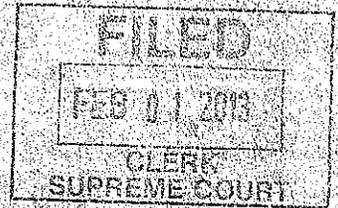


COMMONWEALTH OF KENTUCKY  
SUPREME COURT OF KENTUCKY  
CASE NO. 2012-SC-000290



KENTUCKY NEW ERA, INC.

APPELLANT

v.

CITY OF HOPKINSVILLE, KENTUCKY

APPELLEE

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**BRIEF FOR APPELLANT**

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

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Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Jon L. Fleischaker".

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**CERTIFICATE OF SERVICE**

It is hereby certified that a true and correct copy of the foregoing was mailed via first class U.S. Mail, postage prepaid, to the following: H. Douglas Willen and J. Foster Cotthoff, COTTHOFF & WILLEN, 317 W. 9th Street, P.O. Box 536, Hopkinsville, KY 42241; Hon. Andrew C. Self, Christian County Justice Center, 100 Justice Way, Hopkinsville, KY 42240; Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601, on this 31<sup>st</sup> day of January, 2013. I further certify that no part of the record on appeal was withdrawn by, or on behalf of, Appellant.

A handwritten signature in black ink, appearing to read "Jeremy S. Rogers".

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Counsel for Appellant

## **INTRODUCTION**

This is an appeal from a Court of Appeals Opinion which erroneously held that the Open Records Act's personal privacy exception, KRS 61.878(1)(a), permits the City of Hopkinsville to implement a blanket policy to redact all addresses, telephone numbers and driver's license numbers from routine arrest citations and incident reports, without any showing of any privacy interest or any other regard to the particular circumstances of the reports. The Court of Appeals also erroneously held that the personal privacy exception permits the blanket redaction of the names of all individuals who are under the age of 18, regardless of the nature or level of the individual's involvement in the reported incident.

## **STATEMENT CONCERNING ORAL ARGUMENT**

Appellant Kentucky New Era, Inc. requests oral argument and believes oral argument would be helpful to the Court in addressing the issues presented in this appeal. The issues in this appeal are of intense public importance and involve the Court of Appeals' reversal of well-established Open Records Act interpretation. The Court's decision in this case will significantly impact the application of the Open Records Act with respect to the transparency (or secrecy) of routine police reports throughout the Commonwealth of Kentucky.

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## STATEMENT OF THE CASE

Appellant Kentucky New Era, Inc. (“New Era”) states as follows for its Statement of the Case.

### **I. INTRODUCTION**

This case is about the public’s ability to monitor the actions and inactions of law enforcement agencies under the Open Records Act. The law in Kentucky is clear that secret police activities are inherently incompatible with our system of free and open government. As such, since the 1976 enactment of the Open Records Act<sup>1</sup>, the public and press have always been entitled to obtain copies of police incident and arrest reports, and the ability to withhold or redact information from such reports on “privacy” grounds has been extremely limited. In fact, the concept of “privacy” in such records is contrary to their fundamental nature as public records of official police activities. Accordingly, law enforcement agencies have always been prohibited from instituting blanket nondisclosure policies with respect to the locations of reported crimes or the identities and contact information of the subjects, victims and witnesses with whom the police interacted. This longstanding rule of law has resulted in better and more effective information being available to the public about the location and specific nature of alleged criminal activity as well as providing the means for oversight of law enforcement agencies without any harm to the legitimate privacy rights of individuals.

In 2003, a divided panel of the Court of Appeals allowed an extremely narrow exception to this rule, generally permitting redaction of the identifying information of rape victims and victims of other violent sex crimes. See Cape Publications v. City of

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<sup>1</sup> The Open Records Act is codified at KRS 61.870, *et seq.*

Louisville, 147 S.W.3d 731 (Ky. App. 2003). Now, however, the Court of Appeals decision in this case expands the exception in such a way so as to swallow the rule of disclosure and of public oversight. In this case, the Court of Appeals held that the Appellee City of Hopkinsville, Kentucky (the "City") could implement a blanket policy to withhold the addresses where crimes were reported as well as the identifying and contact information of all subjects, all victims and all witnesses listed in its police incident reports under the Open Records Act's personal privacy exception, KRS 61.878(1)(a).

The Court of Appeals decision prevents the public from knowing the locations of reported crimes. Under the Court of Appeals decision, the public is foreclosed from knowing whether reported criminal activity occurred in a particular area of town, neighborhood, street block or apartment complex. If there has been a spike in reports of criminal activity where you live, work, or send your children to school, that fact will be kept a secret from you. That is the Court of Appeals holding in this case, and it should be reversed.

In so holding, the Court of Appeals effectively reversed one of the longest established rules of Open Records Act interpretation. The decision also ignored the Supreme Court's holding in Board of Examiners of Psychologists v. Courier-Journal & Louisville Times Co., 826 S.W.2d 324 (Ky. 1992). That holding requires the Open Records Act's personal privacy exception to be applied on a fact-specific, case-by-case basis. Yet, the Court of Appeals held that the City may redact the addresses, phone numbers and driver's license numbers of all individuals listed in police reports as a matter of blanket policy, regardless of the circumstances of any particular situation.

The Court of Appeals also approved the City's blanket policy to withhold all information that names anyone less than 18 years of age. That decision is a significant deviation from this Court's binding precedents, and it reverses another longstanding line of Open Records Act decisions recognizing the critical importance of public access to information in police records.

Under the Court of Appeals ruling, law enforcement agencies would be allowed to operate with a level of automatic secrecy that has never existed in Kentucky and that is at odds with the fundamental policies of the Open Records Act. Accordingly, this Court should reverse the decision of the Court of Appeals.

## II. FACTUAL BACKGROUND

On September 3, 2009, New Era reporter and editor Julia Hunter sent an open records request to the Hopkinsville City Clerk requesting the following:

All unredacted (with the exception of social security number) Hopkinsville Police Department arrest citations from Jan. 1, 2009 until Aug. 31, 2009, resulting in any of the following charges: first-degree stalking, second-degree stalking, harassing communications, harassment, first-degree terroristic threatening, second-degree terroristic threatening or third-degree terroristic threatening.

Any and all unredacted (with the exception of social security number) Hopkinsville Police Department reports from Jan. 1, 2009 until Aug. 31, 2009, which may not have resulted in arrests, reporting any threats made toward an individual or a group of individuals. This includes KYIBRS<sup>2</sup> reports and draft reports.

(RA<sup>3</sup> at 5-6) From the request, it is clear that the New Era sought to analyze the various differences in how the City's police department treated complaints of particular crimes and why the police made arrests and pursued charges in some situations but not in others.

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<sup>2</sup> "KYIBRS" stands for Kentucky Incident Based Reporting System.

<sup>3</sup> Record on Appeal.

In a September 9, 2009 letter, the City informed the New Era that responsive records would be produced, but with redactions of unspecified information. (RA at 8.) In letters dated September 14 and 16, 2009, the City clarified that it intended to withhold, in their entirety, all records relating in any way to juveniles, regardless of whether the juvenile was listed as an offender, a victim or a witness and regardless of the nature or level of the juvenile's involvement. (RA at 10, 12.) As support for its decision to withhold all records naming juveniles, the City cited a provision of the Juvenile Code, KRS 610.320, which deals generally with the confidentiality of juvenile court records. (Id.) But there was never any request for juvenile court records.

The City also announced that it would withhold, in their entirety, all records relating to "open cases." (Id.) In support of that decision, the City cited KRS 61.878(1)(h), the Open Records Act's exception for,

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.

(See id.) But the City made no effort to apply this limited and specific exception to any of the records requested.

As for the records that the City agreed to provide, the City announced that it would redact "certain personal information of victims, subjects and/or witnesses." (RA at 10, 12.) In support of that decision, the City cited the Open Records Act's personal privacy exception, which applies to,

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

KRS 61.878(1)(a). But, again, the City made no effort to analyze or apply the limited “privacy” exception to any particular record requested.

In fact, the City made blanket redactions throughout all of the records of virtually all individual information concerning all of the offenders, witnesses and victims named in the records. The City redacted all addresses and telephone numbers as well as all information relating to the individuals’ gender, race, ethnic background, marital status, birth date, driver’s license number, and relationships between offenders and victims. (See RA at 105, *et seq.*, Redacted Records.) In sum, the City withheld all information that could help to confirm the identity of, or to locate, any of the individuals named in the police reports as well as the information concerning the locations where the reported crimes took place. (See *id.*)

### III. PROCEDURAL HISTORY.

#### A. The Attorney General Appeal.

On September 17, 2009, the New Era initiated an appeal to the Attorney General pursuant to KRS 61.880. (See RA at 14-16.) In the appeal letter, the New Era cited the long line of Attorney General Decisions holding that a public agency’s blanket policy to redact information from police reports is a violation of the Open Records Act. (*Id.*) (*citing, inter alia*, OAG 80-144; 92-ORD-126; 02-ORD-36; 04-ORD-188.)

On September 28, 2009, the City responded to the New Era’s appeal. (RA at 18-23.) The City stated that it had undertaken a case-specific approach to redacting the *names* of adult individuals, taking into account a variety of factors including “the particular crime involved,” “whether the case involved sexual crimes,” and “whether disclosure would place a particular witness or informant in harm’s way.” (*Id.* at RA 20.)

However, with respect to all of the other identifying and contact information that the City withheld, the City admitted that it applied “*a blanket policy of nondisclosure.*” (Id.) (emphasis added).

On December 3, 2009, the Attorney General issued a decision in the matter, 09-ORD-201. (RA 25-32.)<sup>4</sup> The Attorney General rejected the City’s claim that the so-called law enforcement exception, KRS 61.878(1)(h), permits the City to withhold all records relating to open cases without any showing that disclosure would result in harm to the potential enforcement action. (09-ORD-201, pp. 5-6.)

The Attorney General also held that the City violated the Open Records Act by refusing to provide any records that name juveniles. (09-ORD-201, pp. 6-7.) To justify its position, the City had cited KRS 610.320(3), part of the Juvenile Code that provides for the general confidentiality of juvenile court records. Consistent with numerous prior decisions, the Attorney General held that the cited Juvenile Code provision applies only to law enforcement and court records relating to juvenile *offenders* and does not apply to police reports solely because such reports contain the name of a juvenile witness or a juvenile victim. (09-ORD-201, pp. 6-7) (*citing* F.T.P. v. Courier-Journal and Louisville Times Co., 774 S.W.2d 444, 446 (Ky. 1989); 96-ORD-115; 97-ORD-77; 98-ORD-123; 98-ORD-185; 99-ORD-29; 08-ORD-105; and 09-ORD-086).

The Attorney General also rejected the City’s blanket nondisclosure policy with respect to the locations of reported crimes as well as the other identifying, contact and demographic information of all individuals listed in the uniform citations and KYIBRS

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<sup>4</sup> A copy of 09-ORD-201 is attached as Appendix item D.

reports. (09-ORD-201, p. 7.) Relying on numerous prior decisions, the Attorney General held that,

[A] law enforcement agency violates the Open Records Act by engaging in the practice of withholding victims' names, addresses, and other personal identifiers from incident reports, absent a particularized showing of a heightened privacy interest outweighing the public's interest in disclosure.

(*Id.* at p. 7) (*quoting* 04-ORD-188; *and citing* 05-ORD-003; 08-ORD-105).

B. The City's Appeal to the Christian Circuit Court.

On December 30, 2009, the City appealed the Attorney General's decision to the Christian Circuit Court pursuant to KRS 61.880(5)(a). (RA at 1, *et seq.*, Compl.) The parties filed cross-motions for summary judgment, and the Circuit Court entered an Opinion and Order on May 20, 2010. (RA at 90-96.)<sup>5</sup> The Circuit Court granted the New Era's motion, and affirmed the Attorney General's decision with regard to all issues in dispute. (*Id.*)

The City then moved to alter, amend or vacate the judgment. (RA at 97, *et seq.*, 5/27/2010 Mot. to Alter, Amend or Vacate.) In an August 25, 2010 Order, the Circuit Court partially granted the City's motion. (RA at 163, *et seq.*)<sup>6</sup> The sole issue addressed in the Order was the City's blanket nondisclosure policy. (*See id.*) The Circuit Court held that the City could withhold all social security numbers<sup>7</sup>, driver's license numbers, home addresses and telephone numbers. (RA at 164.) The Circuit Court held that such information is personal in nature and that it "does little or nothing to reinforce or

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<sup>5</sup> The Christian Circuit Court's May 20, 2010 Opinion and Order is attached as Appendix item C.

<sup>6</sup> A copy of the Circuit Court's August 25, 2009 Order is attached as Appendix item B.

<sup>7</sup> From the time of Ms. Hunter's initial request, the New Era has consistently agreed to the redaction of social security numbers. (*See* RA at 5-6, J. Hunter 9/3/2009 letter.)

otherwise support the underlying purpose of the Open Records Act.” (RA at 164-165.) The Circuit Court opined that, “[w]hile 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.” (RA at 165.)

As for the other identifying and demographic information such as race, gender, and date of birth, the Circuit Court held that the City could not withhold such information because “public interest includes information such as this that may be helpful in evaluating how the responsible public agencies execute their statutory functions” and because “the privacy interests in this type of information are more limited and less personal.” (RA at 165-166.)

C. The Court of Appeals Opinion.

The New Era appealed the Circuit Court’s decision allowing the City to implement a blanket redaction policy for all addresses, telephone numbers and driver’s license numbers of all subjects, witnesses and victims. (RA 168, 9/16/2010 Not. of App’l.) The City cross-appealed the Circuit Court’s ruling which prohibited the City from withholding all records, in their entirety, that name juvenile witnesses or victims. (RA 170, 9/23/2010 Not. of Cross App’l.)

Despite the New Era’s request for oral argument, the Court of Appeals dispensed with oral argument and rendered its Opinion on April 20, 2012.<sup>8</sup> The Court of Appeals ruled in favor of the City on virtually all points.

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<sup>8</sup> A copy of the Court of Appeals April 20, 2012 Opinion is attached as Appendix item A.

The Court of Appeals held that, in these routine police incident and arrest reports, the addresses, telephone numbers and driver's license numbers of subjects, witnesses and victims constitutes information of a personal nature. (Ct. of App. Op., pp. 5-6.) Further, the Court of Appeals also held that there is no public interest in the disclosure of such information. Specifically, the Court of Appeals stated,

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.

(Id. at 6.) The Court of Appeals made no mention of the public interest in knowing the locations where reported crimes have occurred in the community. Nor did the Court of Appeals discuss any public interest in being able to accurately identify the individuals involved. (See id.)

With respect to the incident reports that contain the names of juveniles, the Court of Appeals did not agree that the City could withhold all such records in their entirety. Instead, the Court of Appeals held that the names of the offenders, victims and witnesses under the age of 18 could be redacted from all of the records pursuant to the Open Records Act's personal privacy exception. (Id. at 6.) The Court of Appeals relied on the same Juvenile Code provisions cited by the City, which generally protect the confidentiality of juvenile defendants in juvenile court. (Id. at 7) (*citing* KRS 610.320, 610.340 & 620.050.) Dismissing the public interest in disclosure as "minimal," the Court of Appeals held 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.)

The Court of Appeals made no exception from this absolute holding for particular situations depending upon the age of the juvenile, the nature or level of the juvenile's involvement, or the particular facts and circumstances of the case. (See id.)

Finally, the Court of Appeals reversed the Circuit Court's holding that the City's blanket nondisclosure policy violates the Open Records Act. (Id. at 7-8.) The Court of Appeals held that "blanket redactions do not necessarily violate the Open Records Act." (Id. at 8.) In support of that holding, the Court of Appeals cited Cape Publications v. City of Louisville, 147 S.W.3d 731, 735 (Ky.App. 2003), a case in which the Court of Appeals generally approved of the limited redaction of the identities of victims of violent sex crimes but still refused to approve of absolute blanket nondisclosure policies in such cases. See id. at 732-33.

Further, in its decision in this case, the Court of Appeals flipped the Open Records Act's statutory burdens by holding that a public agency may withhold portions of requested records at its "discretion," and must only meet the burden to show that the information is actually exempt from disclosure "when the redaction is challenged." (Id. at 8.)

### **ARGUMENT**

The Court of Appeals decision should be reversed. The Court of Appeals decision directly conflicts with well established Open Records Act precedent, effectively reverses the Supreme Court's decision in Board of Examiners of Psychologists, 826 S.W.2d 324, and would severely erode the ability of the public and the press to monitor

the actions and inactions of police agencies across Kentucky. The Open Records Act's personal privacy exception has never been, and should not be, interpreted to permit law enforcement agencies to institute blanket nondisclosure policies to withhold broad categories of information from all routine police incident reports.

There is no significant personal privacy interest in the kind of routine identifying and contact information of individuals listed in police reports. Yet, on the other hand, the public interest in disclosure is substantial, and it is much more than the kind of mere curiosity attributed by the Court of Appeals. In our democracy, there is a critical public interest in monitoring the exercise of law enforcement agencies' extensive powers and duties. This has always been, and must continue to be, an inherently public matter.

The public interest in knowing the locations where crimes are reported in the community cannot be overstated. It is a vital public safety concern. Another integral part of that public interest is in knowing the identities and contact information of the people with whom the police have interacted in carrying out their law enforcement duties. There is a substantial public interest in being able to accurately identify -- and, where appropriate, attempt to contact -- individuals named in police reports in order to monitor the actions, *and inactions*, of police agencies. Monitoring the inactions of law enforcement agencies is equally as important as monitoring what actions they take. As the Court of Appeals has held, "[i]ndeed, in some instances the failure to bring criminal charges may be the basis of public scrutiny." Doe v. Conway, 357 S.W.3d 505, 508 (Ky. App. 2010).

In contrast to the significant public interest, any purported "privacy" interest in one's identity and basic contact information is, at best, minimal and cannot justify a per

se rule of secrecy in all cases regardless of the circumstances. Yet, that is what the Court of Appeals Opinion in this case allows. Under the Opinion, law enforcement agencies in Kentucky would be allowed to operate with an unprecedented level of automatic and irrefutable secrecy. That is a very dangerous proposition. This Court should reverse the Court of Appeals Opinion.

**I. THE OPEN RECORDS ACT STRONGLY FAVORS DISCLOSURE AND REQUIRES EXCEPTIONS TO BE STRICTLY CONSTRUED.**

The basic policy of the Open Records Act “is that free and open examination of public records is in the public interest.” KRS 61.871. As this Court has held,

The public's ‘right to know’ under the Open Records Act is premised upon the public's right to expect its agencies properly to execute their statutory functions. In general, inspection of records may reveal whether the public servants are indeed serving the public, and the policy of disclosure provides impetus for an agency steadfastly to pursue the public good.

Board of Examiners of Psychologists, 826 S.W.2d at 328.

Based upon this overriding public interest, the Open Records Act “demonstrates a general bias favoring disclosure.” Hardin County Schs v. Foster, 40 S.W.3d 865, 868 (Ky. 2001) (*citing* Board of Examiners of Psychologists, 826 S.W.2d 324). As the Supreme Court has held, the Open Records Act “presumes a public interest in the free and open examination of public records.” Central Kentucky News-Journal v. George, 306 S.W.3d 41, 45 (Ky. 2010) (*internal citations and quotation marks omitted.*) In particular, the Open Records Act mandates that exceptions to disclosure “shall be *strictly construed* even though such examination may cause inconvenience or embarrassment to public officials *or others.*” KRS 61.871 (emphasis added).

Accordingly, a public agency must always shoulder the burden to justify a decision to withhold a requested record. “[T]he public agency that is the subject of an

Open Records request, has the burden of proving that the document sought fits within an exception to the Open Records Act.” Foster, 40 S.W.3d at 868 (*citing* KRS 61.882(3), and University of Kentucky v. Courier Journal, 830 S.W.2d 373 (Ky. 1992)). In the first instance, when a public agency denies access to a public record, the agency is required to “include a statement of the specific exception authorizing the withholding of the record and a brief explanation of how the exception applies to the record withheld.” KRS 61.880(1). If challenged at the Attorney General level or in court, the agency opposing disclosure must continue to bear the burden to prove the applicability of any claimed exception to disclosure, and such exceptions must be strictly construed. See, e.g., KRS 61.880(2)(c); KRS 61.882(3).

In this case, the Court of Appeals decision departs from these basic tenets of the Open Records Act. The Court of Appeals failed to strictly construe the personal privacy exception and, instead, applied it in an excessively broad way that abandons longstanding precedent, assumes a personal privacy interest in certain information which is not private, and substantially impairs the legitimate public interest in monitoring police actions and inactions. Moreover, instead of holding the City to its statutory burden, the Court of Appeals approved of a broad and absolute blanket nondisclosure policy that allows the City to withhold certain information with no explanation and irrespective of the circumstances. The Court of Appeals decision should be reversed.

## **II. THE COURT OF APPEALS DECISION ERRONEOUSLY APPROVED A BLANKET POLICY OF NONDISCLOSURE.**

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.

Since the Supreme Court's 1992 decision in Board of Examiners of Psychologists, 826 S.W.2d 324, the law has been very clear that the Open Records Act's personal privacy exception is not subject to the kind of blanket nondisclosure policy employed by the City in this case:

[T]he statute exhibits a general bias favoring disclosure. An agency which would withhold records bears the burden of proving their exempt status. The Act's "basic policy" is to afford free and open examination of public records, and all exceptions must be strictly construed. ... [G]iven 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**.

Id. at 327-28 (*internal citations omitted*) (emphasis added).

In decision after decision, the Supreme Court has cited Board of Examiners of Psychologists in rejecting policies of blanket nondisclosure and re-affirming the requirement of a case-specific approach to the personal privacy exception. See Central Kentucky News-Journal, 306 S.W.3d at 47; Cape Publications v. University of Louisville Foundation, 260 S.W.3d 818, 821 (Ky. 2008); Lexington-Fayette Urban County Gov't v. Lexington Herald-Leader Co., 941 S.W.2d 469, 471 (Ky. 1997); Marina Management Servs. v. Cabinet for Tourism, Dep't of Parks, 906 S.W.2d 318, 321 (Ky. 1995); Beckham v. Board of Educ., 873 S.W.2d 575, 576 (Ky. 1994).

Since the Supreme Court's decision in Board of Examiners of Psychologists, *supra*, the Attorney General has also consistently rejected blanket nondisclosure policies, particularly with respect to police incident reports.<sup>9</sup> Instead, the Attorney General has diligently adhered to the Supreme Court's repeated mandate of a case-by-case, fact-specific approach for application of the personal privacy exception. That fact is clearly reflected in the Attorney General's decision on appeal in this case:

In 04-ORD-188, this office expressly rejected an agency's attempt to withhold, as a matter of policy, categories of information from law enforcement records on the basis of KRS 61.878(1)(a). At page three of that decision, we opined that a law enforcement agency violates the Open Records Act by engaging in the practice of withholding victims' names, addresses, and other personal identifiers from incident reports, absent a particularized showing of a heightened privacy interest outweighing the public's interest in disclosure. See also 05-ORD-003; 08-ORD-105. We concluded that a law enforcement agency has a statutory duty to release the requested records for public inspection in full and without redactions absent a particularized showing of a heightened privacy interest in an individual record. 08-ORD-105, p. 4 citing 04-ORD-188.

Here, as in 04-ORD-188, we reject the City's suggested approach that would permit the records custodian to redact personal information as a matter of policy and thereafter shift the burden of proof to the *Kentucky New Era* to articulate a more acute or particularized interest in a record. The Open Records Act, in its present form and as interpreted by the courts in binding precedent, does not permit such an approach.

09-ORD-201 at p. 7 (*internal quotation and punctuation marks omitted*).

Absolute blanket nondisclosure policies, like the City's policy in this case, clearly violate the Open Records Act. In fact, the prohibition against blanket nondisclosure

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<sup>9</sup> The Attorney General is statutorily tasked with adjudicating Open Records Act and Open Meetings Act questions, and Attorney General decisions not appealed to the courts "have the force and effect of law." KRS 61.880(5)(b). As the Supreme Court recently held, "[w]hile not binding on courts, Opinions of the Attorney General are considered highly persuasive and have been accorded great weight." Carter v. Smith, 366 S.W.3d 414, 420 fn.2 (Ky. 2012) (*citing Palmer v. Driggers*, 60 S.W.3d 591, 596 (Ky. App. 2001)).

policies is so strong that the Court of Appeals has held that such policies alone support a finding that the public agency engaged in a bad faith, willful violation of the Open Records Act. See Cabinet for Health & Family Services v. Lexington H-L Servs., 382 S.W.3d 875 (Ky. App. 2012). In that case, the Cabinet had instituted a blanket policy never to release any records relating to child fatalities, in order to protect the purported “privacy interests of its clients.” Id. at 879. The trial court found the Cabinet’s action to be a bad faith, willful violation of the Open Records Act because “[s]uch a blanket policy of denial is wholly incompatible with the purpose, intent, and plain language of the Kentucky Open Records Act.” Id. at 880.

The Court of Appeals agreed, holding that “the Cabinet’s assertion of a blanket policy of nondisclosure plainly contradicts the [Open Records] Act’s preference for open disclosure and in no way satisfies the Cabinet’s burden of justifying an exemption from that policy.” Id. at 883. Continuing, the Court of Appeals noted that “the Cabinet makes little mention of its blanket policy in its briefs, which is understandable since such a policy plainly conflicts with the [Open Records] Act.” Id. at 883. Based upon the Cabinet’s blanket nondisclosure policy, the Court affirmed the holding that the Cabinet’s action was in “bad faith” because “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 [Open Records] Act.” Id. at 883.

The well-established line of precedents based upon Board of Examiners of Psychologists, 826 S.W.2d 324, makes it abundantly clear that the City’s blanket policy of nondisclosure violates the Open Records Act in this case. Yet, the Court of Appeals abandoned that rule of law here and approved of the City’s admitted blanket

nondisclosure policy – a policy that does not take any of the facts or circumstances of a given case into consideration but, rather, automatically calls for the withholding of categories of information in all cases.

The Open Records Act clearly does not contemplate blanket nondisclosure policies of the type at issue here. The Supreme Court has never approved of a blanket nondisclosure policy under the Open Records Act’s personal privacy exception, and the Court should not do so in this case. The Court of Appeals decision should be reversed.

### **III. THE COURT OF APPEALS DECISION ERRONEOUSLY OVERTURNED WELL-ESTABLISHED PRECEDENT CONCERNING THE DISCLOSURE OF POLICE INCIDENT REPORTS.**

In addition to approving an inappropriate blanket nondisclosure policy, the Court of Appeals decision in this case is also directly contrary to longstanding Open Records Act precedent on the issue of police incident reports. Since it became law, the Open Records Act has consistently been interpreted to mandate the disclosure of information in police incident and arrest reports, including the identifying and contact information of the individuals listed in the reports. Such information is not personal or private per se, and the public has a well-recognized substantial interest in the disclosure of such information in police records.

In one of the first decisions dealing with the Open Records Act, then-Attorney General Robert F. Stephens stated that “[t]here is no right of privacy as far as police records are concerned.” OAG 76-424.<sup>10</sup> In another early Open Records Act decision, the Attorney General held,

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<sup>10</sup> OAG 76-424 is not available on LexisNexis. A copy of OAG 76-424 is attached at Appendix item E.

We do not believe that police arrest records contain information of a personal nature. As we pointed out in OAG 76-443, what a police department does is of a public nature. The sovereign is a party to police actions and therefore the public has a right to inspect the records of such actions.

In an organized society a person's right to privacy is limited. Robinson Crusoe had privacy – Howard Hughes did not although he was surrounded by persons employed to shield him from the public.

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.<sup>11</sup>

The rejection of a personal privacy interest in police reports continued, unabated, for decades. In a 1977 decision, the Attorney General specifically addressed the question of whether information in police incident reports can be exempt from disclosure. See OAG 77-102. In that decision, the Attorney General held that a police department seeking to withhold certain information from public inspection must carry the burden “to justify the refusal of inspection with specificity.” Id. Absent such a showing, “records of police departments showing complaints received from citizens and other incidences occurring in its daily operation are open to public inspection.” Id. In OAG 79-582, the Attorney General again re-affirmed the holding that “police log, uniform accident reports, standard crime reports and arrest logs are open to the public” because “police departments do not have the authority to act privately, confidentially or secretly unless expressly authorized in particular kinds of cases.” (*Citing, inter alia*, OAG 77-102.)

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<sup>11</sup> OAG 76-511 is not available on LexisNexis. A copy of OAG 76-511 is attached at Appendix item F. The remaining Attorney General Opinions cited in this Brief were decided after 1976 and are available on LexisNexis. They are, therefore, not attached at the Appendix.

In 1980, the Attorney General rendered a decision that concerned a claim of victim privacy in police reports and held that the “public interest in police business outweighs any privacy interest of victims, offenders or police personnel.” OAG 80-54. The line of Attorney General decisions continued throughout the 1980s, in which the Attorney General “consistently held that a person does not have a privacy interest in local police records pertaining to him.” OAG 91-131 (*citations omitted*).

In OAG 91-12, the Attorney General addressed a Courier-Journal reporter’s open records request for multiple incident and arrest records of the Jefferson County Police Department. In that case, the decision made clear that the records included, among other things, the names, addresses and telephone numbers of the offenders and victims involved in domestic violence and abuse cases. Id. The Attorney General specifically held that the information was not exempt from disclosure under the Open Records Act’s personal privacy exception. Id.

In the 1990s, with the advent of the “911” emergency reporting system, the Attorney General expanded the rule to include law enforcement 911 dispatch logs, holding that “the Dispatch Center is foreclosed from adopting a policy of blanket exclusion relative to names and identifying information appearing on its log.” 94-ORD-133. Throughout the 1990s, the Attorney General continued to apply the rule that police agencies cannot institute blanket policies to withhold identifying information or contact information from incident reports, and none of these Attorney General decisions was overturned by an appellate court. See, e.g., 93-ORD-13; 93-ORD-41; 94-ORD-53; 95-ORD-3; 96-ORD-115; 99-ORD-8; 99-ORD-27; 99-ORD-28; 99-ORD-110. Over the many years that this rule has been in effect, there is no suggestion that its application

resulted in any invasion of privacy, or in any other negative consequences, for the individuals listed in any of the police incident reports.

In 2002, the Attorney General recognized a narrow exception generally allowing the redaction of the identities of the victims of violent sex crimes. See 02-ORD-36. That decision was later affirmed by a split panel of the Court of Appeals in Cape Publications v. City of Louisville, 147 S.W.3d 731 (Ky. App. 2003). In a dissenting opinion in the Cape Publications case, then-Court of Appeals Judge McAnulty reasoned that the “danger of allowing government to operate secretly outweighs any possible benefit, in my humble opinion.” Cape Publications, 147 S.W.3d at 736 (McAnulty, J., dissenting).

The Court of Appeals majority, consistent with the long line of Attorney General decisions on the issue, recognized that the disclosure of the identities of individuals named in police reports fosters the “public interest in monitoring the [agency]’s investigative response to the sexual offense reported,” and that this is “a substantial interest.” Id. at 736. As such, the majority also re-affirmed the longstanding rule that “police incident reports are matters of public interest” and, consequently, that “the public should be allowed to scrutinize the police to ensure they are complying with their statutory duty.” Id. at 733.

However, the majority in Cape Publications held that the unique interests particular to the victims of violent sex crimes justified withholding their identifying information because such victims “need to avoid public exposure as they cope with the singularly traumatic physical and psychological consequences of the crimes perpetrated against them.” Id. at 735. Crucially important to the majority’s holding was the recognition that “a violent sex crime” is fundamentally “different from any other crime”

because of its traumatic sexual nature. Id. at 735. For that reason, the Court of Appeals majority 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.

Moreover, the majority in Cape Publications quoted the Attorney General's holding that, even in violent sex crime cases, there must still be a case-by-case analysis to determine whether, and to what extent, privacy interests apply or have been waived in a particular case. Id. at 732-33. That is an important acknowledgement that privacy interests are not static and must be evaluated within the appropriate circumstances of a given situation. A prime example is the fact that, once criminal charges are filed (in a rape case or in any other kind of case), the information at issue here is available to the public in the public court files or at a public trial as a matter of First Amendment right. See, e.g., Riley v. Gibson, 338 S.W.3d 230, 234-235 (Ky. 2011) (collecting cases regarding constitutional right of public access to criminal court proceedings). In those cases, any claimed "privacy" interest clearly ceases to exist. Yet, in this case, 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. The City simply withholds all such information in all cases.

Following the Court of Appeals decision in Cape Publications, the Attorney General continued to reject blanket nondisclosure policies with respect to names (including juveniles' names), addresses, phone numbers and other personal identifiers from police incident reports. See, e.g., 04-ORD-104; 04-ORD-188; 05-ORD-003; 05-ORD-273; 06-ORD-35; 08-ORD-105; 08-ORD-146; 09-ORD-205; 10-ORD-165.

In 2009, the Court of Appeals decided the case of Lexington H-L Servs. v. Lexington-Fayette Urban County Gov't, 297 S.W.3d 579 (Ky. App. 2009). In that case, the Court of Appeals approved the redaction from police records of the identity of a suspect who was investigated for an alleged rape but who was cleared of the allegations without any charges being brought. The Court of Appeals was careful to note that its decision “is strictly limited to this case” and rejected the notion that suspects’ identities could be redacted in all cases, even in all rape cases, under the personal privacy exception. Id. at 585, fn.8.

Thus, except for the narrow category of violent sex crimes, the Open Records Act has always been interpreted to require the general disclosure of information in police reports, including the identifying and contact information of the individuals involved. Blanket nondisclosure policies with respect to such information have been continually rejected, and there is no reason for that established law to be changed. The public interest in the disclosure of such information and in monitoring the actions and inactions of law enforcement agencies continues to outweigh any alleged nonspecific personal privacy interests, just as it has for the last 36 years.

Here, however, the Court of Appeals decision completely reversed this long line of precedents, dismissing the public interest in disclosure as “minimal” and allowing for the City’s self-described blanket policy of nondisclosure. That is a serious and unjustifiable departure from existing law which essentially judicially rewrites the Open Records Act, and this Court should reverse the decision of the Court of Appeals.

**IV. THE PERSONAL PRIVACY EXCEPTION DOES NOT JUSTIFY THE CITY'S DECISION TO WITHHOLD INFORMATION FROM THE INCIDENT AND ARREST REPORTS.**

The Court of Appeals Opinion in this case incorrectly applied the personal privacy exception by erroneously inflating the alleged personal privacy interests in the locations and the identifying and contact information and by ignoring the significant public interest in disclosure. As confirmed by the long line of judicial precedents and Attorney General decisions, the personal privacy exception does not apply to this kind of information in routine police incident reports and arrest reports.

The personal privacy exception applies to,

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

KRS 61.878(1)(a). The determination of whether the personal privacy exemption may shield a public record from public disclosure is a two-step process. See, e.g., Board of Examiners of Psychologists, 826 S.W.2d at 327-329. First, there must be a cognizable personal privacy interest; there must be "information of a personal nature." KRS 61.878(1)(a). If the records contain information of a personal nature, then a court must proceed to inquire, on a case-by-case basis, whether public disclosure of the information would constitute a clearly unwarranted invasion of personal privacy under the circumstances. In applying the personal privacy exemption, this Court has observed that "there is but one available mode of decision, and that is by comparative weighing of the antagonistic interests." Board of Examiners of Psychologists, 826 S.W.2d at 327; see also Central Kentucky News-Journal, 306 S.W.3d at 47.

Here, both steps of the inquiry should be resolved in favor of public disclosure. The identifying and contact information at issue in this case is not personal in nature, and there is no significant privacy interest in such information. Further, because of the well-established and compelling public interest in monitoring the actions and inactions of law enforcement agencies, disclosure would not constitute a clearly unwarranted invasion of personal privacy.

A. There is No Personal Privacy Interest in the Locations and the Identifying and Contact Information of Individuals in Police Incident Reports.

In the first prong of the analysis, the Court of Appeals erred in ascribing a significant personal privacy interest to the addresses, phone numbers and driver's license numbers contained in routine police incident and arrest reports. For its holding in this case, the Court of Appeals relied primarily upon the decision in Zink v. Department of Workers' Claims, 902 S.W.2d 825 (Ky. App. 1994). (See Ct. of App. Op., p. 5.) That reliance, however, was misplaced for several reasons.

First, Zink involved records very different from police incident and arrest reports. It involved an attorney's request for injury reporting forms that had been submitted to the Department of Workers Claims. The injury forms were required to be submitted by employers to the Department for each workplace injury, primarily for data collection purposes. See id. at 827. Unlike police incident reports, the records did not necessarily reflect any action or inaction of the Department. In fact, the requesting attorney admitted that he did not seek to monitor the actions of the Department but, rather, sought to use the contact information in the forms in order to solicit potential worker's compensation clients. Id. at 826.

In approving the Department's decision to withhold injured workers' identifying and contact information from the attorney, the Court of Appeals engaged in the case-by-case balancing of interests mandated by Board of Examiners of Psychologists, 826 S.W.2d 324. See Zink, 902 S.W.2d at 828-29. For the first prong of that analysis, the Court held that "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." Id. at 828 (emphasis added).

However, that is not where the Court's first-prong analysis ended. The Court made clear that the personal or private nature of information is determined as much by its context as by its content. The immediately following passage from Zink demonstrates the point:

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.

Zink, 902 S.W.2d at 828 (emphasis added). Thus, 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.

Unlike the police reports at issue in this case, the information in the injury forms "reveals little or nothing about" the agency's "own conduct." Id. at 828-29. In fact, the

Zink Court expressly acknowledged the fact that the very same type of information, when contained in police reports, is properly disclosed under the Open Records Act. Id. at 828 (*citing, inter alia*, OAG 89-76). The Attorney General decisions cited with approval in Zink hold that the identifying information of parties and witnesses in *police* reports cannot be withheld under the personal privacy exception. See, e.g., OAG 89-76 (names and addresses in police reports); see also OAG 76-511 (“We do not believe that police arrest records contain information of a personal nature.”). Thus, for the Court of Appeals in this case to rely on Zink as somehow justifying the nondisclosure of *police* reports is simply incorrect. The holding in Zink supports disclosure of the information in the City’s police reports in this case.

Further, because of its unique factual context, Zink has been recognized as representing the outer limits of information that can properly be characterized as personal in nature for purpose of the Open Records Act’s personal privacy exception. The Supreme Court has stated that the information at issue in Zink did “*not greatly*” intrude upon the privacy of the subject individuals. Lexington-Fayette Urban County, 941 S.W.2d at 472 (emphasis added); see also Cape Publications, 147 S.W.3d at 734-735 (same). As such, the outcome in Zink derived principally from the fact that there simply was no public interest in the requested information because it had nothing to do with the actions of the Department of Workers Claims. See id.

In contrast, the identifying and contact information in police incident and arrest reports has no personal privacy implications, and such information can reveal a great deal about the actions and inactions of the police in responding to reports of crime as well as the location of criminal or tortious activity. That is a matter of vital public interest. The

distinction between the injury forms in Zink and the police reports in this case makes a great deal of sense in light of the numerous Kentucky decisions generally recognizing that the right of privacy only exists in the first instance when the information at issue is unconnected with matters of public concern. In the seminal 1927 decision of Brents v. Morgan, 221 Ky. 765, 299 S.W. 967 (Ky. 1927), the Court defined the right of privacy as "the right to be left alone, that is, the right of a person to be free from unwarranted publicity, or the right to live without unwarranted interference by the public *about matters with which the public is not necessarily concerned.*" Id. at 969-70 (emphasis added).

With these fundamental principles of personal privacy in mind, it is clear that the Court of Appeals' reliance on Zink in this case was misplaced because, unlike the injury report forms in Zink, the police reports at issue in this case reveal a great deal about how the law enforcement agency is, or is not, carrying out its public duties as well as frequency and location of criminal or tortious activity. See, e.g., 94-ORD-133. These are matters about which the public necessarily *is* legitimately concerned. See Brents, 299 S.W. at 970. That is the basis of the Attorney General's longstanding analysis that there generally is no personal privacy in police reports. See, e.g., OAG 91-131.

The limitations of the Zink holding are further illustrated by contrasting that case with all of the other Kentucky appellate decisions applying the personal privacy exception. As with all other exceptions to disclosure, the standard for what constitutes information of a personal nature under the first prong of the personal privacy exemption has properly been subjected to the strict construction required by KRS 61.871. The decisions articulate the test for a protectable personal privacy interest as whether the

information involves the "most intimate and personal features of private lives." Board of Examiners of Psychologists, 826 S.W.2d at 328. Courts also examine whether release of the information "would be likely to cause serious personal embarrassment or humiliation." Lexington-Fayette Urban County, 941 S.W.2d at 472. The identifying and contact information of individuals named in routine police reports simply does not meet this standard.

The information is not like the sexual matters discussed in Board of Examiners of Psychologists, where the Court applied the personal privacy exception to records containing the patients' allegations of sexual misbehavior against their psychologist, information which also fell under the psychologist-patient privilege. See 826 S.W.2d at 328. Nor is the information like that in Cape Publications, 147 S.W.3d 731, or Lexington H-L Services, 297 S.W.3d 579, both of which dealt specifically with allegations of crimes of a sexual nature.

Further, the information in this case is nothing like the personal financial matters that have also been recognized, in appropriate instances, as falling within the purview of personal privacy under the Open Records Act. See, e.g., University of Louisville Foundation, 260 S.W.3d 818. In University of Louisville Foundation, the Supreme Court significantly limited the reach of the privacy exception, applying it only to 62 donors who had specifically requested anonymity in connection with their donations at a time when the Foundation had not been declared a public agency. The Court recognized that the donor information "does not involve the revelation of intensely private information, such as personal income or medical history." Id. at 823. As such, the Court rejected the

privacy exception for donors who failed to request anonymity and held that it would not apply to any donors in the future, regardless of requests for anonymity. Id.

Another decision that demonstrates the limitations on the holding in Zink is Hines v. Commonwealth, 41 S.W.3d 872 (Ky. App. 2001). Hines involved an individual who worked as a commercial finder of persons who own unclaimed property which was listed on records published annually by the Department of Treasury. Id. at 873. The Court of Appeals in Hines limited the personal privacy exception to allow the Department of Treasury to withhold only the *values* of the unclaimed properties, because the values correlated to personal finances. See id. at 875. In contrast, the Court acknowledged the importance of the Department's public disclosure of the names and contact information of the unclaimed property owners – information which allowed the public to monitor the actions and inactions of the Department, in part by attempting to contact the individual property owners. See id. at 875-76.

In Palmer v. Driggers, 60 S.W.3d 591 (Ky. App. 2001), the Court of Appeals held that a trial court erred in redacting the names and addresses of witnesses from a complaint of police misconduct under the personal privacy exception. Id. at 600. The witnesses in that case were police officers themselves, and the Court held that “no private citizen would be subject to embarrassment or humiliation” by release of such information. Id. at 600.

Here, this case is much more in line with the holding in Palmer, concerning identifying and contact information such as addresses. Id. Moreover, with respect to the addresses, this case involves the disclosure of the locations where reported crimes took place, a matter of significant public interest. This case does not involve the kind of

sexual matters, personal financial information or personal medical information that has been held to be under the purview of the personal privacy exception. See Board of Examiners of Psychologists, 826 S.W.2d 324; University of Louisville Foundation, 260 S.W.3d at 823. Rather, this case involves the identifying and contact information of subjects, witnesses and victims in police reports and the locations of criminal activity. That information directly concerns the police and their public function of protecting the public, enforcing the criminal laws, investigating allegations of criminal activity, and allocating public resources for those purposes. Such information is not the kind of personal information that justifies non-disclosure under the “strictly construed” personal privacy exception of the Open Records Act. KRS 61.871; KRS 61.878(1)(a).

As such, the Court of Appeals decision should be reversed.

B. There Is No Personal Privacy Interest in the Names of Witnesses or Victims Who Are Under the Age of 18.

The Court of Appeals also erred in holding that the City can institute a blanket policy to withhold the names of all individual witnesses or victims simply because such individuals are under the age of 18. As an initial matter, it should be noted that a person generally has no personal privacy interest in his or her name, regardless of the person’s age. In fact, it is difficult to conceive of information less “private” than one’s name.

There is no law in Kentucky suggesting that the names of minors are any more “personal” or “private” than the names of adults. One example is reflected in the Kentucky Family Education Rights statutes, KRS 160.700 to 160.730. As with its federal counterpart -- the federal Family Educational Rights and Privacy Act of 1974 (FERPA) -- the Kentucky law generally allows schools to publish “directory information,” which, among other things, includes students’ names, addresses and telephone listings. See KRS

160.700(1); 160.720; 20 U.S.C § 1232g. Those laws are a legislative recognition that the names of students under the age of 18 are not private information.

Here, the names are in connection with being a victim or witness in a police incident report, but that does not transform the names into “private” information. On this issue, the Court of Appeals erroneously conflated the names of juvenile *offenders* with those of victims and witnesses. In Kentucky, the identities of juvenile offenders are generally shielded from public disclosure as a matter of statute under the Juvenile Code. See, e.g., KRS 610.320 & 610.340. Those statutes deal with juvenile court records as well as the law enforcement records that become part of the juvenile court case. See id.

By enacting the Juvenile Code, the General Assembly placed a “shroud of secrecy” over juvenile court matters for the purpose of fostering rehabilitation by protecting juvenile offenders from the stigma of a public criminal record. F.T.P. v. Courier-Journal and Louisville Times Co., 774 S.W.2d 444, 446 (Ky. 1989). As the Supreme Court has held, “[t]he Juvenile Code was enacted with the stated goal of rehabilitating juvenile *offenders*, when feasible, as opposed to the primarily punitive nature of the adult penal code.” Phelps v. Commonwealth, 125 S.W.3d 237, 240 (Ky. 2004) (emphasis added). Continuing, the Supreme Court noted that “[t]he system is designed so that children who participate in isolated instances of reckless adolescent behavior do not have to spend the rest of their lives saddled with a criminal record.” Id. at 241.

Neither that policy principle, nor the intent of the Juvenile Code’s confidentiality provisions, applies to maintain the secrecy of the identities of victims or witnesses in ordinary criminal cases involving adult offenders. That fact is made clear in the

Kentucky Uniform Citation utilized by police agencies throughout Kentucky, including the City's police department in this case. There is a box at the top of the form for a police officer to check if the matter involves a "JUVENILE OFFENDER." (See, e.g., RA at 105, 107) (emphasis added). There is no such box in the form for police to check where the witnesses or victims are under age 18. That is because there is no law providing for the confidentiality of such individuals in police citations. Here, the Court of Appeals ignored the distinction between juvenile court matters and adult criminal matters, and it relied upon Juvenile Code provisions that have no application to the identities of witnesses or victims involved in adult criminal matters.<sup>12</sup>

Neither the Supreme Court nor the Court of Appeals has ever held that a victim or witness in a crime has a personal privacy interest in his name simply by virtue of his or her age. Whether one is a juvenile or an adult, there is nothing inherently private or personal about being identified by name as a victim or a witness in a routine police incident report. As with the other information in police incident reports, the Attorney General has long held that police agencies cannot institute a blanket policy to withhold

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<sup>12</sup> Even in the context of juvenile court, the rule of confidentiality for juvenile offenders is not absolute (in contrast to the City's absolute blanket policy for victims and witnesses here). For example, juvenile court judges can publicly release juvenile court records upon a finding that there is "good cause" to do so. KRS 610.340(1)(a). In addition, certain categories of juvenile court records automatically become open to the public, such as records in cases involving juvenile offenders over age 14 or where there is a felony adjudication or where deadly weapons are involved. See KRS 610.320(3). Further, records relating to juvenile offenders become public when the juvenile is tried as an adult in circuit court, a determination that hinges upon the juvenile's age and the nature of the charges. See KRS 635.020.

Thus, there is not an absolute blanket policy of nondisclosure relating to juvenile offenders' names even within the Juvenile Code. There is no reason why the City's police department should be allowed to implement such an absolute blanket policy with respect to witnesses and victims of adults' crimes, simply because the witnesses or victims are less than 18 years old.

the names of juveniles, other than juvenile offenders. As the Attorney General held in this case:

The purpose underlying the shroud of secrecy aimed at protecting juvenile *offenders* is not furthered by the nondisclosure of records identifying juvenile victims or witnesses, and the Attorney General has so recognized in past open records decisions. See, e.g., 96-ORD-115; 97-ORD-77; 98-ORD-123; 98-ORD-185; 99-ORD-29; 08-ORD-105; 09-ORD-086. We find no authority in the statutes, or elsewhere, for the City's position that the legislative intent that informs KRS 610.320(3) is to protect any law enforcement record in which a juvenile's name appears. The City's reliance on KRS 610.320(3) to support nondisclosure of uniform citations and KYIBRS reports that contain the names of juvenile victims or witnesses was therefore misplaced. The City may, of course, invoke KRS 61.878(1)(a) to withhold juvenile victim or witness names if it presents sufficient proof concerning the seriousness of the incident in which the juvenile was victimized, or which the juvenile witnessed, and the adverse impact on the juvenile that would result from disclosure.

09-ORD-201, pp. 6-7.

Further, the fact that witnesses and victims do not have a privacy right to the nondisclosure of their names is the subject of well-established law relating to the constitutional right of public access to court proceedings and court records. There is no dispute that when an incident leads to an arrest or to criminal charges, the victims' and witnesses' identities are publicly available in the relevant court records and proceedings. That fact is not altered simply because the victim or witness is under the age of 18. See, e.g., Lexington Herald Leader Co., Inc. v. Tackett, 601 S.W.2d 905 (Ky. 1980).

Tackett involved a criminal sodomy trial against an adult offender who was accused of sodomizing "10 male victims under the age of 12." Id. at 905. The Supreme Court held that the trial court erred by closing the courtroom to the public during the juvenile victims' testimony. The Court recognized that they were likely to suffer embarrassment and emotional strain from giving public testimony, but the public's

overriding interest in the work of the criminal justice system superseded any privacy claims. Id. at 907.

The same analysis was applied in Johnson v. Simpson, 433 S.W.2d 644 (Ky. 1968), where the Court rejected a trial court's order limiting the disclosure of juvenile witnesses' names in cases against adult offenders. The Court held that "[t]he manner in which justice is administered does not have any private aspects." Id. at 646 (*quoting Phoenix Newspapers, Inc. v. Superior Court In and For Maricopa County*, 418 P.2d 594, 596 (Ariz. 1966)); see also Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 608 (1982) (invalidating statute that excluded the public from trials of sexual offenses involving juvenile victims).

The same analysis applies with equal force in this case. The work of law enforcement agencies in the criminal justice system is carried out on behalf of the public, and it is of crucial public importance. There can be no inherently private information about the work of the police. Consistent with this Court's precedents and the persuasive line of authority from the Attorney General, there is no automatic "privacy" interest in the name of a victim or witness in a routine police report simply because the individual is less than 18 years old. Yet, the Court of Appeals decision allowed for an absolute blanket policy of nondisclosure of all such information in police reports, irrespective of any showing of an alleged privacy interest under the facts and circumstances of the particular cases. The Court of Appeals decision should be reversed.

C. The Desire for Secrecy Does Not Establish a Protectable Privacy Interest.

The Court of Appeals decision in this case exhibits a fundamental misunderstanding of the first prong of the personal privacy exception analysis. The

appropriate inquiry is whether the information contained in a public record involves the "most intimate and personal features of private lives." Board of Examiners of Psychologists, 826 S.W.2d at 328. The plain language of the Open Records Act itself mandates that "inconvenience or embarrassment to public officials or others" should not be considered in the analysis. KRS 61.871. Yet, 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.

In this case, the City has incorrectly argued that the individuals named in police reports have a "privacy" right in the nondisclosure of their identities and contact information so as to avoid the inconvenience of potentially being contacted in connection with the cases in which they were involved. Likewise, the Court of Appeals suggested that the only arguable public interest in disclosure is connected with how easy or difficult it would be for the New Era to contact the individuals listed in police reports. Those contentions are erroneous for several reasons.

First, if an individual is contacted by the media or others, it is the individual's undisputed right not to comment or otherwise respond to that contact. That is a simple enough thing to do which does not amount to inconvenience or harassment. As the Attorney General held in OAG 79-387, "a crime victim or a witness is not required to talk to a reporter if he chooses not to do so." Id. In contrast, completely foreclosing the news media's ability to attempt to contact individuals involved in events of public significance would violate the First Amendment right to gather news. As both the United States Supreme Court and the Kentucky Supreme Court have held, "without some

protection for seeking out the news, freedom of the press could be eviscerated." Riley, 338 S.W.3d at 235 (quoting Branzburg v. Hayes, 408 U.S. 665, 681 (1972)).

The Attorney General's logic in OAG 79-387 is also consistent with the Supreme Court's holding in Cape Publications, Inc. v. Braden, 39 S.W.3d 823 (Ky. 2001), in which the Court applied the Branzburg decision. Id. at 826 (citing Branzburg, 408 U.S. 665). In Braden, the Court held that a trial court violated the First Amendment by restricting reporters' ability to interview jurors after a trial. The Court rejected theoretical claims of juror privacy as a reason to prevent the news media from contacting the jurors, holding that "[i]t is abundantly clear that if a juror does not wish to communicate with another individual, such juror is not required to do so," and "[t]he desire not to communicate is best achieved by simply refusing to talk." Id. at 827. Continuing, the Court held,

Obviously, the court could advise the former jurors that they had no obligation to talk to anyone and that they could simply refuse to speak. Nothing in this opinion should be considered as requiring jurors to speak to the media or anyone else. A juror may speak or remain silent as he or she wishes.

There is nothing to prevent former jurors from reporting actual harassment or intimidation to police authorities for appropriate protection or other remedy as may be required. A former juror can also pursue a private civil remedy if actual harassment or intimidation arises.

Braden, 39 S.W.3d at 828.

As with the jurors in Braden, the hypothetical inconvenience of potentially being contacted about public matters does not create a privacy claim, and it is not a sufficient reason to deny access to information in public records. See KRS 61.871.

The law is clear that the desire for nondisclosure does not equate to a protectable personal privacy interest. In this case, there is no evidence that any of the named

individuals in the police reports requested that their names or other identifying and contact information be kept secret. Rather, the argument was manufactured by the City in order to justify its blanket nondisclosure policy. Yet, even if any such confidentiality requests existed, they would not transform the information into personal private information. See University of Louisville Foundation, 260 S.W.3d at 824. This Court has repeatedly rejected such a notion.

In fact, in some instances, an individual's or agency's desire for secrecy heightens the legitimate public interest in disclosure. The Supreme Court has twice held that the personal privacy exception does not apply to settlement agreements between individuals and public agencies, even where the agreements contain confidentiality provisions. Central Ky. News-Journal, 306 S.W.3d 41; Lexington-Fayette Urban County, 941 S.W.2d 469. This Court's analysis in Lexington-Fayette Urban County is particularly apt because it demonstrates that information cannot be transfigured into information of a personal or private nature simply because individuals request that the information be kept secret. In that case, this Court adopted the Court of Appeals' decision that "a confidentiality clause reached by the agreement of parties to litigation cannot in and of itself create an inherent right to privacy superior to and exempt from the statutory mandate for disclosure contained in the Open Records Act." Id. at 472. Because a police department's settlement of litigation brought by citizens is an inherently public matter, "[a] confidentiality clause in such an agreement is not entitled to protection." Id. at 473.

The same analysis applied in University of Louisville Foundation, 260 S.W.3d 818, which involved donors' requests for nondisclosure in connection with their donations to the Foundation. The Supreme Court soundly rejected the notion that an

interest in nondisclosure equates to a protectable privacy interest for donors who knowingly donate to a public agency. *Id.* at 824 (“... future donors to the Foundation are aware, and on notice, that their gifts are being made to a public institution and, therefore, are subject to disclosure *regardless of any requests for anonymity.*”) (emphasis added).

In OAG 80-144, the Attorney General confirmed that requests for secrecy do not justify nondisclosure of police reports. In that case, the Attorney General held that a sheriff’s department could not withhold the details of a burglary in a police report even where the victim expressly requested that the information not be publicly released. The Attorney General rejected “[s]ecret police activity” as “repugnant to the American system of government,” and held that “when a citizen reports a crime to the police he may generally expect that the news media will learn of the report” and “cannot expect that the matter will be kept secret.” OAG 80-144.

Simply put, the mere desire for nondisclosure is not tantamount in any way to an actual personal privacy interest. If it were, then the personal privacy exception would swallow the Open Records Act’s rule of disclosure. Likewise, an unproven and unsubstantiated belief by the City (or the Court of Appeals) that disclosure may cause inconvenience or embarrassment is insufficient. KRS 61.871.

The Court of Appeals erred by categorically ascribing a personal privacy interest to the information at issue in this case and by confusing an unproven desire for nondisclosure across the board with an actual privacy interest. The Court of Appeals decision should be reversed.

D. There is a Compelling Public Interest in the Disclosure of the Locations of Crimes and the Identifying and Contact Information of Those Involved.

The second prong of the personal privacy exemption inquiry is whether disclosure of information would constitute a “clearly unwarranted” invasion of personal privacy. KRS 61.878(1)(a). This requires a comparative balancing of the asserted privacy interest against the public interest in disclosure. See, e.g., Central Kentucky News-Journal, 306 S.W.3d at 47; Board of Examiners of Psychologists, 826 S.W.2d at 327-329. Here, contrary to well-established law, the Court of Appeals placed no weight whatsoever on the public interest in disclosure and placed an excessive and unwarranted amount of weight on the alleged “privacy” interests in addresses, phone numbers, driver’s license numbers and the names of juveniles.

The locations of crimes and the identifying and contact information at issue in this case is clearly not the kind of “intimate and personal features of private lives” recognized as carrying a significant amount of weight in the balance. Id. Rather, as the Supreme Court has held, disclosure of such information does “not greatly” intrude upon any alleged privacy interests. Lexington-Fayette Urban County Gov’t, 941 S.W.2d at 472.

On the other side of the balance, there is a substantial public interest in knowing the locations of reported crimes and in monitoring the actions of law enforcement agencies. The Court of Appeals’ casual dismissal of the public interest in the names of individuals, addresses, phone numbers and driver’s license numbers as “minimal” is not consistent with the prevailing and longstanding interpretation of the Open Records Act. As the Supreme Court has held, the Open Records Act “presumes a public interest in the free and open examination of public records.” Central Kentucky News-Journal, 306 S.W.3d at 45.

First, there can be no question that the public has a legitimate and compelling interest in knowing the locations of reported crimes. Here, the City's blanket nondisclosure policy with respect to addresses has the bizarre and dangerous effect of foreclosing the public from knowing the locations where crimes occurred. That makes no sense. If there is a series of crimes reported at or near the same location, the public needs to know about it. If certain kinds of crimes occur more frequently in particular areas of town, the public should be informed of that fact. This is a critical matter of public safety, and it can legitimately affect people's decisions about where to live, where to work, where to allow their children to visit and what kinds of safety precautions to take when going to particular areas.

Under the Court of Appeals decision in this case, members of the public cannot find out about the crimes reported in *their own neighborhoods*. Members of the public cannot know if the areas surrounding their children's schools are experiencing a spike in criminal activity. That is a patently illogical result. It should be apparent that the public is entitled to information about the frequency, severity, and nature or patterns of criminal activity at or near particular locations such as neighborhoods, apartment complexes, parks, schools or businesses. The public interest in disclosure of this information is vital. Yet, under the City's blanket nondisclosure policy, the public is not allowed to learn the locations of reported crimes in their communities. The Court should not allow that policy to stand.

In addition to the important safety concerns, the City's nondisclosure policy also forecloses the public's ability to monitor whether, and to what extent, public resources are being allocated throughout the community. Do police regularly respond to reports of

crime more quickly or slowly in certain areas of town? Are more police officers or squad cars normally sent to respond to the same kinds of reports in certain locations? Does the rate of arrests or charges for the same criminal allegations vary depending on the neighborhood? These are but a few of the legitimate questions which cannot be answered for the public when there is a blanket nondisclosure policy with respect to all addresses contained in routine police incident and arrest reports. The public interest in disclosure of the addresses is legitimate and compelling, and the public interest outweighs any arguable "privacy" interest in that information.

Further, as recognized in numerous judicial and Attorney General decisions, there is a particular substantial public interest in the identifying and contact information of persons named in police reports. The information is necessary to a complete and accurate understanding of the reports as well as to a complete ability to monitor police actions. The same is true of police inactions because, in many cases, understanding what the police *don't* do is equally important.

In this case, the Court of Appeals dismissed the public interest in disclosure as nothing more than the New Era's interest in more easily being able to contact the witnesses and victims involved in the incidents. While that is a substantial public interest by itself, in reality there is much more to the public interest in disclosure. This case provides a perfect example of the public interest. The New Era requested particular categories of police reports for an eight-month period in 2009, including both the reports that resulted in charges being brought and the reports that resulted in no further action. (See Open Records Request, RA at 5-6.) There is no suggestion that the New Era sought to do anything other than to review and evaluate the work of the Hopkinsville Police

Department in those cases and to examine why some cases resulted in arrests while others did not. (See id.) The information at issue in this case is vital to such an endeavor.

Names, addresses, phone numbers and driver's license numbers are often necessary to (1) 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. There is clearly a strong public interest in the proper identification of the involved individuals. Where common names like "John Smith" or "Mary Jones" are used, an address, phone number or driver's license number functions as an additional identifier to determine the correct persons involved. In addition to the ability to accurately identify the persons involved, there is also a public interest in the ability to locate and, in some instances, to contact the persons.

In 94-ORD-133, the Attorney General recognized that the same public interest in the disclosure of the identifying and contact information for individuals involved in routine police incident reports also applies to the 911 dispatch records. Specifically, the Attorney General held,

As noted, the public's right to know is premised upon the public's right to expect its agencies to execute their statutory functions. Release of the identities of callers will facilitate the public's ability to monitor the Dispatch Center's performance by enabling the public to ascertain who, if anyone, is misusing or abusing the system by making unreasonable demands on the service, or calling in false reports. Further, release of the caller's identities will enable to the public to assess the effectiveness of the services through direct communications with persons who have availed themselves of the services. Finally, release of the caller's identities will enable the public to evaluate whether services are rendered in a uniform manner regardless of the callers' identities.

94-ORD-133. These same public interests in disclosure are at issue in this case, but they were disregarded by the Court of Appeals, which held that “the public interest in this information is minimal since its disclosure reveals nothing about the Hopkinsville Police Department’s execution of its statutory functions.” (Ct. of App. Op., p. 6.)

The Court of Appeals’ analysis was incorrect. The public interest in disclosure in this case is substantial, and it is vital to the ability to effectively monitor the actions and inactions of the law enforcement agency. Weighed against that significant public interest is a claimed “privacy” interest in names, addresses, phone numbers and drivers license numbers which is, at best, minimal. See Lexington-Fayette Urban County Gov’t, 941 S.W.2d at 472; Cape Publications, 147 S.W.3d at 734-735. The claimed privacy interest does not outweigh the public interest in disclosure.

Moreover, the generalized claim of a privacy interest certainly cannot justify the City’s absolute blanket policy of nondisclosure in all cases, a policy which keeps all such information secret without regard to the facts and circumstances of particular cases and without any attempt by the City to carry its statutory burden of proof.

Accordingly, the Court of Appeals decision should be reversed.

**CONCLUSION**

For all the reasons set forth herein, the New Era respectfully requests this Court reverse the Court of Appeals decision.

Respectfully submitted,



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APPENDIX

- A. Court of Appeals Opinion of April 20, 2012
  
- B. Christian Circuit Court's Opinion and Order of May 20, 2010
  
- C. Christian Circuit Court's Order of August 25, 2010
  
- D. Attorney General Open Records Decision 09-ORD-201
  
- E. OAG 76-424
  
- F. OAG 76-511