SUPREME COURT OF KENTUCKY
NO. 90-SC-498-D

KENTUCKY BOARD OF EXAMINERS OF PSYCHOLOGISTS, AND DIVISION OF OCCUPATIONS AND PROFESSIONS, DEPARTMENT FOR ADMINISTRATION AND MR. DAVID L. NICHOLAS AND DR. STEPHEN T. DEMERS, **MOVANTS,**

v.

THE COURIER-JOURNAL AND LOUISVILLE TIMES COMPANY, AND ANDREW WOLFSON, AND GIDEON GIL, **RESPONDENTS.**

AMICUS CURIAE BRIEF ON BEHALF OF KENTUCKY BOARD OF EXAMINERS OF SOCIAL WORK, KENTUCKY CHAPTER OF THE NATIONAL ASSOCIATION OF SOCIAL WORKERS AND KENTUCKY SOCIETY FOR CLINICAL SOCIAL WORK IN SUPPORT OF MOVANTS

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CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing was served by first-class mail, postage prepaid, upon Hon. William L. Graham, Judge, Franklin Circuit Court, Franklin County Courthouse, Frankfort, Kentucky 40601; Jon L. Fleischaker, Esq., Kimberly Greene, Esq., Karen J. Greenwell, Esq., Wyatt, Tarrant & Combs, 2800 Citizens Plaza, Louisville, Kentucky 40202; Robert V. Bullock, Assistant Attorney General, 116 Capitol Building, Frankfort, Kentucky 40601; and Mr. John C. Scott, Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601, this 5th day of November, 1990.

Stephen F. Schuster

STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION

The Kentucky Board of Examiners of Social Work (the "Social Work Board") is a sister board to the Movant, Kentucky Board of Examiners of Psychologists (the "Psychology Board"). The Social Work Board is established by KRS 335.050 and pursuant to KRS 335.070 and 335.150 has investigative and disciplining functions similar to those of the Psychology Board. Because of the comparable licensing and disciplining functions of both boards, the decision in this case will precedentially affect the Social Work Board perhaps as much as it will affect the Psychology Board. The same statement could probably be made about most of the professional boards that fall under the auspices of the Division of Occupations and Professions.

From time to time in carrying out its statutory obligations with respect to licensing and disciplining, the Social Work Board receives highly confidential and private information about social workers and their clients. With the holding of the Court of Appeals in this case, if it is not reversed, such confidential and private information could not be withheld from an Open Records Request made after the termination of an investigation. Such a rule of law would severely impede the board's ability to carry out its investigative and disciplining functions.

The Kentucky Chapter of the National Association of Social Workers and the Kentucky Society for Clinical Social Work are not statutorily created boards, but they are public service organizations which also receive and deal with confidential and private information. From time to time their members furnish private information to the Social Work Board and other state agencies.

They join in this brief seeking to have the opinion of the Court of Appeals herein reversed and clarified so that they, too, may have some reasonable assurances as to the confidentiality of their records and of private information their members furnish to appropriate boards and agencies.

In this case the Court of Appeals erred in holding, in effect, that existing case law mandates the disclosure of records without regard to their private nature just so long as an investigation has been finally terminated. The Court of Appeals also erred in refusing to apply the "balancing test" that is required under a well-established body of federal law, weighing the value of public disclosure against an encroachment upon substantial privacy interests. Finally, the procedures followed by the Psychology Board in this case in meeting its burden of proving a privacy exemption to the Open Records law is precisely the procedure specifically mandated by parallel federal law, and this Court should officially sanction that procedure as the correct procedure to be followed in future cases.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN HOLDING "CITY OF LOUISVILLE V. COURIER JOURNAL AND LOUISVILLE TIMES CO." TO BE DISPOSITIVE.

It is acknowledged that there is a strong bias in favor of full disclosure of public records. However, KRS 61.878 outlines ten specific exemptions to this full disclosure policy, the very first of which is KRS 61.878(1)(a):

> Public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.

In rejecting the applicability of this exemption, the Court of Appeals in this case held:

> ...we think our case of City of Louisville v. Courier Journal and Louisville Times Co., Ky.App., 637 S.W.2d 658 (1982), is dispositive. Inasmuch as the present case was fully terminated by dismissal, we think the rule cited therein is broad enough to cover the situation....

The Court of Appeals seems to be saying that in terminated cases, there are no longer any exemptions! This is error. The statute itself certainly does not make the same distinction between open and terminated investigations in subsection 1(a) as it specifically does in subsection 1(f). Secondly, City of Louisville did not involve an exemption claimed under subsection 1(a). Thirdly, no other cases have been found in either this or other jurisdictions which would support a holding that records involving personal privacy become subject to disclosure once the investigation is terminated. Finally, there is no social policy or sound legal reason that would compel this conclusion.

City of Louisville construed exemptions claimed under KRS 61.878(1)(f), (g) and (h). Subsection (f) is unique among the ten specified exemptions. It is the only exemption that is time related. It provides that records compiled in the process of an investigation which would harm the agency by revealing the identity of the informant prematurely do not have to be disclosed during the course of the investigation, but they shall be disclosed after the "action is completed or a decision is made." The purpose of this qualified exemption is obvious: if the only reason for claiming the right of non-disclosure is that a premature disclosure of an

informant will spoil the investigation, that reason disappears upon completion of the investigation.

It is interesting to note that in its discussion of subsections (g) and (h) which have to do with "preliminary drafts" and "preliminary recommendations," the Court of Appeals held that such documents remain exempt from public inspection except insofar as such documents may have been incorporated by reference as a part of the final determination. Thus the opinion of the Court of Appeals is logically inconsistent in its attempt to broaden the holding of City of Louisville to all terminated cases.

In no way does City of Louisville address the kinds of records referred to in subsection 1(a), which subsection protects from disclosure documents which "would constitute a clearly unwarranted invasion of personal privacy." It is respectfully submitted that such documents do not change their character as a function of time. It is just as important to protect them from disclosure after an investigation is terminated as it is during the process of investigation. No sound reason can be offered to broaden the holding of City of Louisville so as to require the disclosure of such documents merely because an investigation has been terminated.

II. THE COURT OF APPEALS ERRED IN NOT ADOPTING THE "BALANCING TEST" EMBODIED IN FEDERAL LAW.

A relevant and enlightening article which examines the Personal Privacy Exemption of the Kentucky Open Records Act as it relates to federal law, appears in the Kentucky Law Journal, Vol. 71, No. 4, pp. 853-77. The introduction to that article summarizes the relevant social policy considerations:

> By passing the Kentucky Open Records Act (Act) in 1976, the General Assembly placed Kentucky among the great

> number of states which have recognized the importance of permitting public access to government records. As the Act's preamble states, this right of access is a "fundamental and necessary right of every citizen in the Commonwealth of Kentucky." However, it is not absolute. Although the legislature recognized "that free and open examination of public records is in the public interest," it joined other states in recognizing the legitimate need to exclude certain records from public scrutiny, particularly where release might result in an invasion of privacy. To this end, Kentucky Revised Statutes (KRS) section 61.878(1)(a) excludes from the Act's application "[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.
>
> This standard -- the clearly unwarranted invasion -- and the complex balancing of interests involved in its proper application are the subject of this Note. Kentucky has not yet had the benefit of a thorough exploration of the conflict between the "public's right to governmental information" and its citizens' right to privacy.

(It is respectfully requested that this case gives this Court the opportunity for this "thorough exploration of the conflict.")

The author of the journal article goes on to point out that while there is a paucity of Kentucky case law on point, in all material aspects the language of the Kentucky Open Records Act is identical to the Freedom of Information Act ("FOIA"), 5 U.S.C. §552(b)(6). It appears that this Court has never had an opportunity to examine the relationship between the Kentucky Open Records Act and FOIA, and perhaps for that reason the Court of Appeals was hesitant to apply the "balancing test" referred to in the federal case which it cited but did not consider, Ripskis v. Dept. of Housing and Urban Dev., 746 F.2d 1 (D.C. Cir. 1984). Had the Court of Appeals examined the applicable body of federal law and considered the reasoning of the law journal article referred

to above, it should have come down on the side of non-disclosure. The author of the journal article writes:

> Decisions involving the "similar files" language of the FOIA privacy exemption are of special help in defining the nature of private information since "a finding that the requested information is similar to that contained in personnel or medical files, [within 5 U.S.C. section 552(b)(6)] necessarily implies a substantial privacy interest that must be overcome before disclosure is warranted." The long lists of private information found in these decisions reveal that familial, medical, financial and occupational data are four "core" types of information which normally are recognized as being private information entitled to possible protection. For example, the early and frequently cited decision discussion familial privacy is Rural Housing Alliance v. United States Department of Agriculture. In this decision, the court refused to mandate disclosure of a housing discrimination report, noting that "information regarding marital status, legitimacy of children, identity of fathers of children,...welfare payments, alcoholic consumption, family fights...involves sufficiently similar details to be (afforded protection as) a 'similar file'...."

The kinds of personal information summarized above are exactly the kinds of personal information that social workers receive on a daily basis. Any rule of law that would require the disclosure of such information should be carefully considered and narrowly construed. For this reason alone the Court of Appeals decision in this case should be reversed.

III. THE PROCEDURE FOLLOWED BY THE PSYCHOLOGY BOARD IN THIS CASE SHOULD BE OFFICIALLY SANCTIONED BY THIS COURT.

At page 3 of its Opinion the Court of Appeals mentioned that the Open Records statute imposes the burden of proving non-disclosure upon the board. One is then left to infer that the Court of Appeals felt that the board had not met its burden of proving non-disclosure in this case. However, the board in this case had followed to the letter the method of proving non-disclosure which

has frequently been approved in federal cases, and the Respondents took no steps to show that the proof tendered to the Attorney General in the form of affidavits and indexes was inadequate.

To be specific, in order to meet its burden of proving non-disclosure, the Psychology Board filed with the Attorney General an affidavit of the Custodian its records which incorporated a catalog and index of the entire file in question. Then Robert F. Bullock, Esq., acting on behalf of the board, filed a very detailed affidavit summarizing the private and personal nature of the documents sought to be protected. See Appendices 5 and 6 to the Brief for Movants herein. The Respondents filed no affidavits in opposition to these affidavits. Nor did they in any other way present evidence to rebut the proof tendered in favor of non-disclosure. Therefore, if Kentucky is to adopt the method of proving non-disclosure specifically adopted in FOIA cases, as a matter of law the Respondents did not meet their burden of rebutting the proof tendered in favor of non-disclosure.

A case which succinctly summarizes the method of proving non-disclosure under FOIA is Doyle v. Federal Bureau of Investigation, 722 F.2d 554 (9th Cir. 1983). In that case, Doyle requested documents pertaining to him that were in the possession of the FBI. The FBI withheld many of the requested documents, claiming exemptions from disclosure based upon several exemptions including the Personal Privacy and Confidential Sources Exemption. The District Court ordered the FBI to submit affidavits, itemizing and indexing the withheld documents. The District Court then upheld the FBI's

decision not to disclose the documents. Pertinent to the present case, the Court of Appeals for the Ninth Circuit wrote as follows:

> [2] When an FOIA request is made, a government agency may withhold a document, or portions of it, if it contains information that falls within one of nine statutory exemptions to the disclosure requirements. 5 U.S.C. §552(b).
>
> [3] The government has the burden of establishing that a given document is exempt from disclosure. Church of Scientology, 611 F.2d at 742. The government may not rely upon conclusory and generalized allegations for exemptions in meeting its burden. Id., quoting Vaughn v. Rosen, 157 U.S.App.D.C. 340, 346, 484 F.2d 820, 826 (D.C.Cir. 1973). Rather, the affidavits or oral testimony must be detailed enough for the district court to make a de novo assessment of the government's claim of exemption. See Harvey's Wagon Wheel, Inc. v. N.L.R.B., 550 F.2d 1139, 1142 (9th Cir. 1976).

There are many other Federal cases approving of this procedure. See, e.g., Lewis v. Internal Revenue Service, 823 F.2d 375 (9th Cir. 1987); Stein v. Department of Justice and FBI, 662 F.2d 1245 (7th Cir. 1981); and Exxon Corporation v. Federal Trade Commission, 663 F.2d 120 (D.C. Cir. 1980).

CONCLUSION

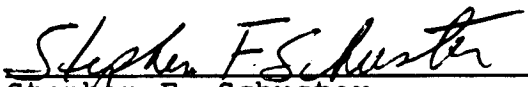
The holding of the Court of Appeals that City of Louisville is dispositive is incorrect, and if the opinion of the Court of Appeals is not reversed, it has the potential to disrupt the investigative and disciplinary functions of every professional board in this Commonwealth. Those boards must be able to receive confidential and private information in carrying out their important functions of licensing and disciplining their members. Alleged victims of mistreatment at the hands of professionals, and social workers acting on their behalf, should have the right, in appropriate cases, to give confidential information to these professional boards without having to fear that once the case is

over they will have to read about their misfortune or their clients' personal problems in the newspapers.

The three organizations of social workers filing this brief are not asking this Court to establish an iron clad rule of law. While they believe that in most cases, such as the present one, no sound reason will exist for the public disclosure of very private information, in some rare cases the conclusion might be the opposite. This Court, therefore, ought to specifically sanction the procedures followed in FOIA cases which will allow state boards and agencies to meet their burden of proving non-disclosure on the basis of privacy by use of specific affidavits such as those that were filed in this case. In a truly exceptional case individuals seeking disclosure should have the burden of proving that the tendered affidavits are inadequate or pretextural.

Whether this Court sanctions the federal procedure or fashions one of its own, the decision of the Court of Appeals herein should be reversed. The personal privacy exemption to the Opens Record Act must be preserved both during and after licensing and disciplinary investigations.

Respectfully submitted,



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