

COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
8th DIVISION
CIVIL BRANCH
NO. 15-CI-2594

ENTERED
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UNIVERSITY OF KENTUCKY

PLAINTIFF/APPELLANT

VS.

OPINION and ORDER

MARK D. GUILFOYLE

DEFENDANT/APPELLEE

This matter came before the Court upon the Appellant University of Kentucky's appeal made following the Office of the Attorney General's decision, In re: Mark D. Guilfoyle/University of Kentucky, 15-ORD-110 (2015). The Court having taken the issue under advisement and having duly considered the briefs and responses, the arguments of counsel, and the applicable law, it is hereby **ORDERED** that the Office of the Attorney General's Decision is **REVERSED**.

Facts

The factual background has been set out at length in the Office of the Attorney General's ("AG") Open Records Decision, In re: Mark D. Guilfoyle/University of Kentucky, 15-ORD-110 (2015), in Appellant University of Kentucky's ("UK") Complaint/Appeal, and in the parties' briefs, but the Court will briefly summarize the history of this case.

On March 12, 2015, Appellee Mark D. Guilfoyle submitted an Open Records request to Dr. Thomas Tucker, the Director of the Kentucky Cancer Registry (“KCR”) at UK’s Markey Cancer Center.¹ Under KRS 214.556(2), all licensed healthcare facilities which provide diagnostic or treatment services to cancer patients are required to report data to the KCR regarding each case of cancer seen at the facility.

Guilfoyle’s request sought:

1. All correspondence including e-mails between the KCR or its agents and Mercy Hospital Partners of Lourdes, Inc. (“Lourdes Hospital”) regarding deficiencies in Lourdes Hospital’s reporting to the KCR, lateness of such reporting or the comprehensiveness of such reporting.
2. All correspondence including e-mails between the KCR or its agents and Lourdes Hospital’s parent organization, Mercy Health Partners, regarding deficiencies in Lourdes Hospital’s reporting to the KCR, lateness of such reporting or the comprehensiveness of such reporting.

15-ORD-110 at 1-2. Guilfoyle intimated that he did not seek any information which would be privileged under KRS 214.556(6).

On March 18, 2015, UK denied Guilfoyle’s requests, claiming that all correspondence between the KCR and any healthcare facility about that facility’s reporting is privileged under KRS 214.556(6). UK argued that the language of KRS 214.556(6) covers significantly more than just data, and that the General Assembly

¹ KRS 214.556(1) states: “There is hereby established within the Kentucky cancer program the Kentucky Cancer Registry and the cancer patient data management system for the purpose of providing accurate and up-to-date information about cancer in Kentucky and facilitating the evaluation and improvement of cancer prevention, screening, diagnosis, therapy, rehabilitation, and community care activities for citizens of the Commonwealth. The cancer patient data management system shall be administered by the Lucille Parker Markey Cancer Center.”

understood and appreciated the necessity of protecting communications between the KCR and reporting facilities when it drafted and approved KRS 214.556(6).

Guilfoyle appealed UK's denial to the AG on March 30, 2015. He argued that UK's reading of KRS 214.556(6) was overbroad, and that "information furnished to KCR 'by reason of this section' includes patient information related to a patient's cancer, diagnosis, treatment, and outcome" but "does not include correspondence between KCR and a facility related to that facility's failure to comply with KRS 214.556(2)". 15-ORD-110 at 2. Guilfoyle also argued that "KRS 214.556(6) permits the KCR to make public any information that the disclosure of which would promote the public health goals of KRS 214.556" and that a healthcare facility's failure to comply with its reporting requirements is precisely that type of information. *Id.* at 2-3.

UK responded on April 17, 2015, contending that the language of KRS 214.556(6) clearly covers "all information" and that following the AG's prior Open Records decision in 11-ORD-176, the General Assembly amended KRS 214.556 to expand the amount of privileged information, to make the privilege applicable to Open Records requests, and to give the KCR the authority to determine whether requests for information could be disclosed in the public interest. UK argued, and submitted an affidavit from Dr. Tucker that also maintained, that it is in the public interest for healthcare facilities to be permitted to engage in confidential dialogue with the KCR so that the KCR can "query data and receive information that provides it critical information about the data". 15-ORD-110 at 3.

On April 28, 2015, Guilfoyle submitted a supplemental response arguing that “KRS 214.556(6) only protects information ‘furnished by reason of this section’” and that the General Assembly’s changes to KRS 214.556 following 11-ORD-176 contemplated that some information is not privileged and should be disclosed as a matter of public interest. 15-ORD-110 at 4.

The AG handed down his decision on June 18, 2015, which found that UK violated the Open Records Act by withholding the requested correspondence. The AG reasoned that “information ‘furnished by reason of this section’ in KRS 214.556(6) does not extend to all KCR records, buy only extends to data and compilations of data submitted by hospitals regarding individual cancer cases under KRS 214.556(2)” and that it did not extend to correspondence between KCR and healthcare facilities regarding the facilities’ compliance with the reporting requirements of KRS 214.556(2). *Id.* at 10.

UK filed its Complaint and Notice of Appeal pursuant to KRS 61.880(5) and KRS 61.882 on July 15, 2015, and Guilfoyle filed his Answer on August 4, 2015. Pursuant to an agreed scheduling order entered August 26, 2015, UK filed its Brief on the merits on September 17, 2015, Guilfoyle filed his Response on October 19, 2015, and UK filed its Reply on November 3, 2015. UK filed a Notice of Submission on November 12, 2015, indicating that the parties have filed their briefs on the issues and that the matter is now submitted for the Court’s ruling.

Standard of Review

When the AG renders a decision with respect to an Open Records Act request, a movant has thirty (30) days to bring an action in Circuit Court pursuant to KRS 61.882. Once an action has commenced, the proceeding is treated as an original action and the Circuit Court is not bound by the AG's decision, "nor is it limited to the 'record' offered to the Attorney General." See City of Fort Thomas v. Cincinnati Enquirer, 406 S.W.3d 842, 849 (Ky. 2013). Thus, the Circuit Court will "determine the matter de novo." KRS 61.882(3).

Analysis

"[T]he basic policy of [the Open Records Act] is that free and open examination of public records is in the public interest". KRS 61.871. Because of this, "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." Id. KRS 61.878(1) sets forth that various public records that are excluded from the Open Records Act "and shall be subject to inspection only upon order of a court of competent jurisdiction", including "[p]ublic records or information the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly". KRS 61.878(1)(l).

This case turns on the interpretation of KRS 214.556(6) in light of the aforementioned public policy behind the Open Records Act and its exceptions. KRS 214.556(6) states:

All information, interviews, reports, statements, memoranda, or other data furnished by reason of this

section, expressly including all portions, subsets, extracts, or compilations of the data as well as any findings or conclusions resulting from those studies, shall be privileged and shall not be considered public records under KRS 61.870 to 61.884. The Kentucky Cancer Registry may determine that certain extracts, subsets, or compilations of data do not reveal privileged information and may be published or otherwise shared to further the public health goals set forth herein.

There have been two prior Open Records decisions based upon KRS 214.556(6): 04-ORD-077, and 11-ORD-176. As the AG notes, in 04-ORD-077, “the requester sought disclosure of statistical information regarding incidents of breast cancer in Jefferson County.” 15-ORD-110 at 5. The AG ruled that UK violated the Open Records Act in withholding the requested information, as “its reliance on [KRS 214.556(6)], incorporated into the Open Records Act by operation of KRS 61.878(1)(l), to withhold the statistical data sought was misplaced.” *Id.* The AG reasoned that since the information could be disclosed without “enabl[ing] the public to readily identify persons to whom the protection extends”, UK must make that information available. *Id.* In ruling upon a similar request, the AG in 11-ORD-176 found that UK “interpret[ed] KRS 214.556(6) too expansively in refusing to provide [the requester] with access to existing responsive data which is ‘not descriptive of any readily identifiable person’ consistent with 04-ORD-077.” The AG characterizes the rulings of 04-ORD-077 and 11-ORD-176 to say that “individually identifiable information was privileged under KRS 214.556(6), but that disclosure of purely statistical data which did not identify any person was not exempted from the Open Records Act.” 15-ORD-110 at 6.

The Court notes that at the time of 11-ORD-176, KRS 214.556(6) stated only: “All information, interviews, reports, statements, memoranda, or other data furnished by reason of this section and any findings or conclusions resulting from those studies shall be privileged.” It did not contain language giving the KCR the discretion to determine which data should be released. However, in 2012 and in response to the AG’s ruling in 11-ORD-176, House Floor Amendment 3 to S.B. 57 amended the language of KRS 214.556(6) to its present incarnation. This new language both included compilations of data as exempt from the Open Records Act and also gave the KCR discretion regarding what data could be released.

The Court has various principles to guide it when interpreting statutes. The Kentucky Supreme Court has expressed:

[W]e first look at the language employed by the legislature itself, relying generally on the common meaning of the particular words chosen, which meaning is often determined by reference to dictionary definitions.

The particular word, sentence or subsection under review must also be viewed in context rather than in a vacuum; other relevant parts of the legislative act must be considered in determining the legislative intent.

However, this preliminary assessment may not resolve the issue if the statute’s wording is ambiguous. ... Where the statute is ambiguous, the Court may properly resort to legislative history...

As noted, the Court may also apply time-honored canons of statutory construction. ... [S]tatutes should be construed together, should be harmonized where possible and should result in effectiveness of all provisions...

Jefferson County Bd. of Educ. v. Fell, 319 S.W.3d 713, 719-20 (Ky. 2012) (citations omitted).

Therefore, the Court must first look to the plain language of KRS 214.556(6) to determine if the issue can be resolved from a simple reading of the statute. The first sentence of KRS 214.556(6) says:

All information, interviews, reports, statements, memoranda, or other data furnished by reason of this section, expressly including all portions, subsets, extracts, or compilations of the data as well as any findings or conclusions resulting from those studies, shall be privileged and shall not be considered public records under KRS 61.870 to 61.884.

UK places emphasis on “all information” to argue that “[b]y its plain language, KRS 214.556(6) does not limit the privilege to records and information furnished under a particular subsection ... nor is the privilege only concerned with ‘data’ or ‘patient data’ ... nor is the privilege limited to records furnished ‘by’ or ‘to’ a particular person or entity.” UK Brief at 8-9. It therefore believes that the correspondence that Guilfoyle seeks is covered by the privilege.

Guilfoyle, however, argues that the phrase “‘furnished by reason of this section’ refers to the mandates on health care facilities to furnish certain information to the KCR” and that the correspondence he seeks “is not furnished to the KCR by reason of the law”. Guilfoyle Response at 7-8. He accordingly contends that the information he seeks is not protected, as he believes that reading this subsection along with KRS 214.556(5) shows that “the privilege in [KRS] 214.556(6) is to protect a patient’s identity and treatment information.” Id. at 8.

The Court is of the opinion that UK's reading of the statute is the more correct interpretation. The language of KRS 214.556(6) clearly encompasses a very broad set of material which is to fall within the privilege of being outside the public record. The statute states that "[a]ll information ... furnished by reason of this section" is privileged. In the Court's view, "this section" refers generally to KRS 214.556, and as such, "the privilege in subsection (6) extends to all information furnished by any party within the KCR's cancer patient data management system". UK Brief, at 9.

The Court appreciates the general instruction of KRS 61.871 that "exceptions provided for by KRS 61.878 or otherwise provided by law shall be strictly construed". However, to attempt to "strictly construe" language that specifies that "[a]ll information ... shall be privileged and shall not be considered public records" is likely an exercise in futility, and it fails to give meaning to the words that the General Assembly chose.

Further, when viewing the language of KRS 214.556(6) in its context within KRS 214.556 as a whole, it is evident that the information must be privileged. The majority of the material that is likely to be requested in relation to KRS 214.556 would include identifying patient information, so the default position when construing requests under this section must be one of confidentiality. Thus, while the Open Records Act typically favors a policy of disclosure, KRS 214.556 must favor a policy of privacy. The General Assembly could have chosen specific types of material that the KCR would be required to disclose upon receiving an Open Records request, but they did not. Under the language of the most recent amendment to KRS

214.556(6), the KCR has the discretion to decide which “extracts, subsets, or compilations of data do not reveal privileged information and may be published or otherwise shared”. The correspondence that Guilfoyle seeks is not an “extract, subset, or compilation of data” that the KCR may disclose “to further the public health goals set forth herein.” Instead, it more accurately falls under the larger category of “all information” which is privileged and not considered public records.

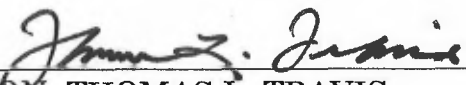
Guilfoyle argues that “[t]he General Assembly intended for amendments to KRS 214.556(6) to apply to patient information only.” He includes comments from Rep. Rocky Adkins that “[t]he amendment does not eliminate access to the registry information [but] simply tightens up the registry’s ability to protect individual patient identities without eliminating access to critical data maintained by the registry”. However, the Court can reach a decision without resorting to extrinsic aids such as the legislative history, as the statute’s language is not ambiguous. See Fell, 319 S.W.3d at 719; see also Stephenson v. Woodward, 182 S.W.3d 162, 172 (Ky. 2005). Attempting to discern legislative intent from the comments of a single legislator is a slippery slope, as it may not adequately reflect the various thoughts and intent of the remaining members of the General Assembly. As such, the Court agrees with UK that “Guilfoyle’s citation to a single legislator’s thoughts on amendments to KRS 214.556(6) does not diminish or override the entire General Assembly’s statutorily expressed intent in enacting KRS 214.556(6), which speaks for itself and refutes his position with or without the 2012 amendments.” UK Reply at 3.

Finally, the AG's prior decisions of 04-ORD-077 and 11-ORD-176 are inapplicable to this instance, where Guilfoyle seeks "[a]ll correspondence ... regarding deficiencies in Lourdes Hospital's reporting to the KCR, lateness of such reporting or the comprehensiveness of such reporting". 15-ORD-110 at 1-2. As noted above, the requester in 04-ORD-077 and 11-ORD-176 sought statistical information regarding incidences of breast cancer in Jefferson County, and following the latter of those decisions, the General Assembly amended KRS 214.556(6) to give the KCR the discretion to choose whether to release statistical data or not. Neither decision addresses correspondence between the KCR and a reporting facility, nor does the amended language of KRS 214.556(6).

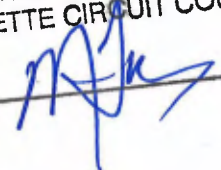
Conclusion

In the Court's view, it is clear that the AG's decision must be reversed. The correspondence Guilfoyle seeks falls under "all information ... furnished by reason of" KRS 214.556. KRS 214.556(6). As such, it is privileged and "shall not be considered public records under KRS 61.870 to 61.884." *Id.* Therefore, it is hereby **ORDERED** that the AG's decision in In re: Mark D. Guilfoyle/University of Kentucky, 15-ORD-110 (2015), is **REVERSED**.

Entered this 17th day of July, 2017.



HON. THOMAS L. TRAVIS
Fayette Circuit Court, 8th Division

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CERTIFICATE OF SERVICE



This is to certify a copy of the foregoing has been mailed on
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