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20-ORD-104

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In re: *The Courier-Journal*/Louisville Metro Police Department

Summary: Louisville Metro Police Department ("the Department") did not violate the Open Records Act ("Act") by denying a request for the "full investigative file" relating to dismissed charges against Kenneth Walker. On appeal, the Department justified its reliance on KRS 17.150(2)(d) to withhold the investigating file because disclosure would reveal information pertaining to prospective law enforcement actions.

Open Records Decision

On June 5, 2020, *The Courier-Journal* ("Appellant") requested a copy of the "full audio recordings of police interviews with Kenneth Walker and Jonathan Mattingly that were played publicly, in part, by Commonwealth's Attorney Tom Wine at a press conference" and "the full investigative file relating to the now dismissed charges against Kenneth Walker, including but not limited to any returns from a search of his phone, any recordings from jail calls made by Walker and any other evidence collected by [the Department]." In a timely response, the Department denied the request under KRS 61.878(1)(h) and KRS 17.150(2). The Department explained that the investigation involving Mr. Walker was ongoing and that no decision has been made regarding prosecution. Additionally, the Department explained, "the investigative file ties very closely to the ongoing PIU [Professional Integrity Unit] investigation" into an officer-involved shooting that led to the death of Ms. Breonna Taylor. According to the Department, "[p]rematurely releasing the investigative file at this time could result in prejudice

to the potential witnesses and may adversely color a witness' recollection of the events of both potential law enforcement actions as they relate to" the incident. This appeal followed.

Appellant explains that Mr. Walker was charged with attempted murder following an officer-involved shooting on March 13, 2020. The fatal shots were fired during the Department's execution of a search warrant at Ms. Taylor's home during the early morning hours of March 13, 2020. Appellant's request, and this appeal, involve records pertaining to the Department's investigation of the events that occurred that evening. On May 20, 2020, the Department provided the Kentucky Attorney General's Office with portions of its file regarding the investigation of Ms. Taylor's death to assist the Attorney General with his independent investigation. Two days later, the Jefferson County Commonwealth's Attorney declined to continue its prosecution of Mr. Walker. Notwithstanding the Commonwealth's Attorney's decision not to prosecute Mr. Walker at this time, the FBI publicly announced that it would be investigating the incident. Therefore, there are currently two agencies actively investigating this matter to determine whether criminal prosecutions should be initiated.

KRS 61.878(1)(h) permits a law enforcement agency to deny a request for investigative records obtained by a law enforcement agency during a criminal investigation if premature disclosure of those records will cause harm to the investigation. In *City of Ft. Thomas v. Cincinnati Enquirer,* 406 S.W.3d 842 (Ky. 2013), the Supreme Court of Kentucky held that investigative files of law enforcement agencies are not categorically exempt from disclosure under KRS 61.878(1)(h). Rather, when a record pertains to a prospective law enforcement action, KRS 61.878(1)(h) "is appropriately invoked only when the agency can articulate a factual basis for applying it, only, that is, when because of the record's content, its release poses a concrete risk of harm to the agency in the prospective action." *Id*. at 851. The Court in that case did not address the application of KRS 17.150(2), because the subject of the investigation had already been prosecuted and convicted. *See id*. at 846. Notwithstanding the agency's claim that the convicted defendant could still seek post-conviction relief, the Court found the agency had not satisfied its burden under KRS 61.878(1)(h). *Id*. at 852.

Thus, the holding in *Ft. Thomas* is inapplicable to KRS 17.150. This Office has recognized that a public agency is not required to articulate a specific and

concrete harm to a potential prosecution to invoke KRS 17.150 successfully. Rather, KRS 17.150(3) merely requires the agency to "justify the refusal of inspection with specificity." KRS 17.150(3); *see also* 14-ORD-154 (holding that *Ft. Thomas* does not apply in the context of KRS 17.150 and affirming the agency's denial based on that provision despite the agency's failure to articulate harm to the prospective law enforcement action).

Here, KRS 17.150(2) is controlling and this Office need not address the Department's arguments for withholding records under KRS 61.878(1)(h). Under KRS 17.150, "[i]ntelligence and investigative reports maintained by criminal justice agencies are subject to public inspection *if* prosecution is completed or a determination not to prosecute has been made." KRS 17.150(2) (emphasis added). This Office has observed that "[i]nvestigative reports are nearly always withheld from public inspection to protect sources of information and techniques of investigations and also to prevent premature disclosure of the contents to the targets of investigation, which could thwart law enforcement efforts." OAG 83-123, p. 2 (citations omitted). This Office has also determined that the term "investigative reports" is "broad enough to extend to laboratory, forensic, and other reports generated in the course of an investigation." 05-ORD-246, p. 2. For example, audio and video recordings, including "dash-cam video recordings," may fall within the parameters of KRS 17.150(2). *See* 07-ORD-095 (quoting 04-ORD-234). So, too, may photographs taken as part of a criminal investigation. *See* 19-ORD-025, p. 4. In other words, "the right of public inspection set forth in KRS 17.150(2) is contingent upon the completion of the investigation and [prosecution] or a determination having been made not to prosecute." OAG 90-143; *see also* 20-ORD-090.

This Office has previously stated that "KRS 17.150 does not require the agency to demonstrate a showing of harm. It merely requires the agency to provide a specific reason for withholding the records." 14-ORD-154, pp. 4-5. That "specificity" requirement is stated in KRS 17.150(3), which provides that "[w]hen a demand for the inspection of the records is refused by the custodian of the records, the burden shall be upon the custodian to justify the refusal of inspection with specificity." Furthermore, "[e]xemptions provided by this section shall not be used by the custodian of records to delay or impede the exercise of rights granted by this section." *Id.* Although a prospective law enforcement action alone is not sufficient to demonstrate harm under KRS 61.878(1)(h), as held by the Court in *Ft.*

Thomas, this Office has found that such a showing satisfies KRS 17.150. *See* 20-ORD-090 (finding that the Office of Attorney General properly withheld records when acting as a special prosecutor and a decision whether to prosecute had not been made).

Here, the Commonwealth's Attorney has made a determination not to prosecute Mr. Walker. That fact might ordinarily be dispositive. "However," KRS 17.150(2)(d) provides that, "portions of the records may be withheld from inspection if the inspection would disclose . . . [i]nformation contained in the records to be used in a prospective law enforcement action." Therefore, even if a prosecutorial decision has been made in Mr. Walker's case, there remain other "prospective law enforcement actions" such that KRS 17.150 still applies. Specifically, the Department explains that there are other ongoing criminal investigations arising from the same nucleus of facts that may culminate in prosecutions brought by the Attorney General or the FBI.

On appeal, the Department provided this Office with a copy of Assistant Deputy Attorney General Amy Burke's June 19, 2020, letter to Interim Department Chief Robert Schroeder. In that letter, Assistant Deputy Attorney General Burke explained that the Office of the Attorney General is conducting an investigation into Ms. Breonna Taylor's death while serving as special prosecutor pursuant to KRS 15.190. As part of its ongoing investigation, the Attorney General "has obtained an investigative file for an officer-involved shooting created by [the Department's PIU], designated PIU case No. 20-019." Ms. Burke also confirmed that "no prosecutorial decision has been made. The public dissemination of the investigative file . . . would be premature and [would] have an adverse impact on our ability to properly investigate and, if appropriate, prosecute this matter."

The Department also provided this Office with a copy of a June 22, 2020, letter from Special Agent in Charge James R. Brown, Jr. to Interim Chief Schroeder. In that letter, Special Agent Brown explained that the FBI is conducting an investigation into the circumstances leading to Ms. Taylor's death. As part of its investigation into potential federal offenses, "the FBI has obtained investigative files for an Officer-Involved Shooting created by [the Department's PIU], designated PIU Case No. 20-019, and an investigative file created by the Criminal Interdiction Division, Place-Based Investigations, designated PBI Case No. 20-01." Agent Brown further explained that "[t]he public dissemination of the

investigative files for PIU Case No. 20-019 and PBI Case No. 20-01, at this time in the federal investigation," would have an adverse impact on the FBI's ability to investigate the matter properly. Thus, the FBI confirmed that its investigation of this matter is ongoing and that no prosecutorial decision has been made.

In light of the substantiating information that the Department provided on appeal, this Office finds that the Department has justified the denial of Appellant's request under KRS 17.150(2)(d) with sufficient specificity. The Department has conclusively established that "prospective law enforcement actions," both state and federal, may result from the March 13 incident. Moreover, the Department has stated with specificity that disclosure of the investigative records in dispute would impede the ability of the Attorney General and the FBI to conduct their investigations and that premature release of these records could cause harm to a potential prosecution. Accordingly, the Department did not violate the Act.

In so holding, this Office notes that KRS 17.150(3) does not permit a public agency to withhold the subject investigation file indefinitely. Although the Department cannot indefinitely postpone access to the requested investigative records by characterizing the investigation as open or active, it has adequately substantiated that characterization here. *See* 17-ORD-242 (holding that an agency provided enough specificity by describing the nature of the prospective law enforcement action, even though more than twenty years had elapsed since the investigation began, but observing that the exemption could not apply indefinitely). The Department assures this Office that "this is not a matter of whether the records will be available to the public, only when." Upon completion of the ongoing investigations, these criminal justice agencies will determine whether to prosecute. If they decide to prosecute, the records may be withheld until the conclusion of the prosecution. KRS 17.150(2). If a decision not to prosecute is made, and there are no other potential law enforcement actions pending, the records could be subject to release unless another exception applies.

Either party may appeal this decision by initiating action in the appropriate circuit court per KRS 61.880(5) and KRS 61.882. Pursuant to KRS 61.880(3), the Attorney General shall be notified of any action in circuit court, but shall not be named as a party in that action or in any subsequent proceeding.

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/s/ Michelle D. Harrison

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Distributed to:

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