COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 19-CI-907

FRANKFORT NEWSMEDIA, LLC **PLAINTIFF**

v. **OPINION & ORDER**

RICK ROGERS, *et al*. **DEFENDANTS**

This is an action brought under the Kentucky Open Records Act, KRS 61.870 *et seq.* to obtain public access to a report prepared by an outside law firm, paid for by the taxpayers, concerning allegations of sexual harassment at the Franklin County Regional Jail. The case is now before the Court on Plaintiff's motion for summary judgment. After a review of parties' briefs and an i*n camera* review of the subject document, the Court hereby **GRANTS** Plaintiff's Motion for Summary Judgment for reasons stated more fully below.

BACKGROUND

Plaintiff Frankfort Newsmedia, LLC ("State Journal") made open records requests to Defendants Franklin County Attorney and the Franklin County Jailer ("Franklin County") in order to obtain a copy of a completed investigation report relating to sexual harassment allegations against former chief deputy jailer Kelly Rouse. Complaint, ¶ 6. Defendants provided the State Journal with a redacted copy of the report after initially denying the request. *Id*. ¶ 7. The State Journal appealed the County's decision to the Office of the Attorney General, which determined the County had not violated the Open Records Act by withholding portions of the final investigation report. The Attorney General upheld

the County's refusal to provide the report pursuant to the criminal investigation or litigation exception in KRS 61.878(1)(h). *See* OAG 19-ORD-152 Jul. 31, 2019.

Plaintiff appealed the Attorney General's decision by filing an original action in this Court on August 30, 2019. In its Complaint, the State Journal maintained the County violated the Open Records Act by withholding the requested record from the State Journal and by subsequently over-redacting the copies of the records that were ultimately provided. Id. ¶ 15. On July 30, 2020, Plaintiff moved the Court to enter summary judgment and order an *in camera* inspection of the subject documents.

STANDARD OF REVIEW

Kentucky's Open Records Act "seeks to ensure the free and open examination of public records." *Cape Publications, Inc. v. University of Louisville Foundation, Inc.*, 260 S.W.3d 818, 821 (Ky. 2008). Thus, the Act ensures that public records may be freely inspected by any person, unless otherwise expressly exempt from disclosure. *See* KRS 61.872(1). This reflects the "basic policy" of the Act "that free and open examination of public records is in the public interest." KRS 61.871. The Supreme Court of Kentucky has elaborated further, stating, "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." *Kentucky Bd. of Exam'rs.*, 826 S.W.2d 324, 328. Thus, "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." *Id.*

Thus, the Act "exhibits a general bias favoring disclosure," or simply put, a presumption that the requested documents must be disclosed. *Kentucky Bd. of Exam'rs.*, 826 S.W.2d at 327. However, KRS 61.878 enumerates specific exemptions. At issue in

the present suit is the "personal privacy exemption," which allows a public agency to withhold "[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).

Pursuant to KRS 61.882(3), this Court reviews the decision of the Attorney General *de novo*. Thus, this Court may grant summary judgment only if it first concludes that there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *See* CR 56.03. However, the Court notes that an Attorney General's opinion, while non-binding, is "highly persuasive." *York v. Commonwealth*, 815 S.W.2d 415, 417 (Ky. App. 1991) (citation omitted). Regardless, the Court ultimately must decide Open Records Act disclosure issues on a case-by-case basis. *See, e.g.*, *Kentucky Bd. of Exam'rs. of Psychologists v. Courier Journal & Louisville Times Co.*, 826 S.W.2d 324, 327–28 (Ky. 1992).

KRS 61.882 provides that the Circuit Court of the county where the public record is maintained shall have jurisdiction to enforce the provisions of KRS 61.870 to 61.884, by injunction or other appropriate order on application of any person. KRS 61.882(3) states:

> The court on its own motion, or on motion of either of the parties, may view the records in controversy in camera before reaching a decision. Any noncompliance with the order of the court may be punished as contempt of court.

The County submitted the requested documents for in camera review, and the Court has carefully examined the documents.

Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is

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entitled to a judgment as a matter of law." CR 56.03. Thus, "the movant should not succeed unless his right to judgment is shown with such clarity that there is no room left for controversy." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 482 (Ky. 1991) (citations omitted). In other words, "[o]nly when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor should the motion for summary judgment be granted." *Id*. (citations omitted). Additionally, the record must be viewed in the light most favorable to the nonmoving party. *Id.* at 480 (citation omitted).

ANALYSIS

The stated purpose of the Kentucky Open Records Act ("KORA"), KRS 61.870 to KRS 61.884, "is that free and open examination of public records is in the public interest and the exceptions provided for by KRS 61.878 or otherwise provided by law shall be strictly construed, even though such examination may cause inconvenience or embarrassment to public officials or others." *See* KRS 61.871. Franklin County contends aspects of the investigation report sought by Plaintiff are exempt from the Open Records Act.

1. **Records of law enforcement agencies, KRS 61.878(1)(h)**

First, the County argues the exception in KRS 61.878(1)(h) applies because the "investigation records requested are county attorney records pertaining to criminal investigations or potential criminal litigation." *See* 19-ORD-152, attached as "Exhibit 1" to Plaintiff's Memorandum in Support of its Motion for Summary Judgment. Plaintiff argues this exception does not shield all records in a county attorney's office from public

inspection. Plaintiff's Memorandum in Support of its Motion for Summary Judgment, pp. 9.

The Court, after conducting its *in camera* review, finds that the investigation report pertains to a personnel matter rather than an inquiry for purposes of potential criminal litigation. The letter was composed by an outside law firm that was engaged to review allegations concerning working conditions at the Franklin County Regional Jail, and whether there was evidence to substantiate allegations of "workplace behavior constituting a sexually hostile, or sexually harassing work environment." (6/28/18 Letter to Rick E. Sparks, p. 1). There is no reference in the letter to any criminal charges. By its own terms, the report is dealing with a human resources matter, not a criminal investigation.

Over two years after completion of the report, no criminal charges have been brought, and there is no on-going criminal investigation. Notably, the investigation report does not function to detect or investigate criminal violations, nor does the mere fact that the report is in the possession of the County Attorney exempt the report disclosure. Therefore, the County's invocation of KRS 61.878(1)(h) is not appropriate.

2. Information of a personal nature, KRS 61.878(1)(a)

In addition to the law enforcement exception, the County argues the investigation report is not subject to disclosure because it contains information of a personal nature, pursuant to KRS 61.878(1)(a). To decide whether a particular record is properly excluded under the personal privacy exemption for certain public records, the Court must initially determine whether such record or information contained therein is of a personal nature; if the record or information is of a personal nature, the Court must then determine whether public disclosure would constitute a clearly unwarranted invasion of personal privacy.

Lexington H-L Services, Inc. v. Lexington-Fayette Urban County Government, 297 S.W.3d 579 (Ky. App. 2009).

Here, the investigation report sought by the State Journal contains summaries and descriptions of interviews with former and current employees of the Franklin County Regional Jail. The Court acknowledges the subject matter of the investigation report has the potential to include embarrassing information. But there is no information in the report about purely personal matters. The report concerns the conduct of public employees in a government facility, performing public duties. It does not delve into any relationships or personal conduct that may have taken place outside of working hours. Thus, there is no basis for any claim that "disclosure would constitute a clearly unwarranted invasion of personal privacy." *Kentucky Bd. Of Examiner of Psychologists v. Courier Journal & Louisville Times Co.*, 826 S.W.2d 324, 327. (Ky. 2013).

Specifically, the current case presents the issue of whether a public agency should redact the narrative of a report submitted by outside counsel, and paid for with tax dollars, that recommended remedial actions to address the problem of sexual harassment at the Franklin County Regional Jail. The Court recently considered the application of the personal privacy exemption of KRS 61.878(1)(a) to investigations of sexual harassment in public workplaces in *Finance and Administration Cabinet v. Kentucky Public Radio, Inc.*, Civil Action No. 18-CI-335 and *Labor Cabinet v. Kentucky Public Radio, Inc.*, Civil Action No. 18-CI-422. In those cases, this Court found that the public's interest in reviewing the records of sexual harassment allegations outweighed the privacy interests of the public employees, and the Court ordered the redacted information to be released. In the present case, there is no mention of the names of the complaining witnesses. The Jail

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official who allegedly created the hostile work environment, as a public official whose conduct all took place in a public workplace while being paid by the taxpayers, has no legitimate privacy interests at stake.

Weighing whether such record or information contained in the documents submitted by the County is of a personal nature, the Court finds it is not. The investigation report does not identify by name the subject of any interview conducted in the course of the investigation. The Court recognizes the discussion of specific instances laid out in the report may have the potential to lead to identification, which could reveal the identity of the people interviewed. However, the Court finds this possibility too remote to be exempt under the personal privacy exemption. This conclusion is bolstered by the reality that all employees involved were in a public workplace, paid by the taxpayers, and engaged in performing public duties at all relevant times.

Against this minimal privacy interest, the Court must balance the public's right to inspect these records. In doing so, the Court takes notice that, "[a]t its most basic level, the purpose of disclosure focuses on the citizens' right to be informed as to what their government is doing." *Zink v. Dep't of Workers' Claims*, 902 S.W.2d 825, 828 (Ky. App. 1994). For example, through disclosure of complaints and investigation materials, the public can discern whether county agencies—funded by taxpayer dollars—are efficiently and effectively investigating and addressing employee misconduct. This provides insight into the behavior of government employees, as well as the efficiency and productivity of our public workplaces. Perhaps more importantly, it ensures that investigations are handled competently and without favoritism. The taxpayers paid for this report. They have a right to review it in full.

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CONCLUSION

After performing an *in camera* review the Court is unable to find any aspect of the investigation report to be exempt from the Open Records Act. The Court **ORDERS** Defendant Franklin County Attorney to produce unredacted requested records. These documents shall be released unless Defendant moves for injunctive relief within five (5) days from the entry of this Order. In the event such a motion is filed, the Court will stay compliance with the order directing release pending a final ruling on the merits of any motion for injunctive relief under CR 65.

SO ORDERED this 2nd day of September, 2020.

/s/ HON. PHILLIP J. SHEPHERD
electronically signed
9/2/2020 3:28:48 PM ET

PHILLIP J. SHEPHERD, JUDGE
Franklin Circuit Court, Division I

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