RENDERED: MAY 20, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002040-MR
AND
NO. 2003-CA-002049-MR

THE UNIVERSITY OF
LOUISVILLE FOUNDATION, INC. APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE STEPHEN K. MERSHON, JUDGE
ACTION NO. 01-CI-003349

CAPE PUBLICATIONS, INC.,
D/B/A THE COURIER-JOURNAL APPELLEE/CROSS-APPELLANT

OPINION
REVERSING IN PART

** ** ** ** **

BEFORE: TACKETT AND VANMETER, JUDGES; MILLER, SENIOR JUDGE.[1]

TACKETT, JUDGE: This case is before us on cross-appeals from the decision of the Jefferson Circuit Court, which held that Cape Publications, Inc., d/b/a The Louisville Courier-Journal

[1] Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110.(5)(b) of the Kentucky Constitution and KRS 21.580.

(the Newspaper), had a limited right to access records of donations made to the University of Louisville Foundation, Inc., a non-profit fundraising organization for the University of Louisville, under the Open Records Act, Kentucky Revised Statute (KRS) 61.870 et seq. The court held that the Newspaper could not access those records where the donor had specifically requested anonymity because those records were exempt from disclosure under the privacy exception found in KRS 61.878(1)(a), but records where the donor had not requested anonymity were held subject to the Open Records Act. Both parties appeal, the Foundation seeking to have all donor records held exempt under the privacy exception, while the Newspaper seeks to have even those records where the donor has specifically requested anonymity held subject to disclosure. We hold that all the donor records should be exempt from disclosure, and reverse in part the judgment of the circuit court.

This case turns on the interpretation of KRS 61.878(1)(a), which provides that "[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy" are exempt from disclosure. This statute has been interpreted several times by this Court and by our Supreme

Court. Reviewing all the relevant authority, we conclude that these records must be exempt from disclosure.

Our Supreme Court addressed the issue in Lexington-Fayette Urban County Government v. Lexington Herald-Leader, 941 S.W.2d 469 (Ky. 1997). That case involved settlement agreements in actions by individuals against the police department, wherein public funds were expended to settle the claims. In holding that the Open Records Act's purpose would be served by disclosure, the court acknowledged that there is a statutory bias in favor of disclosure and that the courts must weigh the antagonistic interests of privacy of the individuals mentioned in the records and the public's right to know what its government is doing. See Kentucky Board of Examiners of Psychologists v. The Courier-Journal & Louisville Times Co., 826 S.W.2d 324, 327 (Ky. 1992). In the LFUCG case, the court concluded that the public's right to know how public money is spent outweighs the privacy interests of the individual parties to the settlement agreements. The court took special note that the privacy clauses in the settlement agreements appeared to be specifically for the benefit of the government and not the individuals involved.

The Newspaper urges us to hold that this case is similar to the LFUCG case, and to grant them access to all the donor records. The Foundation argues, and we agree, that the

LFUCG case is not on point, in that the public interest found in that case is not found in this case; in fact, the records requested do not relate to expenditure of money by the government but intake of money from private individuals and corporations to support a public university. It seems to us that this case is most similar to the cases of Zink v. Commonwealth of Kentucky, Department of Workers' Claims, Labor Cabinet, 902 S.W.2d 825 (Ky.App. 1994), and Hines v. Commonwealth of Kentucky, Dept. of Treasury, 41 S.W.3d 872 (Ky.App. 2001). In Zink, an attorney sought records of the Department of Workers' Claims, specifically reports of employers about on-the-job injuries. The attorney sought to use the records to expand his client base through direct marketing. In Hines, a commercial finder of rightful owners of unclaimed property sought access to the Department of Treasury's lists of the value of unclaimed property. Both cases share a common thread; we held in each case that the information sought would reveal little or nothing about the operations of the public agency and much about the private individuals. Since the Foundation has been held to be a public agency, there are other ways in which its operations may be scrutinized through the Open Records Act without impinging on the privacy interests of its donors.

There is a theoretical connection, it is argued, between the identity of the donors and the way the University eventually expends money raised. The Newspaper cites an Ohio case in support of this argument, State ex rel. Toledo Blade Co. v. University of Toledo Foundation, 602 N.E.2d 1159, 1163 (Ohio 1992). The critical difference between the open records law considered in the Toledo Blade case and this one is that the Ohio law did not contain a privacy exemption, and the Ohio court also cited a Michigan case, Clerical-Technical Union of Michigan State Univ. v. Bd. Of Trustees, Michigan State Univ., 190 Mich. App. 300, 475 N.W.2d 373 (1991), where donor records were held exempt under Michigan's open records law, which did contain a specific privacy exemption.

While the Newspaper's motivation may be mere curiosity, we perceive a possibly significant intrusion on the donors' privacy should these records be held subject to disclosure. As this Court has noted before in Zink and Hines, if this information is open to one it is open to all, inviting unwanted attention and unwarranted intrusion. The public interest may be a notch above the de minimis interests at issue in Zink and Hines, but performing the balancing test prescribed by our Supreme Court in LFUCG, we conclude that the privacy interests of the donors to the Foundation outweigh the public interest in disclosure and hold that all of the records should

be held exempt from disclosure. We believe that it does not matter whether a donor has specifically requested anonymity; the circuit court's logic in holding that a donor's request for anonymity somehow weighs in the analysis is flawed. We believe that unless the donor specifically waives the right to privacy, it should remain protected whether requested or not.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is reversed in part, and the court below is directed to enter an order denying the Newspaper access to the requested records.

ALL CONCUR.

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