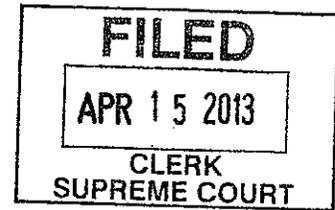


COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2012-SC-000290



KENTUCKY NEW ERA, INC.

APPELLANT

v.

CITY OF HOPKINSVILLE, KENTUCKY

APPELLEE

APPELLANT'S REPLY BRIEF

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

Respectfully Submitted,

A handwritten signature in cursive script, 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 12th day of April, 2013. I further certify that no part of the record on appeal was withdrawn by, or on behalf of, Appellant.

A handwritten signature in cursive script, appearing to read "Jeremy S. Rogers".

Counsel for Appellant

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ARGUMENT

I. THE CITY'S BLANKET NONDISCLOSURE POLICY VIOLATES THE OPEN RECORDS ACT.

The Court of Appeals decision should be reversed. The Court of Appeals approved of a blanket nondisclosure policy of the City of Hopkinsville (the "City"). Under the blanket policy, the City withheld all addresses (including the locations of the reported crimes), phone numbers and driver's license numbers of all victims and witnesses from all of the requested police reports. The City also withheld all names of witnesses and victims who were under the age of 18, regardless of the circumstances. The Court of Appeals upheld the City's claim that all such information is automatically and irrefutably exempt from disclosure under the personal privacy exception, KRS 61.878(1)(a). That holding should be reversed.

The Court of Appeals' approval of the City's blanket nondisclosure policy effectively reverses the Supreme Court's decision in Board of Examiners of Psychologists v. Courier-Journal & Louisville Times, Inc., 826 S.W.2d 324 (Ky. 1992), which requires that application of the personal privacy exception must be a fact-specific inquiry based on the circumstances surrounding each situation. In that case, the Supreme Court very clearly held that "there is but one available mode of decision, and that is by comparative weighing of the antagonistic interests" because "[n]ecessarily, the circumstances of a particular case will affect the balance" and the issue "can only be determined within a specific context." Id. at 327-28. The Court of Appeals decision in this case ignored the mandate of the Open Records Act.

To support its blanket nondisclosure policy, the City relies heavily upon the decision in Lexington H-L Services v. Lexington-Fayette Urban County Gov't, 297

S.W.3d 579 (Ky. App. 2009). (See City's Brf., pp. 13-14.) The City's reliance is misplaced. The decision in Lexington H-L Services dealt with the redaction of the name of one particular suspect who had been accused of rape but had been cleared of the allegation without any charges. The Court of Appeals focused its analysis on the particular facts of that case and held that, "[w]e caution that our holding is strictly limited to this case and that judicial decisions concerning such open record requests are to be made on a 'case-by-case basis.'" Id. at 585 (*citing Palmer v. Driggers*, 60 S.W.3d 591, 597 (Ky. App. 2001); and Cape Publications v. City of Louisville, 147 S.W.3d 731, 735 (Ky. App. 2003)). Further, the Court of Appeals in Lexington H-L Services held,

This opinion should not be misconstrued as holding that a rape suspect's identity would never be subject to disclosure when a police investigation is cleared by exception. There may exist facts justifying disclosure thereof; for example, in a case where a full investigation into police conduct could only be accomplished by disclosure of a suspect's identity.

Id. at 585, fn.8. The Court's holding actually prohibits exactly the kind of blanket nondisclosure policy used by the City, and upheld by the Court of Appeals, in this case. Id.

The City also incorrectly claims that blanket nondisclosure policies were approved in Cape Publications v. City of Louisville, 147 S.W.3d 731 (Ky. App. 2003). The decision in Cape Publications was focused narrowly on the identities of the victims of violent sex crimes. The Court of Appeals acknowledged the Supreme Court's holding that "[j]udicial review of a disclosure decision must be approached on a case-by-case basis." Id. at 735 (*quoting Driggers v. Palmer*, 60 S.W.3d 591, 597 (Ky. App. 2001)). Moreover, the Cape Publications Court quoted at length from the Attorney General's holding that there continues to be a requirement to apply the personal privacy exception on a fact-specific, case-by-case basis:

We continue to ascribe to the view that the Division may not withhold the identities of *all* crime victims as a matter of policy, and believe that the majority of cases will be governed by the rule announced in 96-ORD-115 and 99-ORD-27. Further, we believe that in rare instances, such as where the victim of a sexual offense has "gone public," or other circumstances in which the victim has evidenced a waiver of privacy, that victim's privacy interests may be subordinate to the public's interest in disclosure.

Id. at 732-733 (emphasis in original).

Contrary to the City's suggestion, the holdings in Cape Publications and Lexington H-L Services both follow the longstanding requirement under Board of Examiners of Psychologists that the personal privacy exception must be applied on a fact-specific basis. Blanket nondisclosure policies, like the City's in this case, violate the Open Records Act.

Further, the Court of Appeals decision in Cabinet for Health & Family Services v. Lexington H-L Servs., 382 S.W.3d 875 (Ky. App. 2012), makes clear that a public agency's blanket nondisclosure policy "plainly conflicts" with the Open Records Act because it "in no way satisfies" the agency's burden. Id. at 883. The agency's use of a blanket nondisclosure policy in that case was sufficient to warrant a finding of bad faith to support an award of costs and attorneys' fees under KRS 61.882(5).

The City attempts to distinguish Cabinet for Health & Family Services by focusing on the fact that there was a separate statute authorizing release of the child fatality records at issue in that case, KRS 620.050(12)(a). (See City's Brf., pp. 16-17.) The City claims "that there is no specific statute authorizing disclosure" in this case. (Id. at 17.) The City's claim is wrong. The Open Records Act has always *required* (not merely authorized) the disclosure of police reports, and the Act has always required the agency to carry its burden of proof with specificity to justify any redactions under the

personal privacy exception. See, e.g., 04-ORD-104 (and numerous decision cited therein).

The Court of Appeals decision in Cabinet for Health & Family Services focused squarely on the Cabinet's blanket nondisclosure policy, which (like the City's policy in this case) takes no facts or circumstances of particular situations into account and simply results in the automatic withholding of categories of information in public records. The City incorrectly argues that the blanket nondisclosure policy in Cabinet for Health & Family Services was only invalidated because of the separate statute authorizing disclosure of child fatality records. (City's Brf., p. 17.) In truth, the Court of Appeals in that case specifically based its decision on the fact that the Cabinet's inappropriate blanket nondisclosure policy violated the Open Records Act:

We agree with the circuit court that the Cabinet's failure to disclose the requested records in this case constituted a "willful" violation of the Open Records Act. Had the Cabinet considered Appellees' requests on their merits and denied disclosure upon a reasonable basis, perhaps our opinion would be different. However, 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 and despite the acknowledged applicability of KRS 620.050(12)(a) under these circumstances. The circuit court concluded that these denials were made in "bad faith," and we see no grounds to disagree with that conclusion.

Id. at 883-884.

This case is no different from the situation in Cabinet for Health & Family Services, 382 S.W.3d 875. Like the blanket nondisclosure policy in that case, the City's broad and unyielding blanket nondisclosure policy in this case is a violation of the Open Records Act. The Court of Appeals decision should be reversed.

In approving the City's nondisclosure in this case, the Court of Appeals held 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 by KRS 61.878 when the redaction is challenged.” (4/20/12 Ct. of App. Op., p. 8.) That holding is wrong, and it ignores the fundamental requirements of the Open Records Act.

The Open Records Act has always required that a public agency’s initial denial of access “shall 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). There is nothing in the Open Records Act that gives a public agency the “discretion” to withhold or redact public records under a blanket policy while only being required to justify its decision if it is later challenged in court.

Further, the Court of Appeals holding ignores the reality in this case that the City never even attempted to carry its burden to justify nondisclosure of the particular records at issue here. Instead, the City has consistently relied solely on its blanket nondisclosure policy. Like the nondisclosure policy in Cabinet for Health and Family Services, the City’s policy “plainly contradicts the [Open Records] Act’s preference for open disclosure and in no way satisfies the [City]’s burden of justifying an exemption from that policy.” 382 S.W.3d 883 (*citing, inter alia*, KRS 61.871; KRS 61.882(3)). Accordingly, the Court of Appeals decision should be reversed.

II. THERE IS NO PERSONAL PRIVACY INTEREST IN THE POLICE RECORDS.

The City made no showing to carry its burden of proving its personal privacy claim. The particular locations of the reported crimes are not personal private information. Nor is there any evidence of a particular personal privacy interest in the identifying and contact information of victims and witnesses in the police reports. Instead, in keeping with its blanket nondisclosure policy, the City simply suggests that

there is a generalized, across-the-board, privacy interest in *all* such information regardless of the circumstances. The City's claim is unsupported by any facts in this case, and it is directly contrary to the law.

In its Brief, the City repeatedly asserts that its blanket nondisclosure policy is somehow necessary to foster "unhampered reporting of crimes and community public safety." (City's Brf., p. 19; see also pp. 27, 38-39.) The City also suggests that all of the victims and witnesses listed in the police reports necessarily live in fear that the disclosure of their identities or contact information in the police reports would endanger their safety. (See id. at 18-19, 21-22, 27.) Yet, there is absolutely no evidence to support the City's contentions with respect to any (and certainly not *all*) of the requested records. The City's argument is based on nothing more than pure speculation.

Further, the City's claims are overwhelmingly refuted by the 37-year history of the Open Records Act. The City does not deny that the courts and the Attorney General have repeatedly and consistently required disclosure of this type of information in police reports and arrest records. See, e.g., 04-ORD-104 (and numerous decision cited therein); see also OAG 91-131 (stating that the Attorney General has "consistently held that a person does not have a privacy interest in local police records pertaining to him"); OAG 80-54 ("public interest in police business outweighs any privacy interest of victims, offenders or police personnel"). The consistent disclosure of such information in police records has not caused any of the hypothetical results that the City claims, and the City offers nothing to support the notion that the situation is somehow different in this case.

The City cites Bowling v. Brandenburg, 37 S.W.3d 785 (Ky. App. 2000), for the contention that police records can be withheld or redacted under the personal privacy

exception simply based upon the nature of the crime itself. (See City's Brf., pp. 39-41.) That contention is wrong for several reasons. First, Bowling dealt with one particular 911 call in a domestic violence case and did not pertain to any blanket nondisclosure policy like the City's in this case. Second, the decision in Bowling dealt only with the *audio recording* of the call; it did not concern access to the police records themselves. The Court of Appeals in Bowling acknowledged that the written police records had been fully released to the requestor. Id. at 786. In fact, the records specifically identified the 911 caller, the alleged victims, and the location of the reported crime -- a personal residence. Id. at 786. The Bowling decision does not support the City's claim.

The City failed to carry its burden to prove any specific personal privacy interests in the records, and instead relied only on an unlawful blanket nondisclosure policy. Accordingly, the Court of Appeals decision should be reversed.

III. THE PUBLIC INTEREST IN DISCLOSURE IS SUBSTANTIAL.

The City incorrectly dismisses the public interest in disclosure as nothing more than mere curiosity or nosiness. The City's view of the public interest is extraordinarily myopic, as was the Court of Appeals'. The Court of Appeals held that the public interest in the locations of reported crimes and in the identifying and contact information of those persons involved "is minimal since its disclosure reveals nothing about the Hopkinsville Police Department's execution of its statutory functions." (Ct. of App. Op., p. 6.) That logic is incorrect. The information actually reveals a great deal about the police department's actions.

The public interest in disclosure of such information is substantial, and the release of this type of information from police reports has been consistently held to support the

public interest in monitoring the actions and inactions of law enforcement agencies. See, e.g., 94-ORD-133; see also OAG 80-54 (“public interest in police business outweighs any privacy interest of victims, offenders or police personnel”).

Similarly, the City incorrectly suggests that the *only* interest in disclosure in this case is the interest of the New Era in contacting the witnesses and victims of the reported crimes. (See City’s Brf., p. 37.) First, that is not true. The well-recognized public interest in disclosure of police reports encompasses a great deal more. See, e.g., 94-ORD-133. For example, the City ignores the extremely strong public interest in knowing the locations where reported crimes have occurred in the community. Yet, that information is automatically withheld under the City’s blanket nondisclosure policy. The public has a legitimate interest in knowing the locations where reported crimes occurred and in knowing the identities of those with whom the police interacted in responding to the reports. That public interest is substantial.

Contrary to the Court of Appeals’ holding, there is also a substantial public interest in being able to contact the individuals involved in police reports, and that interest is directly in line with monitoring the actions and inactions of law enforcement agencies. See, e.g., 94-ORD-133. In that decision, the Attorney General held that there is a substantial public interest in the disclosure of 911 callers’ identities because it “will enable the public to assess the effectiveness of the services through direct communication with persons who have availed themselves of the services” and “to evaluate whether services are rendered in a uniform matter regardless of the callers’ identities.” Id. That public interest in disclosure applies with equal force in this case.

Similarly, in Hines v. Commonwealth, 41 S.W.3d 872 (Ky. App. 2001), the Court of Appeals acknowledged the importance of the disclosure of the names and contact information of the individual owners of unclaimed property held by the government because that information allowed the public to monitor the actions and inactions of the public agency in part by attempting to contact the individuals. See id. at 875-76.

The Court of Appeals seriously erred by ignoring the substantial and well-established public interest in disclosure of the information at issue here. The public has a strong interest in knowing the locations of reported crimes and in knowing the identities of those with whom the police have interacted in performing their law enforcement duties. The Court of Appeals decision should be reversed.

IV. THE CITY'S BLANKET POLICY TO WITHHOLD THE NAMES OF VICTIMS AND WITNESSES UNDER THE AGE OF 18 VIOLATES THE OPEN RECORDS ACT.

The City incorrectly argues that KRS 610.320(3) supports its blanket policy to withhold all police records which identify a victim or witness under age 18. (City's Brf., pp. 30-33.) That statute is part of the Kentucky Juvenile Code, and it only pertains to records of juvenile offenders – not witnesses or victims. A plain reading of the statute shows that it was intended to deal with juvenile court records “kept by the clerk of the court” in the context of juvenile criminal cases. Id.

The City asks for an interpretation of the statute that would mandate that the entirety of any police incident report be withheld from public inspection simply because it names someone under age 18 in any capacity. Such a result would be nonsensical and is not the legislative intent of KRS 610.320. The confidentiality provisions of the Juvenile Code were only designed to foster rehabilitation of juvenile *offenders*. See

F.T.P. v. Courier-Journal and Louisville Times Co., 774 S.W.2d 444, 446 (Ky. 1989);
Phelps v. Commonwealth, 125 S.W.3d 237, 241 (Ky. 2004). A person has no personal
privacy interest in his or her name, regardless of the person's age.

The City's blanket policy to withhold records naming witnesses and victims under
the age of 18, without regard to any of the circumstances, is a violation of the Open
Records Act. See Cabinet for Health & Family Services, 382 S.W.3d 875. 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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