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20-ORD-151

September 21, 2020

In re: John W. Potter/Louisville Metro Police Department

Summary: Under KRS 17.150(2), Louisville Metro Police Department ("Department") did not violate the Open Records Act ("Act") by denying a request for a copy of the Risk Assessment Matrix and the Arrest/Search Warrant Information Sheet prepared in relation to the search warrant executed at Ms. Breonna Taylor's residence. However, the Department violated KRS 61.880(1) by failing to issue a timely written response to that request.

Open Records Decision

John W. Potter ("Appellant") requested from the Department a copy of the Risk Assessment Matrix (LMPD #05-0016) and the Arrest/Search Warrant Information Sheet (LMPD #05-0023), if any, that were prepared in relation to a search warrant executed at Ms. Breonna Taylor's residence, 3993 Springfield Drive in Louisville, Kentucky 40214, on March 13, 2020. Citing KRS 17.150(2) and KRS 61.878(1)(h), the Department denied Appellant's request because the "investigation surrounding the death of Breonna Taylor is an ongoing criminal investigation in which no prosecutorial decision has been made." The Department maintained that requested records constitute "intelligence and investigative reports being utilized in the criminal investigation being conducted by the LMPD Public Integrity Unit, the Kentucky Office of Attorney General, and the [Federal Bureau of Investigation ('FBI')]." Releasing these records prematurely, in the Department's view, could result in "tipping off witnesses and potential suspects as to the direction of the criminal investigation/prosecution and impact witness

[sic] recollection of events." Disclosure could also taint the jury pool "by permitting the 'case' [to] be tried in the court of public opinion rather than in court with the benefit of procedural and evidentiary rules." The Department noted that both the Office of the Attorney General and the FBI "have confirmed that release of investigative records of the incident involving Ms. Taylor would have an adverse impact on their ability to properly investigate the matter."

Under KRS 17.150(2), "[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 61.878(1)(l) exempts from disclosure records "the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly." In 20-ORD-090, this Office found that "the completion of a prosecution or a decision not to prosecute is a condition precedent to public inspection" of records within the scope of KRS 17.150(2). Recently, this Office specifically recognized that Risk Assessment Matrix forms "are used to determine whether the service of a search warrant requires the Department to use a [Special Weapons and Tactics] SWAT team. Because serving a search warrant is inherently connected with an ongoing criminal investigation, and the Risk Assessment Matrix form represents intelligence gathered in that investigation, these forms are also 'intelligence and investigative reports' subject to KRS 17.150(2)." 20-ORD-131, p. 2.

In 20-ORD-131, the requester had sought, in relevant part, "all Risk Assessment Matrix forms for warrants 'executed or scheduled to be executed' between March 8 and March 14, 2020," regarding two specified addresses, including Ms. Taylor's residence. Here, as in that case, the Department has asserted "that the requested records pertain to the potential prosecution of the officers involved in Ms. Taylor's death and to an ongoing investigation of the incident by the FBI." To substantiate its position, the Department also relied upon the same letters from the FBI and the Office of the Attorney General "stating that both agencies are actively investigating the incident in question for potential criminal prosecution." As in 20-ORD-131, this same documentation substantiates, with adequate specificity, that a prosecutorial decision has not been made. *See* 20-ORD-104 (affirming the Department's reliance on KRS 17.150(2)(d) to deny a request for a Professional Integrity Unit investigative file regarding the March 13 officer-involved shooting at issue because it established with the required specificity that no prosecutorial decision had been made).

The Department has "established conclusively that potential prosecutions, both state and federal," regarding the March 13 incident "remain entirely possible and that disclosure of the records in dispute would impede the ability of the Attorney General and the FBI to investigate the incident by disclosing information to be used in potential prosecutions." 20-ORD-131, p. 3. Based upon the foregoing, this Office affirms the Department denial of Appellant's request under KRS 17.150(2)(d).

As in 20-ORD-104 and 20-ORD-131, however, this Office reiterates that "upon completion of the ongoing investigations or a determination not to prosecute, any relevant records that are responsive to Appellant's request may be subject to disclosure unless those records are specifically excluded from application of the Act by another statutory exception." Because KRS 17.150(2) is dispositive of this appeal, this Office declines to consider the application of KRS 61.878(1)(h) at this time. However, the record on appeal establishes that the Department violated the Act by failing to issue a timely response to Appellant's request.

Under KRS 61.880(1), "[e]ach public agency, upon any request for records made under [the Act], shall determine within three (3) [business] days . . . after the receipt of any such request whether to comply with the request and shall notify in writing the person making the request, within the three (3) day period, of its decision." However, in response to the coronavirus pandemic, the General Assembly passed Senate Bill 150 ("SB 150"), which extended the time for a public agency to respond upon receipt of an open records request from three days to ten days.[1] SB 150 contained an emergency clause and became effective on March 30, 2020, upon the Governor's signature. In this case, the Department did not issue any response to Appellant's May 30, 2020, request until approximately two months later on July 31, 2020. The Department provided no explanation for this delay. For that reason and in light of the Act's clear mandate, this Office finds that the Department violated KRS 61.880(1) when it failed to issue a timely written response to Appellant's request.

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[1] In relevant part, Section 1(8)(b) of SB 150 provides, "[n]otwithstanding KRS 61.872 and 61.880, a public agency shall respond to the request to inspect or receive copies of public records within 10 days of its receipt."

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 shall be notified of any action in circuit court, but shall not be named as a party in that action or in any subsequent proceedings.

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/s/ Michelle D. Harrison

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Distributed to:

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