17-ORD-095

May 16, 2017

In re: *Casey County News*/Casey County Board of Education

Summary: Settlement agreement to which the Casey County Board of Education was a party was a public record; notwithstanding confidentiality provision, agreement was not exempt from public disclosure in the absence of a court order imposing confidentiality; no clearly unwarranted invasion of personal privacy existed where case had already been publicly tried and a verdict rendered.

Open Records Decision

The question presented in this appeal is whether the Casey County Board of Education violated the Open Records Act in the disposition of *Casey County News* Editor Larry Rowell's April 10, 2017, request for a copy of a settlement agreement in a civil case in which the Board and a former middle school principal were defendants. For the reasons that follow, we find that the disposition of Mr. Rowell's request was in violation of the Act.

Mr. Rowell originally wrote to Superintendent Marion Sowders on January 20, 2017, requesting "[a] complete accounting of all monies in the court settlement in the civil matter of Cassondra Elmore and Angela Rodgers vs. Casey County Board of Education and Kathy Fogle, [Casey Circuit Court] civil action No. 13-CI-00142." Board attorney Winter R. Huff responded on January 24, 2017, that "this is not in the Board's possession or control," and further stated:

> [T]he source of funds was from the Board's insurer. … The funds paid in settlement did not pertain to the Board, which was dismissed from the civil action. The settlement funds only pertained to non-employees of the District.

On April 10, 2017, Mr. Rowell made the request at issue, specifically asking for "copies of any and all settlement agreements and other records memorializing or reflecting the settlement reached in the case," including but not limited to "any and all records reflecting the amount(s) of any payments made in connection with the settlement(s)."

The Board replied, through counsel, on April 14, 2017,[1] that this case was distinguishable from other situations involving settlement agreements because "here the settlement was post trial **after** the dismissal of the public agency involved. Therefore, although the public agency is a party to the final Release and Settlement Agreement as it was a party to the litigation, nevertheless, the settlement was primarily for the benefit of a private individual, not a public agency." (Emphasis in original.) Counsel further asserted:

> I am at this time bound by a provision in the Settlement Agreement which recites that it must be maintained confidential to the fullest extent permitted by law, and cannot be revealed except as otherwise required by law …. The specific exception relied upon is that the Release and Settlement Agreement is not a "public record" as defined by applicable law, and that, if and to the extent [it] could be deemed a "public record," it is subject to exemption pursuant to KRS 61.878(1)(a).

The Board therefore denied access to the settlement agreement. The *Casey County News* initiated this appeal on April 18, 2017.

On behalf of the newspaper, attorney Jeremy S. Rogers argues that "the Board acknowledges that it entered into the Agreement, that it possesses a copy of the Agreement, and that the Agreement provided for the payment of money to the plaintiffs to settle the underlying lawsuit," and therefore the agreement is a

[1] Since this response was one day outside the three-day period, excluding weekends and holidays, provided by KRS 61.880(1), its untimeliness constituted a procedural violation.

public record and must be disclosed under existing precedent. The Board, in response, contends as follows:

> [T]he fact that the confidentiality provision was negotiated for by and between private individuals **after** a public trial is an important and legitimate distinction …. All evidence presented in the trial was open to the public and the media. Any "right to know" of the public was fully satisfied by the trial proceedings. The verdict was likewise public information.
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> The verdict only affected private individuals. The Plaintiffs are not District employees, nor was the Defendant against whom the verdict was rendered.

(Emphasis in original.)

KRS 61.870(2) defines "public record" to include all records "which are prepared, owned, used, in the possession of or retained by a public agency." As the Supreme Court of Kentucky has observed, "[t]here can be no viable contention that an agreement which represents the final settlement of a civil lawsuit whereby a governmental entity pays public funds to compensate for an injury it inflicted is not a public record." *Lexington-Fayette Urban County Gov't v. Lexington Herald-Leader Co.*, 941 S.W.2d 469, 471 (Ky. 1997). The fact that the Board's insurer was the source of funds makes no difference, since "the settlement proceeds were paid out of … an insurance policy, the premiums for which had to have been, at least indirectly, paid with public tax money." *Central Kentucky News-Journal v. George*, 306 S.W.3d 41, 46 (Ky. 2010).

We find no significance in the fact that the settlement was reached after a trial and jury verdict. The agreement is a document "prepared, owned, used, in the possession of or retained by a public agency." KRS 61.870(2). Thus, there is no viable argument that this settlement agreement, entered into and retained by the Board, is not a "public record."

Nor is there any merit to the Board's argument that the confidentiality provision in the agreement prevents its disclosure under the Open Records Act. "[A] public agency may not circumvent the statutory requirements [of the Open

Records Act] by agreeing to keep the terms of a settlement agreement confidential." *Lexington-Fayette Urban County Gov't v. Lexington Herald-Leader Co., supra,* 941 S.W.2d at 472. "[A] confidentiality clause reached by agreement of the parties … cannot in and of itself create an inherent right to privacy superior and exempt from the statutory mandate for disclosure contained in the Open Records Act." *Central Kentucky News-Journal v. George, supra,* 306 S.W.3d at 46 (Ky. 2010); *see also* 12-ORD-201.

There is an exception in cases where a court has imposed confidentiality. "If the settlement agreement is sealed by order of a court, the question of whether the document is subject to public inspection must be raised in the judicial system." OAG 01-6. The burden of proving the existence of such a court order, however, rests upon the public agency. 11-ORD-212. The Board has not even alleged that the settlement agreement was sealed by court order. Therefore, the confidentiality provision does not impair the right of public inspection under the Open Records Act.

Nor is there any other basis upon which it could be argued that the disclosure of the settlement terms "would constitute a clearly unwarranted invasion of personal privacy" within the meaning of KRS 61.878(1)(a), the exception invoked by the Board. We note that the privacy analysis necessitates a "comparative weighing of the antagonistic interests. Necessarily, the circumstances of a particular case will affect the balance." *Kentucky Board of Examiners of Psychologists v. Courier-Journal and Louisville Times Co.,* 826 S.W.2d 324, 327-28 (Ky. 1992). "At 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. Com., Dept. of Workers' Claims, Labor Cabinet,* 902 S.W.2d 825, 829 (Ky. App. 1994).

In *Central Kentucky News-Journal,* the Court held that the settlement agreements in that case "do not contain any of the underlying details of the claims they purport to resolve that could expose [anyone] to the risk of serious personal embarrassment [or] humiliation," and thus there was only a "minimal privacy interest." 306 S.W.3d at 47 (emphasis in original). In the present case, there can be no such risk because all the "underlying details of the claims" have been aired in a public trial. Consequently, the privacy interest here is equally

minimal, as presumably the only remaining undisclosed information is the terms of the settlement.

The Court in *Central Kentucky News-Journal* continued: "Against such a minimal privacy interest lies … a strong public interest in knowing how its tax money is being put to use by the state's agencies. [W]e see [the settlement amount] as bearing a direct nexus to exactly how the public agency uses the public money—whether as settlement amounts or in regard to liability insurance premiums." Here, just as in *Central Kentucky News-Journal,* the balance weighs heavily in favor of disclosure.

We find no meaningful distinction in either the fact that the Board itself was dismissed from the lawsuit prior to the jury verdict, or the fact that that the school principal had retired prior to the settlement. The Board has not disputed Mr. Rogers' representation that "Ms. Fogle was sued in her capacity as principal of Casey County Middle School for actions she allegedly took in that capacity," and that "the settlement payment … appears to have come from the same publicly-funded insurance policy that covers both claims against the Board and claims against its employees … for actions taken in their official capacities." The Board has admitted that it was a party to the settlement agreement and that its insurance premiums purchased the coverage from which the settlement was paid. Furthermore, Ms. Fogle's intervening retirement has no effect on the extent to which public funds were involved in the settlement. Therefore, in the absence of any viable argument under KRS 61.878(1)(a), we find that the Casey County School Board violated the Open Records Act by not providing a copy of the settlement agreement.

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court pursuant to KRS 61.880(5) and KRS 61.882. Pursuant to KRS 61.880(3), the Attorney General must be notified of any action in circuit court, but should not be named as a party in that action or in any subsequent proceedings.

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