

SUPREME COURT OF KENTUCKY

City of Fort Thomas v. Cincinnati Enquirer

406 S.W.3d 842 (Ky. 2013) · Decided August 29, 2013

SUMMARY

The Kentucky Supreme Court held that a police department's investigatory file is not categorically exempt from disclosure under the Kentucky Open Records Act merely because it relates to a prospective law enforcement action. The agency must articulate a concrete, non-speculative risk of harm from disclosure and separate exempt from non-exempt records or meaningful categories of records. The court also held that an erroneous denial based on a good-faith claim of exemption does not, by itself, establish the willfulness necessary for attorney-fee and cost sanctions.

CASE DETAILS

COURT	Supreme Court of Kentucky
WRITING FOR THE COURT	Justice Abramson; Abramson; Minton; Cunningham; Noble; Scott; Venters
JURISDICTION	Kentucky
DECIDED	August 29, 2013
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	The City sought discretionary review of the Kentucky Court of Appeals' decision concerning the City's denial of a Kentucky Open Records Act request for a police homicide-investigation file. The Supreme Court affirmed the remand requiring a more particularized exemption showing, reversed to the extent the Court of Appeals suggested an award of attorney's fees and costs, and remanded for further proceedings.
STANDARD OF REVIEW	The Supreme Court reviews the trial court's factual findings for clear error and reviews issues concerning construction of the Kentucky Open Records Act de novo. A trial court's determination regarding willfulness is reviewed for clear error, and its fee determination is reviewed for abuse of discretion.
PRECEDENTIAL VALUE	published and precedential
PARTIES	City of Fort Thomas v. Cincinnati Enquirer

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QUESTIONS PRESENTED

1. Whether the Kentucky Open Records Act law-enforcement exemption categorically protects a police department's entire investigative file whenever a prospective enforcement action remains possible.
2. What factual showing an agency must make to establish that disclosure of particular records or categories of records would harm the agency in a prospective law-enforcement action.
3. Whether the City was subject to attorney's fees, costs, or statutory sanctions for willfully withholding the requested records.

HOLDINGS

1. A police department's investigatory file is not categorically exempt merely because it relates to a prospective law-enforcement action. Under KRS 61.878(1)(h), the agency must establish that the records were compiled for law-enforcement purposes, that an enforcement action is prospective, and that premature disclosure would harm the agency in an articulable and concrete way.
2. An agency invoking the exemption must articulate a factual basis showing that disclosure of particular records or meaningful categories of records poses a concrete, nonhypothetical and nonspeculative risk of harm or interference with the prospective enforcement action. For voluminous requests, a categorical or generic showing may suffice if the categories are meaningful and linked rationally to the asserted harm, but the agency must identify and review responsive records and disclose all nonexempt records.
3. The City was not shown to have willfully violated the Open Records Act, and the trial court did not abuse its discretion by denying fees and costs. A mistaken denial based on a good-faith and plausible claim of statutory exemption is insufficient to establish the willfulness or bad faith required for sanctions under KRS 61.882(5).

KEY QUOTATIONS

"We hold, rather, that the law enforcement exemption is appropriately invoked only when the agency can articulate a factual basis for applying it, only, that is, when, because of the record's content, its release poses a concrete risk of harm to the agency in the prospective action." (406 S.W.3d at 851)

"In sum, the Court of Appeals correctly determined that KRS 61.878(1)(h), the law enforcement exemption, does not create a blanket exclusion from the Open Record Act's disclosure provisions for all law enforcement records pertinent to a prospective law enforcement action." (406 S.W.3d at 856-857)

FACTUAL BACKGROUND

Fort Thomas police investigated the shooting death of Robert McCafferty and assisted in the prosecution of his wife, Cheryl McCafferty, who was convicted of first-degree manslaughter in March 2009. After she waived direct appeal rights in exchange for an eighteen-year sentence, the Cincinnati Enquirer requested access to and copies of the investigation file. The City denied the request in its entirety under the Kentucky Open Records Act's law-enforcement exemption, asserting that a possible collateral challenge meant the enforcement action remained prospective. The City had previously released two videotapes to a television station, with interior-home footage redacted.

PROCEDURAL HISTORY

The City denied the Cincinnati Enquirer's request for the entire police investigative file concerning the homicide of Robert McCafferty, asserting that the law-enforcement exemption categorically protected the file while a collateral challenge remained possible. After an unsuccessful Attorney General review, the Campbell Circuit Court upheld the denial. The Court of Appeals rejected the blanket exemption, vacated or reversed in part, and remanded for segregation of exempt and nonexempt records; it also suggested that fees and costs could be awarded. The Supreme Court granted discretionary review, affirmed the remand requirement, rejected the blanket-exemption theory, and reversed the fee-related portion.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

The City must make a good-faith effort to identify records responsive to the Enquirer's request and either provide them or explain with adequate particularity why they are exempt under the Kentucky Open Records Act. The trial court may require an outline, index, affidavit, testimony, or in-camera inspection as necessary to evaluate the exemption claim.

CASES CITED

- Skaggs v. Redford, 844 S.W.2d 389 (Ky. 1992)
- Bowling v. Lexington-Fayette Urban County Government, 172 S.W.3d 333 (Ky. 2005)
- Commonwealth, Department of Corrections v. Chestnut, 250 S.W.3d 655 (Ky. 2008)
- Kentucky Board of Examiners of Psychologists v. Courier-Journal & Louisville Times Co., 826 S.W.2d 324 (Ky. 1992)
- Shawnee Telecom Resources, Inc. v. Brown, 354 S.W.3d 542 (Ky. 2011)
- National Labor Relations Board v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978)
- Sussman v. United States Marshals Service, 494 F.3d 1106 (D.C. Cir. 2007)
- Manna v. United States Department of Justice, 51 F.3d 1158 (3d Cir. 1995)
- Leshner v. Hynes, 19 N.Y.3d 57, 945 N.Y.S.2d 214, 968 N.E.2d 451 (2012)
- Fioretti v. Maryland State Board of Dental Examiners, 351 Md. 66, 716 A.2d 258 (1998)
- Globe Newspaper Co. v. Police Commissioner of Boston, 419 Mass. 852, 648 N.E.2d 419 (1995)

- *Evening News Association v. City of Troy*, 417 Mich. 481, 339 N.W.2d 421 (1983)
- *Mapother v. Department of Justice*, 3 F.3d 1533 (D.C. Cir. 1993)
- *McDonnell v. United States*, 4 F.3d 1227 (3d Cir. 1993)
- *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973)
- *Owens-Corning Fiberglas Corporation v. Golightly*, 976 S.W.2d 409 (Ky. 1998)
- *Davy v. Central Intelligence Agency*, 550 F.3d 1155 (D.C. Cir. 2008)
- *Miller v. Eldridge*, 146 S.W.3d 909 (Ky. 2004)
- *Wolf v. Central Intelligence Agency*, 473 F.3d 370 (D.C. Cir. 2007)
- *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980)
- *Jimenez v. Executive Office for United States Attorneys*, 764 F. Supp. 2d 174 (D.D.C. 2011)
- *Landmark Legal Foundation v. Environmental Protection Agency*, 272 F. Supp. 2d 59 (D.D.C. 2003)