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21-ORD-128

July 19, 2021

In re: Ashley Gruner/Kentucky State Police

Summary: The Kentucky State Police (“KSP”) violated the Open Records Act (“the Act”) when it failed to carry its burden that KRS 17.150(2) or KRS 61.878(1)(h) authorized it to deny inspection of records contained in a 53-year-old cold case.

Open Records Decision

Ashley Gruner (“Appellant”) asked KSP to inspect records related to an unsolved homicide case that occurred in Western Kentucky approximately 53 years ago. KSP responded and denied the request pursuant to KRS 17.150(2)(d) and KRS 61.878(1)(h) because “[t]his information is part of an investigation that is still open” and “premature release of any records related to an ongoing investigation in a public forum could result in prejudice to the witnesses and may adversely affect their recollection of the events.” KSP directed the Appellant to “contact the Post 2 Records Clerk . . . to determine if the case has been closed” prior to submitting another request. The Appellant initiated this appeal soon after.

To deny inspection under the Act, a public agency must give “a brief explanation of how the exception applies to the record withheld”. KRS 61.880(1). Such a denial 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). Under KRS 61.880(2)(c), 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.

KSP relies on both KRS 61.878(1)(h) and KRS 17.150(2) to deny inspection of the 53-year-old casefile, which remains unresolved. In 21-ORD-

098, this Office explained the difference between these two exemptions. Under KRS 61.878(1)(h), “records of law enforcement agencies . . . that were compiled in the process of detecting and investigating statutory or regulatory violations if the disclosure of the information would harm the agency by revealing the identity of informants not otherwise known or by premature release of information to be used in a prospective law enforcement action” are exempt from inspection. Under KRS 17.150(2), however, “intelligence 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.” If a law enforcement agency denies access to a record under KRS 17.150(2) it must explain “with specificity” if a prosecution is ongoing or if a decision not to prosecute has been made. KRS 17.150(3). If prosecution has concluded, or a decision not to prosecute has been made, then the agency must specify how one of the four conditions under KRS 17.150(2)(a)-(d) apply to allow it to continue to deny inspection. *See*, 21-ORD-098 at *2.

Although a law enforcement agency may invoke KRS 17.150(2) to deny inspection of intelligence reports related to a case in which prosecution has not concluded, the exemption cannot apply indefinitely. *See* KRS 17.150(3) (“Exemptions provided by this section shall not be used by the custodian of the records to delay or impede the exercise of rights granted by this section.”). As explained in 21-ORD-098, the purpose of this exemption is to protect the rights of the criminally accused to a fair and impartial trial. But as time progresses, and it becomes apparent that no prosecution will be forthcoming, then a *de facto* decision not to prosecute has been made. *See Department of Kentucky State Police v. Teague*, Case No. 2018-CA-000186, 2019 WL 856756 (Ky. App. Feb. 22, 2019) (holding that KSP could not rely on KRS 17.150 to deny inspection of records relating to an investigation that had been ongoing for 22 years and there was no evidence that a suspect would be charged in the future).

Thus, for KSP to carry its burden under KRS 17.150(2), it must show that it is a law enforcement agency, the records are investigative reports, and that there has been no determination not to prosecute. Here, it is undisputed that KSP is a law enforcement agency and that the records are investigative reports. The question is whether KSP has explained with specificity that no determination has been made regarding prosecution. On appeal, KSP explains that the case is “currently open,” that it is on KSP’s cold case peer review list, that the case was reviewed on May 28, 2019, and that a witness has been interviewed since that date. KSP further states that the case is due for another review in November 2021, and that KSP “published a press release in October 2019, seeking the public’s help for anyone with information.” KSP notes that

“[d]ue to the age of the case, all other witnesses in this investigation are deceased.” Finally, KSP claims that its laboratory has recently acquired new forensic technology which it claims may result in the discovery of new evidence in this case. However, at the time of this appeal, KSP has only submitted a request to its laboratory to use the equipment in this case, and it is unable to confirm whether this evidence will be analyzed using the new equipment.

Although some of these facts support KSP’s claim that investigation of this case has not concluded, it is undisputed that 53 years have passed since the crime occurred, all witnesses, except one, are deceased, the surviving witness has already been interviewed, and KSP has sought public assistance because it currently is unable to charge anyone. It is unclear from this record whether KSP has identified a suspect, or if any suspect still survives. Given the fact that 53 years have passed since this case began, “KSP’s incredibly vague, speculative, and remote concerns under the circumstances of the case [are] unreasonable.” *Teague*, 2019 WL 856756 at * 2 (internal quotations omitted). Therefore, under these facts, KSP has failed to explain with specificity that no determination has been made regarding prosecution, because a *de facto* decision not to prosecute has been made by the passage of time.¹ Therefore, KSP cannot rely on KRS 17.150(2) to deny inspection of the requested reports.²

Turning to KSP’s other claimed exemption, for records to be exempt under KRS 61.878(1)(h), an agency must show “a concrete risk of harm to the agency” if the records are released. *City of Ft. Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 851 (Ky. 2013). *See, also*, 21-ORD-098; 21-ORD-102. The Kentucky Supreme Court has held that law enforcement investigative files are not automatically exempt under KRS 61.878(1)(h). *Id.* at 842. Meaning that

¹ KRS 17.150(2) states that intelligence records may be inspected if “a determination not to prosecute has been made.” The statute does not specify how such a determination can be made, or by whom. Intuitively, the decision ordinarily would be made by a prosecutor. In using the term “*de facto* decision,” this Office is not stating that prosecution is legally barred from occurring. Instead, it is a recognition that the condition of the investigation is such that a prosecution cannot occur now, and is unlikely to occur in the future, based on the evidence currently available to the law enforcement agency.

² Although KSP relies on 21-ORD-098 in support of its denial, that decision is easily distinguishable by the amount of time that this case has remained open. In 21-ORD-098, this Office affirmed KSP’s decision to deny inspection of an eight-year-old unresolved case under KRS 17.150(2). Without deciding the maximum amount of time that a case can remain open before a *de facto* decision not to prosecute has been made, this Office relies on the Court of Appeals’ holding in *Teague* to hold that, in this case, 53 years is well beyond that threshold.

reliance on KRS 61.878(1)(h) is proper only if “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.

This Office has found that the release of information which could affect a witness' memories, or could assist a suspect in creating an alibi, qualifies as specific and concrete harms that could occur to an investigation if the records are hastily released in the early stages of an investigation. *See, e.g.*, 21-ORD-098. But here, there is only one living witness, and that person has already been interviewed. *See, e.g.*, 21-ORD-052 (finding that a law enforcement agency's claim that witness memories could be affected by the premature release of records is speculative when all witnesses have already been interviewed). Further, there is no evidence in this record that KSP has identified a suspect who is still alive and could be prosecuted. Therefore, KSP has failed to identify a specific a concrete harm that could result to this investigation if records were released.³

To summarize, after the passage of 53 years, all witnesses have been interviewed or are deceased, and KSP cannot identify a suspect that may be prosecuted for this crime. A *de facto* decision not to prosecute, therefore, has been made for KSP, and it cannot rely on KRS 17.150(2) to deny inspection of the records. Nor has KSP met its burden under KRS 61.878(1)(h) to explain how the release of this information will harm the very investigation for which it has sought public assistance. For these reasons, the KSP violated the Act in withholding the requested records.

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.

³ KSP's claim that its new laboratory equipment may reinvigorate its investigation is speculative. Although KSP claims that this case is a “good candidate” for the new equipment, it is unable to confirm that the equipment will in fact be used. Moreover, the equipment purportedly can be used to find latent fingerprints on evidence that has already been gathered. It is unclear how the release of the current case file, which does not contain the results of a laboratory test that has not been performed, could harm the investigation. But even if these forensic tests occur and the results shed new light on the case, KSP is required to separate exempt records from nonexempt records, and provide access to nonexempt records. KRS 61.878(4). KSP may be able to carry its burden that the premature release of the forensic report could harm the investigation if such a report is created and the public seeks its inspection.

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Distributed to:

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