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21-ORD-123

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In re: James Adams/Louisville Metro Police Department

Summary: The Louisville Metro Police Department (the “Department”) violated the Open Records Act (“the Act”) when it failed to explain how an exception to the Act permitted it to deny inspection of a record.

Open Records Decision

James Adams (“Appellant”) sent a request to the Department for copies of “any and all records concerning the investigation opened by [the Department] upon the discovery of the body of” a specifically identified decedent. The Appellant specified that the scope of his request included “reports, investigators’ notes, officers’ body camera video, interview records” as well as “autopsy reports, toxicology and lab reports, emails, texts, reports, memoranda, written messages, voice mail messages, video, audio, drawings, images, photographs, diagrams, maps, charts, graphs, tables or any other communication or record of any kind, whether by, to, from or directed to [the Department] or anyone else” regarding the investigation.

In a timely response, the Department provided all responsive records in its possession, except for “intelligence work-up reports provided by the [the Department’s] Real Time Crime Center” because such records contain “confidential intelligence information, the disclosure of which is confidential pursuant to federal law (See 28 CFR Part 23, incorporated into the Open Records Act by KRS 61.878(1)(k)).” The Appellant then initiated this appeal.

When a public agency denies a request under the Act, it must give “a brief explanation of how the exception applies to the record withheld.” KRS

61.880(1). The agency's explanation must "provide particular and detailed information," not merely a "limited and perfunctory response." *Edmondson v. Alig*, 926 S.W.2d 856, 858 (Ky. App. 1996). Here, in the Department's initial response it stated that the records were "confidential intelligence information" and cited the entire "28 CFR Part 23" as authority for denying the Appellant access to these records. It provided no further explanation in support of its denial. Therefore, the Department violated the Act when it did not explain sufficiently its denial under KRS 61.880(1).

On appeal, the Department provides more information to explain its denial. Specifically, the Department claims that its "Real Time Crime Center" receives federal funding under a grant that is subject to the Omnibus Crime Control and Safe Streets Act of 1968. (Public Law 90-351) ("Omnibus Act"). Under the Omnibus Act, the Department of Justice promulgated a regulation, the purpose of which "is to assure that all criminal intelligence systems operating through support under the Omnibus [Act] . . . are utilized in conformance with the privacy and constitutional rights of individuals." 28 CFR § 23.1. Under 28 CFR § 23.20(e), a "project or authorized recipient shall disseminate criminal intelligence information only where there is a need to know and a right to know the information in the performance of law enforcement activity." Thus, to carry its burden that this exception applies to the requested records, the Department must prove both that the requested records come from a "criminal intelligence system operating through support under" the Omnibus Act, 28 CFR § 23.3(a), and that such records qualify as "criminal intelligence information," as defined, which can only be disseminated to those who "need to know and [have] a right to know the information in the performance of a law enforcement activity," 28 CFR § 23.20(e).

First, the confidentiality requirements apply only to "criminal intelligence systems" that "operate through support under" the Omnibus Act. 28 C.F.R. §23.3(a). "Criminal Intelligence System or Intelligence System means the arrangements, equipment, facilities, and procedures used for the receipt, storage, interagency exchange or dissemination, and analysis of criminal intelligence information." 23 CFR § 23.3(b)(1). The Department claims that its Real Time Crime Center is "supported" by funds administered under the Edward Byrne Memorial Justice Assistance Grant Program ("Grant Program"), which is a funding source under the Omnibus Act. The Department states that the Grant Program allows governments "to support a broad range of activities to prevent and control crime based on their own state and local needs and conditions." The Department further states that it partially uses

this grant money to “subscribe[] to criminal data analysis software platforms and proprietary data sources for personally-identifying information.”

In support of its claim, the Department provides a list of Department programs that receive funding from the Grant Program. According to this list, there are 32 Department programs that appear to be funded, at least in part, by the Grant Program. However, the Department provides no direct link between the Grant Program and the Department’s Real Time Crime Center. Nor does the Department explain the work that it conducts at the Real Time Crime Center. Instead, the Department claims that the particular information at issue here is an intelligence report that was used to identify the decedent using pictures of his tattoos.¹ It is not clear from this record whether funds from the Grant Program were used to generate that report.

Second, even if the Department had successfully shown that the report was created by a “criminal intelligence system” supported by Omnibus Act funds, the Department must also establish that the record contains “criminal intelligence information,” as that term is defined. “Criminal intelligence information means data which has been evaluated to determine that it is relevant to the identification of and the criminal activity engaged in by an individual or organization which is reasonably suspected of involvement in criminal activity, and meets criminal intelligence system submission criteria.” 28 CFR § 23.3(b)(3) (cleaned up). The purpose of gathering, storing, and sharing such information among law enforcement is to target organizational crime. *See* 28 CFR § 23.2. Therefore, “criminal intelligence systems” contain information about a person when there is reasonable suspicion to believe he or she is engaging in certain crimes, but such person has not been charged. *See* 28 CFR §23.20. The reason such information is confidential is to protect the privacy interest of people who have not been officially charged with a crime. *See* 34 U.S.C. § 10231(c) (requiring criminal intelligence systems to comply with Department of Justice regulations “to assure that such systems are not utilized in violation of the privacy and constitutional rights of individuals”).

Here, the Department fails to explain how the withheld report qualifies as “criminal intelligence information” under 28 CFR § 23.3(b)(3). The Department argues that the record qualifies as “criminal intelligence information” because it contains information that is “collected and maintained

¹ The Department explains that this was the only method available to identify the decedent so that the Department could notify his next of kin. There is no evidence in this record that such identifying information is connected with an ongoing law enforcement investigation, and the Department did not rely on KRS 61.878(1)(h) or KRS 17.150 to deny any requested records.

on the basis that it is relevant to the identification of an individual possibly engaged in criminal activity and the identification of the alleged criminal activity.” But based on the record before this Office, the report at issue was not generated because the decedent was suspected of engaging in crime. Rather, it appears as though the report was used to identify the unknown decedent using photographs of his tattoos, which the Department admits was a “non-criminal investigation.” And it is not clear how the decedent’s privacy interest in this information endures, now that he is deceased. *See, e.g.*, 14-ORD-090 (finding that autopsy reports could not be withheld under KRS 61.878(1)(a), the personal privacy exemption, because deceased individuals have no cognizable privacy interest in such records). The Department did not claim that the withheld report contains “criminal intelligence information” about surviving individuals suspected of criminal activity, whose privacy interests are protected under 28 CFR § 23.3.

A public agency that denies a request to inspect records carries the burden of proving that the claimed exemption applies to withhold the requested record. KRS 61.880(2)(c). It may be true that the Real Time Crime Center receives Omnibus Act funding, and that it generates “criminal intelligence information” using such funds. But under these facts, the Department has failed to carry its burden that an intelligence report used to identify a decedent, which was unconnected to a criminal investigation, qualifies as protected “criminal intelligence information” under 28 CFR § 23.3(b)(3). For that reason, it violated the Act.

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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Distributed to:

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