

Open Records

Requests for a Public Employee's Personnel File

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Many law enforcement agencies have received open records requests for records involving offense or collision reports. Agencies may also have received requests for 911 tapes and mobile data records. Most departments have procedures in place to handle these requests and are ready and able to respond to them appropriately.

However, open record requests for an employee's personnel file may be a new request for some agencies. These requests may come from an attorney seeking information regarding an officer's training or disciplinary records, or from another law enforcement agency conducting a background investigation on a potential police applicant. Requests for such records have even come from the media for reporting or investigative purposes.

Regardless of the purpose, an open records request for information in a personnel file presents a number of considerations for the records custodian. A personnel file contains some records that are subject to public inspection and others that are not. The agency must comply with applicable statutory and case law, but also take into account other interests as well. Since the request is for an employee's personnel file, the employee may have an interest in what records are provided. Perhaps the request involves a pending criminal case, at which time the commonwealth or county attorney may be consulted. In a request for information from a personnel file, the agency's legal advisor should be consulted prior to responding whenever possible.

The Kentucky open records law clearly states in KRS 61.870(2) 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."

The open records law identifies a public record as all papers "or other documentation regardless of physical form or characteristics, which are prepared, owned, used, in the possession of or retained by a public agency."

When an agency receives a request, it must immediately determine what information it deems is exempt from inspection or release. Kentucky statute spells out which public records are not subject to inspection except by order of a court with jurisdiction in the matter. One exemption in KRS 61.878(1)(a) involves "public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy."

In the case of *Kentucky Board of Examiners of Psychologists v. The Courier-Journal and Louisville Times Co.*, the Kentucky Supreme Court held that the analysis of this exemption is a comparative weighing of the antagonistic interests of privacy versus the preference for openness for public good. The public's right to obtain and access information is premised upon the public's right to expect that public agencies will properly execute their statutory functions.

The Kentucky Court of Appeals addressed the balancing analysis in a 2001 case, *Palmer v. Driggers*. In that case, the Court held that the first step is to determine whether or not the information requested is of a personal nature. If the information is of a personal nature, the second step will be to ask – would public disclosure constitute a clearly unwarranted invasion of privacy?

For instance, the Ky. attorney general has opined that an "employee's name, position, work station and salary are subject to inspection, as well as portions of the employee's resume reflecting relevant prior work experience, educational qualifications and information regarding the employee's ability to discharge the responsibilities of public employment." Other examples of records that have been ruled open to inspection include names of an employee's references, resignation letters from public employees, and termination letters, which may include settlement or severance agreements.

One type of record that is of particular interest to law enforcement officers is those detailing misconduct complaints and disciplinary records. The Ky. AG, in previous open records decisions, has opined that complaints against public employees and "reprimands to employees and disciplinary records generally, have been treated as open records."

The Ky. AG's Office has generally held that the privacy of public employees against whom complaints is outweighed by the public interest in monitoring agency action. Therefore, it is incumbent upon an agency to "disclose all records related to . . . (an employee's) performance of his public duties and withhold only those records unrelated to his performance of his public duties," a 2008 decision stated.

As an example, in the *Palmer* case involving a former police officer who resigned prior to the imposition of any disciplinary action, the Kentucky Court of Appeals ruled that the public disclosure of the complaint in this case would not constitute a clearly unwarranted invasion of privacy. However, in another Kentucky Court of Appeals case ruling regarding the *City of Louisville v. Courier-Journal and the Louisville Times*, internal affairs reports have been ruled exempt from inspection if the internal affairs officers have no independent authority to issue a binding decision and serve merely as fact finders.

Furthermore, both the attorney general and statute mandate a public employee is entitled to inspect and copy records that relate to him unless there is an on-going criminal or administrative investigation.

Agencies may withhold certain records that are of a purely personal nature and unrelated to any public interest. These records include home address, social security number, marital status, and financial matters such as pay withholding, tax, insurance, savings, retirement and child support information, according to 2002, 2000 and 1996 decisions respectively. Additionally, two 1996 decisions stated that performance evaluations are generally exempt from inspection as the opinions of a supervisor and because they are completed with the understanding that the review will remain confidential.

However, in the 2006 Kentucky Court of Appeals *Cape Publications v. City of Louisville* decision, an agency head's (or a person in a position of similar authority) performance evaluation is not completely exempt particularly when as in this case, the employee allegedly committed a criminal act. The disclosure of the non-personal information was deemed to be in the public interest.

Another exemption that may apply to this type of request is KRS 61.878(1). This subsection exempts from disclosure records or information that the General Assembly has prohibited. For law enforcement agencies, this includes KRS 15.400(3). This statute exempts from disclosure certain information for any person seeking Kentucky Law Enforcement Council peace officer certification. The information includes the "person's home address, telephone number, date of birth, Social Security number, background investigation, medical examination, psychological examination and polygraph examination," the statute states. Centralized criminal history records also are exempted from disclosure by KRS 17.150.

As outlined above, an open records request for information from an employee's personnel file can entail a significant amount of research to ensure fairness to both the requestor and the employee, and there are numerous concerns that need to be addressed. A reply to this type of request may take a longer period of time than those involving other records and the initial response should be drafted accordingly.

It is strongly recommended when an agency receives a request for an employee's record, the agency's legal counsel or an advisor with open records experience be consulted prior to a response being made. It is critical that any open records request receive a timely and legal response from an agency, because failure to do so may prove costly for the agency not only in money but in public trust. ☛

For more details regarding your agency's responsibilities in complying with Kentucky's open records laws, read KRS chapters 17.150 and 61.870 to 61.884.

