by-case basis.”**

*Id.* at 735 (footnote omitted). Hence, **we conclude that the open records act does not generally prohibit a blanket redaction policy.** As such, we reject the Herald–Leader's contrary contention.

Lexington H-L Serv., Inc. v. Lexington-Fayette Urban County Government, 297 S.W.3d 579, 585-586 (Ky. App. 2009) (emphasis added)

This makes sense in light of the reasoning behind the court's decision, which has been expressed in two previous Kentucky court decisions addressing the case-by-case balancing test to be used when determining whether public disclosure would constitute a

clearly unwarranted invasion of personal privacy. This test was first articulated in Kentucky Bd. Of Examr's v. Courier-Journal, 826 S.W.2d 324 (Ky. 1992). When weighing the privacy interest protected by KRS 61.878(1)(a) against the public's interest in disclosure, the Supreme Court determined that the "statute contemplates a case-specific approach." Kentucky Bd. Of Examr's v. Courier-Journal, *supra*, at 328.

In the present case, the Court of Appeals relied on Cape Publications v. City of Louisville, 147 S.W.3d 731 (Ky. App. 2003) to affirm the City's position on the issue of blanket redactions. The Court of Appeals opinion states,

As an initial point, blanket readactions do not necessarily violate the Open Records Act. Cape Publ'ns v. City of Louisville, 147 S.W.3d 731, 735 (Ky. App. 2003). In Cape Publ'ns, once Cape Publications challenged the redaction, the public agency had the burden to establish an exemption precluding disclosure of the required documents. *Id.* at 733-734. Judicial review of such an action requires the courts to engage in a case-by-case analysis. *Id.* at 743. Thus, a proper interpretation of the law allows a public agency to redact records from an open records request at their discretion, but it must meet the burden set forth by KRS 61.878 when the redaction is challenged. (Court of Appeals Op., p. 8)

In Cape Publications, *supra*, the Court of Appeals reiterated the decision in Kentucky Board of Examiners, and clarified that the case-by-case analysis adopted in that decision was "a determination to be used by the Courts not the City." Thus, any required situational analysis to determine disclosure is *judicial* in nature. That is exactly what occurred in this case. The City is not required to use a weighing test each time it receives an open records request, and thus a blanket redaction policy for information exempted under KRS 61.878(1)(a) is appropriate. Therefore, the City's policy (upheld by the Court of Appeals Opinion) does not violate the statutory burden set forth in KRS 61.882(3).

Despite the fact that the weighing test is not required for agencies, the City takes extra effort to assure the public's right to know about the affairs of its government is

protected. For names of suspects, victims, and witnesses, the City does employ a case-by-case analysis to determine whether the information can be properly withheld. This analysis depends on a variety of unique factors. For example, the City considers whether the case resulted in individuals being charged with a crime and the particular crime involved, whether the case involved sexual crimes, and whether disclosure would place a particular witness or informant in harm's way.

The City has carefully considered its policy decisions, and the determination for each redaction is supported by various other statutes and cases. For instance, the names of victims of sexual crimes are entitled to blanket protection (see Cape Publications v. City of Louisville, supra), and, in many instances, it is proper for a public agency to withhold the name of a suspect that has been falsely accused or exonerated. In addition, the names of witnesses and informants have protection under KRS 17.150(2), which permits a law enforcement agency to withhold information on a closed case that would divulge the name of a confidential informant or information that would lead to the identification of a confidential informant. In addition, the statute protects information that would endanger the life or physical safety of law enforcement personnel. It is clear that the City does not take lightly its responsibility to the public in providing information, but also works to assure it is complying with state law intended to protect vulnerable classes of individuals.

The New Era has attempted to bolster its argument against blanket redactions by citing to the recent case of Cabinet for Health and Family Services v. Lexington H-L Servs., 382 S.W.3d 875 (Ky. App. 2012). However, the reliance on that case is misplaced. The Court of Appeals did agree with the Circuit Court that the blanket policy

of nondisclosure in that particular case was violative of the Open Records Act where the Cabinet had failed to provide records of child abuse or neglect that led to a fatality or near fatality.

Unlike the present case, the Cabinet had withheld information from an Open Records request despite the fact that there was a particular statute authorizing the release of the specific information sought. KRS 620.050(12)(a) states that, "Information may be publicly disclosed by the cabinet in a case where child abuse or neglect has resulted in a child fatality or near fatality." Hence, there was specific authorization for the release of the information. The Court of Appeals, agreeing with the Circuit Court, stated that "it is apparent that the Cabinet failed to make particularized analysis and instead relied on an all-encompassing policy of nondisclosure despite the purpose of the Act and despite the acknowledged applicability of KRS 620.050(12)(a) under these circumstances." Cabinet for Health and Family Services v. Lexington H-L Servs., 382 S.W.3d 875, 883 (Ky. App. 2012)

It is obvious from a plain reading of the Cabinet for Health and Family Services v. Lexington H-L Servs. opinion that the nondisclosure policy was invalidated due to the existence of KRS 620.050(12)(a). The Legislature had specifically condoned the release of information where child abuse or neglect has resulted in a child fatality or near fatality. Despite that clear mandate, the Cabinet failed to do so and was sanctioned accordingly. The present case is clearly distinguished from Cabinet for Health and Family Services v. Lexington H-L Servs. in that there is no specific statute authorizing disclosure. Rather, the present case falls in line with Lexington H-L Serv., Inc. v. Lexington-Fayette Urban County Government, supra; Cape Publications v. City of Louisville, supra, and Kentucky

Bd. Of Examr's v. Courier-Journal, supra. Those cases stand for the proposition that blanket redactions are allowable and that judges, not agencies, look at situations on a case-by-case basis to determine if the agency was correct in withholding information.

Finally, even if a blanket redaction policy were not appropriate in this case (which the City denies), the City still acted properly in redacting this personal information under KRS § 61.878(1)(a). The statute requires that records be redacted when “public disclosure . . . would constitute a clearly unwarranted invasion of personal privacy.” This is undoubtedly true in the instant case. The records requested by the New Era concern an victims (some who are minors) of, among other charges, harassment, terroristic threatening, and two degrees of stalking. As the court in Cape Publications v. City of Louisville, supra, stated when analyzing KRS 61.878, “of primary concern is the nature of the information which is the subject of the requested disclosure; whether it is the type of information about which the public would have little or no legitimate interest but which would be likely to cause serious personal embarrassment or humiliation.” Cape Publications v. City of Louisville, 147 S.W.3d at 734. The Cape Publications v. City of Louisville court ultimately held that the public’s interest in disclosure was outweighed by the privacy interest of the victims, combined with the public interest in insuring victims’ physical safety and encouraging them to report sexual crimes.

Similarly to the sexual crimes discussed in Cape Publications v. City of Louisville, embarrassment and humiliation are only two potential serious effects of releasing personal information regarding the crimes in this instance. Stalking, harassment, and terroristic threatening are crimes which often involve aggressive, emotionally charged situations which can escalate quickly. Victims often already have a

heightened fear of personal danger, and the stability of the suspect is already in question. It is easy to see how releasing personal information related to these crimes could lead to retaliation, further threats, or at the very least a fear of contacting law enforcement. It is also painfully clear that releasing personal information relating to charges of stalking, harassment, and terroristic threatening could lead to disastrous results that could never be outweighed by the public's interest in tracking law enforcement practices. For community law enforcement to be successful, officers rely on the active engagement of citizens in the process. If the overreaching standards embraced by the New Era are adopted and applied to disclosure of certain records, unhampered reporting of crimes and community public safety are at a greater risk.

For the above-stated reasons, the City asks this Court to deny the New Era's appeal as it pertains to "blanket redactions." To hold otherwise would be a departure from the long line of cases that culminated in the very clear and succinct holding of Lexington H-L Serv., Inc. v. Lexington-Fayette Urban County Government, 297 S.W.3d 579 (Ky. App. 2009). The Court of Appeals Opinion must be affirmed on this particular issue.

**III. REDACTING PORTIONS OF POLICE REPORTS IS NOT NECESSARILY VIOLATIVE OF THE OPEN RECORDS ACT.**

The New Era next argues that the City violates the Open Records Act simply due to the fact that the City redacts portions of police incident reports. This argument belittles the privacy exception found in KRS 61.878(1)(a) and would make it to where nothing could be redacted from a police report.

The 1976 Attorney General Opinion cited by the New Era states, "There is no right of privacy as far as police records are concerned." (OAG 76-424, p. 3.) However,

that statement cannot be taken just by itself. That particular case dealt with a request for one's criminal history. The Opinion stated that there were exceptions that could apply (KRS 17.150(2) or KRS 61.870-61.884), but found that none did on the specific request. Id. There was no specific discussion whatsoever regarding the privacy exception found in KRS 61.878(1)(a) to the facts at issue in OAG 76-424.

Further, the New Era cites OAG 76-511 which once again dealt with the denial of criminal history records of a particular individual. In fact, OAG 76-424 and OAG 76-511 dealt with requests on the same individual made to two different agencies. The opinion in OAG 76-511 stated, "What a person does in his own home or on his own piece of property, whether it be large or small, is mainly his private affair but when he enters on the public ways, breaks a law, or inflicts a tort on his fellow man he forfeits his privacy to a certain extent." (OAG 76-511, p.3.) The opinion goes on to state that, "The Kentucky Open Records Act is brand new and there have been no court decisions on it to date." Id. However, a clear reading of the rationale of OAG 76-511 (and OAG 76-424) indicates that one who has committed a crime (or a tort) does not necessarily have privacy rights as they have **chosen** to commit an act which puts themselves in the public eye. The present case deals with names, addresses, and phone numbers of **victims** of or **witnesses** to horrible crimes such as stalking, harassment, and terroristic threatening. Surely, those people did not thrust themselves in the public eye.

More recent Attorney General opinions have indicated that portions of police reports can be redacted. 09-ORD-205 cites opinions, including OAG 77-102 cited by the New Era, to state:

the Attorney General has also recognized that portions of such records may be redacted by a law enforcement agency if the

agency can articulate a basis for partial nondisclosure in terms” of one or more of the statutory exceptions codified at KRS 61.878(1). 04-ORD-104, p. 5. As the Attorney General observed in OAG 77-102, “[i]f a police department feels it necessary to withhold certain items from public inspection it may do so under KRS 17.150 [and/or KRS 61.878(1)(h)] but the burden is upon the custodian to justify the refusal of inspection with specificity.” *Id.*, p. 1. Under this line of reasoning, a law enforcement agency must “separate the excepted and make the nonexcepted material available for examination,” KRS 61.878(4), and provide specific justification for the partial nondisclosure. 05-ORD-003, p. 5.

(09-ORD-205, p. 4)

Clearly, the City can redact information in certain circumstances even if the document requested is a police incident report. The cases of Lexington H-L Serv., Inc. v. Lexington-Fayette Urban County Government, *supra*, and Cape Publications v. City of Louisville, *supra*, have held that privacy interests in certain, particularized situations outweigh the public’s “right to know.” The redaction of police reports in this matter, where said reports deal with stalking and other such crimes, is highly appropriate. The New Era erroneously states that the Court of Appeals in Cape Publications “was careful to re-affirm the longstanding rule requiring disclosure of the identifying information of individuals listed in police records in cases *other* than sex crimes. *See Id.* at 732-33” (See Appellant’s Brief, p. 21). The Cape Publications panel did no such thing; rather they simply noted, “We are not persuaded by the Courier–Journals argument that a violent sex crime is no different from any other crime.” Cape Publications v. City of Louisville, *supra* at 735. The Court of Appeals *did not* make a bright line rule about sex crimes and all non-sex crimes. As stated previously, victims of stalking, harassment, and terroristic threatening often already have a heightened fear of personal danger, and the stability of the suspect is already in question. The release of personal information of

victims and witnesses in these cases is not warranted given the extreme nature of the cases and the privacy rights of those who have unwittingly been involved in the crime(s).

The New Era further argues for disclosure by stating that, “the City’s blanket nondisclosure policy makes no exception for cases in which the information has become part of a public court record or has otherwise been publicly released.” (See Appellant’s Brief, p. 21.) This argument is completely without merit. “[I]nformation is no less private simply because that information is available someplace.” Cape Publications v. City of Louisville, supra at 735 (citing Zink v. Commonwealth of Kentucky, 902 S.W. 2d 825, 828 (Ky. App. 1994)).

It is apparent that police incident reports may be redacted under certain circumstances. The City has appropriately redacted personal information of certain victims and witnesses with regards to the crimes of stalking, harassment, harassing communications, and terroristic threatening. Unlike perpetrators of these crimes, these people did nothing to put themselves in the public eye other than be victimized by or witness to a heinous crime. The New Era points to “alleged nonspecific personal privacy interests” with regards to these victims and witnesses. (See Appellant’s Brief, p. 22.). The City, and the Court of Appeals, do not see the situation the same. The Court of Appeals must be affirmed on this issue.

IV. THE CITY AND THE COURTS PROPERLY RELIED ON THE PERSONAL PRIVACY EXCEPTION IN KRS 61.878(1)(a) TO WITHHOLD INFORMATION FROM INCIDENT AND ARREST REPORTS.

**A. The privacy interest of individuals is greater than the public interest in the information sought by the New Era.**

In its response to the New Era's original request for records, the City redacted personal information of victims, suspects, and witnesses in many of the records provided. The City relied on KRS 61.878(1)(a) in withholding personal information from responsive records in accordance with KRS 61.878(4). KRS 61.878(1)(a) allows exclusion of "[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." In redacting the social security number, home address, telephone number, and driver's license numbers as a matter of policy the City asserts that disclosure would constitute the type of privacy envisioned by the statute which cannot be outweighed by the New Era's general interest in disclosure.

The Trial Court and Court of Appeals ultimately agreed with the City's position on these matters.<sup>1</sup> In so doing, the lower courts relied on the holdings of Zink v. Commonwealth of Kentucky, 902 S.W. 2d 825 (Ky. App. 1994) and Kentucky Bd. Of Examiners of Psychologists v. The Courier-Journal and Louisville Times Co., 826 S.W. 2d 324 (Ky. 1992). In addressing the privacy interest in one's personal information, specifically addressing information found in open records, the Zink Court of Appeals panel held as follows:

In determining whether the appellant's request constitutes clearly unwarranted invasion of personal privacy under KRS 61.878(1)(a), we are guided by our Supreme Court's precedent in Kentucky Bd. of Examiners of Psychologists v. Courier-Journal & Louisville Times Co., Ky., 826 S.W.2d 324 (1992). Under that holding, our analysis begins with a determination of whether the subject

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<sup>1</sup> It should be noted that both parties agree that Social Security Numbers are to be redacted from any open records.

information is of a "personal nature." If we find that it is, we must then determine whether public disclosure "would constitute a clearly unwarranted invasion of personal privacy." This latter determination entails a "comparative weighing of antagonistic interests" in which the privacy interest in nondisclosure is balanced against the general rule of inspection and its underlying policy of openness for the public good. *Id.* at 327. As the Supreme Court noted, the circumstances of a given case will affect the balance. *Id.* at 328.

Zink, at 828.

Here, the Court of Appeals applied the two-prong test set forth in Kentucky Bd. Of Examiners of Psychologists, *supra*. First, the Court made a determination as to whether the information sought by the New Era was of a personal nature. The Court of Appeals held:

With respect to whether the driver's license numbers, home addresses and telephone numbers constitute personal information, we turn to this court's holding in *Zink v. Commonwealth, Dep't of Workers' Claims, Labor Cabinet*, 902 S.W. 2d 825 (Ky. App. 1994), wherein we denied public access to injury reports filed with the Kentucky Department of Workers' Claims which contained the injured employee's name, home address, telephone number, date of birth and social security number, among other information. *Id.* at 829. Such a right, which this court described as "the right to be left alone," is one of "our most time-honored rights" and "has long been steadfastly recognized by our laws and customs." *Id.* Indeed the information contained in the injury reports has been "accepted by society as details in which an individual has at least some expectation of privacy" despite some of the information being accessible through other forums. *Id.* at 828. In the case at bar, therefore, the home addresses, telephone numbers, and driver's license numbers at issue amount to personal information and satisfy the first prong of our analysis.

(Ct. of Appeals Op., p. 5)

Next, the Court of Appeals tackled the second prong of the legal test. "The second prong of the test requires us to determine whether the public's interest in disclosure of the home addresses, telephone number, and driver's license numbers of

witnesses and victims named in the police reports at issue outweighs the individual's privacy interests in said information." Id. The New Era argued "that without disclosure of the identification and contact information, its ability to inspect the Hopkinsville Police Department is burdened because it becomes harder to contact the witnesses and victims of these incidents." Id. at 5-6. The Court of Appeals clearly stated, "We do not find this argument to be compelling." Id. at 6.

The Court of Appeals soundly laid out its reasoning for nondisclosure in stating:

Public interest under the Kentucky Open Records Act is "premised upon the public's right to expect its agencies properly to execute their statutory functions." *Palmer*, 60 S.W.3d at 598. The purpose of the Act is not furthered "by disclosure of information about private citizens that is accumulated in various government files that reveals little or nothing about an agency's own conduct." *Zink*, 902 S.W.2d at 829. Here, the release of specific contact information would make it easier for New Era to contact the witnesses or victims named in the police reports, but the public interest in this information is minimal since its disclosure reveals nothing about the Hopkinsville Police Department's execution of its statutory functions. Thus, the privacy interest involved outweighs the public interest in such information and the trial court did not err in this regard.

(Ct. of Appeals Op., p. 6)

Further, the fact that some of the information sought may be obtained via other sources does not take away the private nature of said information. The Court of Appeals in Zink stated:

While the place of one's employment may not arise to a personal level, as one generally does not work in secret, other information such as marital status, number of dependents, wage rate, social security number, home address and telephone number are generally accepted by society as details in which an individual has at least some expectation of privacy. Appellant points out that much of this same information is contained in other public documents which are made available for public inspection such as police accident reports (made available pursuant to a line of

Attorney General Opinions, *See* OAG 89–76, 83–53, 80–210, 76–478). As has been pointed out, however, when an individual enters on the public way, breaks a law, or inflicts a tort on his fellow man he forfeits his privacy to a certain extent. *See* OAG 76–511. We also realize that telephone numbers and home addresses are often publicly available through sources such as telephone directories and voter registration lists. **However, we think this information is no less private simply because that information is available someplace. We deal therefore, not in total non-disclosure, but with an individual's interest in selective disclosure.** (emphasis added)

Zink, *supra* at 828.

Obviously, the ability to get personal information from another source does **not** make that information any less private or any more subject to release. To take the New Era's position on the whole, they cannot do their job without this information from the City. However, this is obviously not the case.

The New Era further states that the holding in Zink “was limited to the ‘personal’ nature of the information in the **context** of mandatory reports of workplace injuries and not in any other types of public records.” (See Appellant Brief, p. 25) (emphasis added) Therefore, they argue that there is a context to determining whether information is personal or not. However, the New Era turns around and states, “the identifying and contact information in police incident and arrest reports has **no personal privacy implications...**” *Id.* at p. 26. (emphasis added) Therefore, according to the New Era we must look at context as well as content to determine the personal nature of information **UNLESS** the information comes from a police report; then, it's always devoid of privacy. The New Era makes differing arguments out of both sides of its proverbial mouth: either it believes the information must be analyzed on a case-by-case basis or it doesn't. Arguing both ways to create a self-interested “point” is misleading to the Court. Further, it sounds as if the New Era is arguing for a blanket policy of non-privacy where it has

previously argued against such blanket polices from the City's side. The privacy argument of the New Era seemingly erodes before one's eyes as the New Era attempts to distinguish its claim from the cases used by the Court of Appeals in this matter.

The New Era also attempts to distinguish the information sought from information sought in other cases. The New Era certainly feels that the information sought is not of a private nature and, thus, is not entitled to protection like the sexual matters in Board of Examiners of Psychologists, Cape Publications, or Lexington H-L Services, all supra. Despite no "bright-line" rule that sex crimes are the only matters exempt from the Open Records Act, the New Era argues as if there are no other crimes worthy of protecting victims/witnesses. As stated earlier in this brief, embarrassment and humiliation are only two potential serious effects of releasing personal information regarding the crimes in this instance. Stalking, harassment, and terroristic threatening are crimes which often involve aggressive, emotionally charged situations which can escalate quickly. Victims often already have a heightened fear of personal danger, and the stability of the suspect is already in question. It is easy to see how releasing personal information related to these crimes could lead to retaliation, further threats, or at the very least a fear of contacting law enforcement. The New Era ignores these issues and facts.

The New Era states that "this case is much more in line with holding in Palmer, concerning identifying and contact information such as addresses." The New Era refers to Palmer v. Driggers, 60 S.W.3d 591 (Ky. App. 2001). In that case, the Court of Appeals reviewed the nondisclosure of documents surrounding a complaint of police misconduct and found:

**Unlike Zink and Kentucky Board of Examiners of Psychologists, the information sought by the newspaper in the present case does not**

**contain information concerning an innocent, private citizen.** In fact, the only parties that would have standing to argue that the information contained in the complaint is embarrassing or humiliating to them would be Palmer and Driggers.

We believe the complaint against Palmer presents a matter of unique public interest. At the time of the complaint, Palmer was an Owensboro police officer, who was sworn to protect the public. The complaint charged specific acts of misconduct by Palmer while he was on duty. Since the question of the disclosure of the details of this alleged misconduct is the reason for this appeal, we will generally describe the alleged misconduct as Palmer neglecting his duty to the public by having an inappropriate relationship with another police officer while on duty. We believe the public has a legitimate interest in knowing the underlying basis for a disciplinary charge against a police officer who has been charged with misconduct under KRS 95.450. While the allegations of misconduct by Palmer are of a personal nature, we hold that the public disclosure of the complaint would not constitute a clearly unwarranted invasion of Palmer's personal privacy.

Palmer v. Driggers, 60 S.W.3d 591, 598-599 (Ky. App. 2001) (emphasis added)

The Palmer case dealt with (a) a public employee (b) charged with violating his official duties as a law enforcement officer. In those instances, the public's right to know was found to exceed the privacy interests of the officers. The New Era holds Palmer out as similar when it is completely dissimilar to the present case. Here, we have witnesses/victims who did nothing wrong, nor did they seek out the situation that occurred. The people in question were not city employees. Again, "What a person does in his own home or on his own piece of property, whether it be large or small, is mainly his private affair but when he enters on the public ways, breaks a law, or inflicts a tort on his fellow man he forfeits his privacy to a certain extent." (OAG 76-511, p.3.) Here, the victims/witnesses involved did not create the situation investigated and, thus, are entitled to privacy.

The Court of Appeals and Circuit Court used the logic and reasons found in Zink and Kentucky Board of Examiners, supra, to order redaction of personal information. In doing so, the courts authorized the City to protect the citizens of Hopkinsville from unreasonable inquiry as to their private information. As noted, unwarranted invasions of personal privacy are not allowed under the Open Records Act. The courts in this matter simply ratified the legislature's intent by ruling as it did. To that end, the Court of Appeals and Circuit Court properly found that the individual privacy interest outweighed any interest the New Era had in obtaining personal identifying information. The Court of Appeals and Circuit Court both relied on established law and sound reason in ordering that social security numbers, driver's license numbers, home addresses, and telephone numbers be redacted from any of the records requested by the New Era. As such, that portion of the Court of Appeals opinion should be upheld and the New Era's Appeal denied.

**B. Records pertaining to juvenile victims or witnesses are rightfully withheld under KRS 61.878(1)(a).**

The Court of Appeals also correctly ruled that the City may withhold the names of juvenile witnesses and victims of crimes. The Trial Court originally found that the City violated the Open Records Act by not releasing records involving information pertaining to juveniles. The Trial Court found that "the purpose underlying the shroud of secrecy aimed at protecting juvenile offenders is not furthered by the disclosure of records identifying juvenile victims or witnesses." (RA. at 93) The City appealed from that portion of the Trial Court's ruling.

The Court of Appeals found KRS 61.878(a)(1) to be dispositive of the juvenile issue at hand. The Court of Appeals stated:

The General Assembly has demonstrated a strong commitment to the protection and care of children, most noticeably reflected in the Juvenile Code, codified in KRS Chapters 600 to 645. *See* KRS 610.320(3) (limits disclosure of juvenile law enforcement records); KRS 610.340 (limits disclosure of juvenile court records); KRS 620.050 (limits disclosure of information contained in investigations into allegations of child abuse, dependency or neglect). **Extending that commitment to the present case, we believe that allegations of stalking, harassment, and terroristic threatening of a juvenile “touches upon the most intimate and personal features of private lives.”** *Kentucky Bd. of Exam’rs of Psychologists v. Courier-Journal & Louisville Times Co.*, 826 S.W.2d 324, 328 (Ky. 1992). As we stated earlier, the public interest asserted by the New Era in this circumstance is minimal. Due to the nature of these crimes, as well as the heightened privacy interest afforded towards juveniles, we are compelled to find that the potential adverse impact on juvenile victims or witnesses outweighs any benefit to the public from releasing the juveniles’ names contained in these reports.

(Court of Appeals Op., p. 7) (emphasis added)

The Court of Appeals noted in a footnote that the City had originally argued that KRS 610.320 precluded the disclosure of arrest records containing names of juveniles. However, the Court of Appeals declined to address the City’s argument pertaining to KRS 610.320 as the Court found that 61.878(1)(a) applied to the facts at issue. (*Id.*, footnote 4). However, the Court of Appeals did state, “We do note that disclosing the names of juvenile victims and witnesses of the crimes at issue, while protecting the names of juvenile perpetrators, seems to produce a perverse and absurd result.” (*Id.* at pp. 6-7, footnote 4)

The City agrees with the logic of the Court of Appeals opinion. It makes no sense for a 16 year old perpetrator of terroristic threatening to receive statutory anonymity while the 14 year old victim gets his/her name in the paper. Juveniles are treated differently throughout the law for various and good reasons. Applying the privacy

exception in these instances furthers the strong commitment to the protection and care of children espoused by the General Assembly.

As noted above, the City originally made a different argument to redact the names of juvenile victims/witnesses. The City makes this alternate argument as the Court of Appeals declined to address the argument in its Opinion. In originally denying release of these records, the City relied on KRS 610.320. Subsection 3 of KRS 610.320 states that "all law enforcement and court records regarding children who have not reached their eighteenth birthday shall not be opened to scrutiny by the public." This law was incorporated into KRS 61.878 by subsection (1)(l), which provides an exemption from disclosure for any public records where the General Assembly has enacted a specific state statute prohibiting, restricting, or making confidential records or information pertaining to certain subjects.

KRS 610.320(3) is clear in its requirement that no law enforcement records regarding juveniles be released, short of specific exemptions which do not apply in this case. The legislature did not make a distinction between those records relating solely to offenders and all other records regarding children who have not reached their eighteenth birthday. A plain language reading of the statute requires protection of records relating not only to offenders, but also juvenile victims and witnesses.

In previous filings in this matter, the New Era cited F.T.P. v. Courier-Journal & Louisville Times Co. 774 S.W.2d 444 (Ky. 1989) in support of its position that the City misused KRS 610.320 in applying its prohibition against disclosure of records to all children under age eighteen instead of just offenders. It should be noted that in F.T.P. the issue specifically pertained to a juvenile offender, and the Kentucky Supreme Court was

interpreting KRS 610.070 and 610.340, not KRS 610.320. In interpreting these statutes, the Court stated that “[t]he purpose of the shroud of secrecy and confidentiality mandated by the above cited statutes is to protect the juvenile.” The Court then went on to apply that purpose of protection to the particular circumstances of the case, which was to ensure that publicity did not deprive the juvenile offender of a fair trial. The Court did not address the “shroud of secrecy” as it applied to witnesses or victims under the age of eighteen, nor did it specifically address KRS 610.320 and the purpose behind its statutory prohibition against allowing public scrutiny of all law enforcement and court records pertaining to these children. It is difficult to imagine that the legislature did not intend for juvenile witnesses or victims to be extended protection in the same manner as juvenile offenders.

Although the Attorney General has interpreted the F.T.P. court decision to mean that only records of juvenile offenders should be confidential, it is interesting to note that the Attorney General has also relied on KRS 610.320 in support of protection of the records of juvenile *victims*. In 96-ORD-115, the Attorney General issued an opinion holding that Lexington Fayette Urban County Government correctly invoked KRS 61.878(1)(a) to withhold information contained in an incident report regarding a shooting of a juvenile victim. The Attorney General stated that it recognized “the General Assembly has demonstrated a strong commitment to the ‘protection and care of children,’ and goes on to cite KRS 610.320(3) as evidence of this “legislative intent to provide special protection to children.” (96-ORD-115, p. 2.) Although the Attorney General stopped short of approving a blanket redaction policy for records containing the identities

of juvenile victims, the office did acknowledge a “public policy which militates in favor of protecting the privacy of juvenile victims of crime.” Id.

Furthermore, the use of the word “records” without added limitation in both KRS 610.320(3) and KRS 61.878(1)(l) supports a public agency in adopting and enforcing a blanket policy of nondisclosure of all records regarding juvenile offenders. There are no provisions in either statute that would forbid a blanket redaction policy generally for these records. In the absence of a court decision specific to KRS 610.320 and the records of juveniles other than offenders, the plain language of the statute should control. Therefore, the City rightfully relied on the statute in denying release of the requested reports involving juveniles.

Protecting child victims is paramount in today’s society. One only needs to remember the shameless interviewing of elementary age children in Newtown, Connecticut to know that children who are victims of sinister acts need protection. This Court must affirm the Court of Appeals Opinion with regards to the facts at issue. The names of juvenile witnesses and victims of stalking, terroristic threatening, and harassment must be afforded privacy under KRS 61.878(1)(a) as called for by the Court of Appeals. Alternatively, KRS 610.320(3) and KRS 61.878(1)(l) allow the redaction of names in this instance.

**C. The facts of this case establish a protectable privacy interest for the individual citizens involved.**

The New Era argues that the citizens of Kentucky do not have a privacy interest in private matters. The New Era states, “a perceived, theoretical unproven inconvenience to witnesses and victims appears to be exactly what the Court of Appeals simply assumed here, rather than evaluating whether there is actually a personal privacy interest.” (See

Appellant Brief, p. 35). Again, the New Era refuses to acknowledge that the information sought contains private information of an individual(s).

The New Era keeps forgetting that these people are either innocent bystanders or victims themselves. The New Era cites to Cape Publications, Inc. v. Braden, 39 S.W. 3d 823 (Ky. 2001) (dealing with the interviewing of jurors); Cape Publications v. University of Louisville Foundation, 260 S.W.3d 818 (Ky. 2008) (dealing with donors, both anonymous and named, to a university); and Central Kentucky News-Journal v. George, 306 S.W.3d 41 (Ky. 2010) (dealing with settlement agreements with public agencies where the agreement contains a confidentiality clause) as grounds for disclosing private information. None of these cases is on point with the facts of this matter. Again, we are dealing with victims and witnesses (adults and juveniles) of highly sensitive crimes. We are not discussing a court order about not speaking with jurors or who donated to the University of Louisville. Nor are we discussing how much money was paid by City X to a litigant in a court dispute. We are discussing victims of crimes, witnesses to crimes, and kids. KRS 61.878(1)(a) is to be applied by the Courts on a case-by-case basis. This case is not any of the cases cited by the New Era; not even close. The facts of those cases may have leant themselves to disclosure. The facts of this case do not.

12-ORD-227, a recent Opinion of the Kentucky Attorney General, supports the proposition that witnesses have privacy rights. Primarily, the privacy interest “is quite similar to the facts in *Lexington H-L Services, Inc. v. Lexington-Fayette Urban County Government*, 297 S.W.3d 579 (Ky. App 2009), which also involved an individual suspected of a crime but never charged.” (12-ORD-227 at 7.) The Attorney General found that an uncharged citizen’s name did not have to be disclosed in an embezzlement

case under the auspices of KRS 61.878(1)(a). *Id.* at 8. More importantly for our discussion, the witnesses' names "were also properly redacted." *Id.* Hence, the privacy interest in a witness' name cannot be discounted in all cases as the Attorney General has stated one clearly exists.

The Court of Appeals correctly found a privacy interest in those individuals dealt with in this case. The New Era states that, "the mere desire for nondisclosure is not tantamount in any way to an actual personal privacy interest." (See Appellant Brief, p. 38). That is not the argument here at all. Whether privacy was requested is irrelevant for the City's purposes. The facts are that KRS 61.878(1)(a) offers a privacy exemption to the Open Records Act. The City (and the Courts) found that the exemption fit the facts of the case. The City's only desire is to treat its citizens fairly and to use exemptions where they are called for. That is what has happened in this matter. The Court of Appeals opinion validated that point.

**D. The New Era's interest in the information at issue does not comport with the intent of the Open Records Act.**

The New Era's arguments for release of personal identifying information advocate a mandate of full access to public records under the Open Records Act. The New Era premises its argument on its interpretation of the legislative policy behind the Open Records Act articulated in KRS 61.871. There is no dispute that "free and open examination of public records is in the public interest," or that the exceptions should be "strictly construed." This is the declaration of the Kentucky General Assembly which is clearly stated by statute and which the City mindfully considers each time it receives an open records request.

The Open Records Act exists to ensure that public agencies and officials are accountable to the people, and that the general public is given the chance to examine the workings of its government. As the Court held in Hines v. Com., Dept. of Treasury, 41 S.W.3d 872, 874 (Ky.App. 2001), the “public’s right to disclosure is premised *only* upon its right to be informed whether governmental agencies properly execute their statutory functions.” [emphasis added] The public is not entitled, as a matter of law, to more than the information they need to evaluate the effectiveness of government operations. Furthermore, it is important to recognize that the purpose of the Act is not advanced “by disclosure of information about private citizens that is accumulated in various government files that reveals little or nothing about an agency’s own conduct.” Zink v. Com., Dept. of Workers' Claims, Labor Cabinet, 902 S.W.2d 825, 829 (Ky.App. 1994). The Trial Court agreed, quoting the above line from Zink in finding that the information sought did not comport with the established goals of the Open Records Act.

While the public’s interest in holding its government accountable is indeed a vital premise of the Open Records Act, the City’s decisions to withhold records in the instant case cannot be summarily rejected through an overreaching premise of an unrestricted mandate of public access. Nor can it be found that the City has not met its statutorily assigned burden of proof under the Kentucky Open Records Act in withholding the records at issue in this case. A resolution of this issue requires scrutiny of the true purpose of the open records law and its exceptions, and an analysis of the City’s reasoning in correctly withholding certain responsive records requested by the New Era.

The New Era relies on many purposes to support its position of full disclosure of a victim’s identifying information: “(1) to accurately identify the individuals involved,

(2) determine the locations of reported crimes, (3) contact individuals in order to investigate whether and how public law enforcement officers are performing their duties, (4) provide a complete understanding of what happened, and (5) determine how public resources are being allocated.” (See Appellant Brief, p. 42). However, these reasons are not aligned with the purpose of the Open Records Act itself, which, as stated above, is to allow the public to evaluate the government’s execution of its statutory duties. The Open Records Act was not intended to grant, much less protect, a right of the media to contact victims of crimes, or to assist in police investigations.

The identity of individuals is not always disclosed to the media pursuant to the exceptions in KRS 61.878(1). The locations of crimes were not necessarily redacted in this case; only the home addresses of the witnesses victims (the two locations may or may not be the same place). The full disclosure requested by the New Era does not afford the victim a sole avenue of access to the media; instead, it affords the media easier access to the victim. The difference, for purposes of open records analysis, is substantial. If a victim wishes to contact the media with complaints or information that he or she feels should be publicized, the victim already has access to the media. Contact information for media outlets is readily available to any person who desires to speak with the media, and whether or not to do so should be the decision of the victim. A public agency’s decision to withhold personal information in responding to an open records request does not deny the victim that choice, but in fact protects the victim’s right to choose. Nor does it deny the public the opportunity of receiving fair and accurate reporting of incidents by hindering communication, since the victim can decide to contact the media at any time and provide the identifying information.

Furthermore, the Open Records Act was not enacted to provide the media with a duty or a right to assist the police in its investigations of crime. In the context of the Act, the media's right is the same of the public: to utilize public records to evaluate performance of government, within the statutory authority and limits provided.

The New Era seemingly proposes the need for full disclosure of personal information so that it can write a complete understanding of what happened. In Kentucky Bd. Of Examr's v. Courier-Journal, 826 S.W.2d 324, 328 (Ky. 1992), the Supreme Court reiterates the need to stay focused on the true purpose of the Open Records Act by remaining "Mindful that the policy of disclosure is purported to subserve the public interest, not satisfy the public's curiosity,..." A complete story is not the goal; the goal is subserving the public interest. While the public does indeed have an interest in disclosure, there are other public interests that must be accounted for as well when evaluating police activity.

The Court of Appeals (concurring with the Attorney General's analysis in 02-ORD-36) has held that the public's interest does not outweigh "the privacy interests of victims of sexual offenses, particularly when those privacy interests are coupled with a compelling public interest in insuring the physical safety of the victims and encouraging them to report sexual offenses without fear of exposure." Cape Publications v. City of Louisville, 147 S.W. 3d 731, 736 (Ky. App. 2003). While the media should function as a reliable watchdog regarding government activity, this does not entitle it to full disclosure in every instance of police activity, particularly when victim safety is jeopardized or crime reporting is discouraged by the unnecessary release of personal information. This is true when a case involves sexual offenses, as in Cape Publ'n v. City of Louisville,

supra, and it is true when a case involves harassment, stalking and terroristic threatening, as it does here. It is counterintuitive to demand full disclosure to ensure the public is being adequately protected by its police force, when, in fact, full disclosure can also hinder the police force's ability to adequately protect the public.

Fair and accurate reporting of police activity does not and should not always include full disclosure. To conclude otherwise undermines the purposes behind the exemptions established in KRS 61.878, which the City correctly utilized to make its decisions in responding to the New Era's open records requests. The City's decision to withhold identifying information furthers the Supreme Court's holding that the Open Records Act's personal privacy exemption from disclosure "reflects society's recognition that 'privacy remains a basic right of the sovereign people.'" Cape Publications Inc. v. University of Louisville Foundation, Inc., 260 S.W. 3d 818, 821 (Ky. 2008) (citing Board of Educ. v. Lexington-Fayette Urban County Human Rights Comm'n, 625 S.W. 2d 109, 110 (Ky. App. 1981)). Furthermore, the personal information sought was lawfully withheld in accordance with the statutory exemptions expressly set forth by the Kentucky legislature.

The New Era cites to 94-ORD-133 for the notion that 911 dispatch records/recordings can be released, including the identity of the caller. This argument fails to look at the facts of a given case and the applicable exemptions to the Open Records Act thereto. However, the facts of Bowling v. Brandenburg, 37 S.W. 3d 785 (Ky. App. 2000) clearly show that not all 911 calls are created equal for purposes of releasing information. The facts of Bowling are as follows:

Lawrence Edward Bowling appeals from an order of the Madison Circuit Court denying his motion for summary judgment and granting

summary judgment to Ray Brandenburg. Having reviewed the record and the applicable law, we affirm.

The Berea City Police Department received a 911 telephone call on December 16, 1998, seeking assistance from a caller who claimed to be Bowling's grandson, Kenneth Lawson. Lawson alleged that Bowling had threatened to kill his own wife, Lawson, and other members of Bowling's family. An officer was dispatched to Bowling's home, where both Bowling and his wife advised the officer that there was no problem. The police took no further action in regard to the call.

On December 18, 1998, Bowling requested and was provided a written record of the call. He also requested a copy of the recorded 911 call and on the advice of Brandenburg, the chief of police, Bowling put his request in writing on December 21, 1998, pursuant to KRS 61.872(2). After consulting with the city attorney, Brandenburg denied Bowling's request by letter dated December 23, 1998, citing KRS 61.878(1)(a), (h), and (i), with a brief explanation of each provision.

Bowling v. Brandenburg, 37 S.W. 3d 785, 786 (Ky. App. 2000)

The Court of Appeals stated:

Zink v. Commonwealth, Ky.App., 902 S.W.2d 825 (1994), 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. (footnote omitted) **Releasing the tapes of 911 calls seeking police assistance, particularly in instances of domestic violence, would have a chilling effect on those who might otherwise seek assistance because they would become subject to, as the trial judge in this case noted, retaliation, harassment, or public ridicule.**

Bowling, supra at 788 (emphasis added). Again, the nature of the crime plays an important role in determining the release of information. In Bowling it was domestic

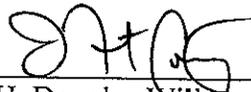
violence; in our case it's stalking, harassment, or terroristic threatening. All involve victims worthy of protection.

The Court of Appeals and Trial Court correctly found that disclosure of personal information in the form of social security numbers, home addresses, driver's license numbers, and telephone numbers was not warranted under the Open Records Act. The facts of this case dictate redaction of these items under KRS 61.878(1)(a). To that extent, the Court of Appeals opinion should be upheld and the New Era's appeal denied.

### CONCLUSION

For the reasons set forth herein, the City of Hopkinsville, Kentucky respectfully requests this Court to AFFIRM the Court of Appeals decision.

Respectfully submitted,

  
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