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21-ORD-136

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In re: Larry Stallard/Richmond Police Department

Summary: The Richmond Police Department ("Department") violated the Open Records Act ("the Act") when it failed to give a detailed explanation of the cause for its delay in providing access to investigative files. The Department also subverted the intent of the Act by claiming that it required nearly eight months to process the request. The Department further violated the Act by failing to explain the application of exceptions to the Act and failed to meet its burden of proof that records were exempt from inspection.

Open Records Decision

On August 5, 2020, Larry Stallard ("Appellant") requested copies of the Department's "entire case files for all drug overdoses occurring in Year 2019 in City of Richmond to which [the Department] responded, both those resulting in death and those that did not." The Department issued a response stating, "Due to the current COVID-19 pandemic, the resulting staff shortage, and the volume of the records you are requesting, the prospected [*sic*] date for fulfillment is no later than March 31, 2021."

On March 29, 2021, the Department advised the Appellant that it would provide him with "444 pages of files and dispatch records, and one flash drive of photos," but denied the request as to 15 case files under KRS 17.150(2)(d) because they were "still open with an investigation that is ongoing and prosecution has not been declined or completed." The Department also withheld copies of photographs "taken inside a private residence," under KRS 61.168(4)(a). However, on March 31, 2021, the Department issued a supplemental response denying the Appellant's request as to all responsive

photographs under KRS 61.878(1)(q), which is a new exemption to the Act that took effect on March 23, 2021. This appeal followed.

Under KRS 61.880(4), a person may petition the Attorney General to review an agency's action, short of denial of inspection, if the "person feels the intent of [the Act] is being subverted[.]" One way in which a public agency may subvert the intent of the Act is to delay access to records unreasonably. *See, e.g.*, 21-ORD-099.[1] Although an agency is ordinarily required to respond to a request, and produce responsive records that are not exempt, within the period established in KRS 61.880(1), a public agency may extend that time when certain conditions are met.[2] Specifically, "[i]f the public record is in active use, in storage or not otherwise available, the official custodian shall immediately notify the applicant and shall designate a place, time, and date for inspection of the public records, not to exceed three (3) days from receipt of the application, unless a detailed explanation of the cause is given for further delay and the place, time, and earliest date on which the public record will be available for inspection." KRS 61.872(5).

KRS 61.872(5) requires the public agency to notify the requester that the records are "in active use, storage, or not otherwise available." The statute also places the burden on the agency to give a "detailed explanation of the cause" for further delay. *Id.* But here, the Department did not say whether the records were in active use, storage, or were not otherwise available. The Department merely asserted that it needed a delay of nearly eight months due to "the volume of the records" and a temporary staff shortage. Without providing the "detailed explanation" required under KRS 61.872(5), the Department violated the Act when it failed to describe sufficiently the reason for the delay in its response to the Appellant.

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[1] The General Assembly has now expressly adopted this Office's prior interpretations of KRS 61.880(4) to include "excessive extensions of time" as grounds to support a claim that a public agency has subverted the intent of the Act. *See* KRS 61.880(4). However, this statutory amendment did not take effect until June 29, 2021, when House Bill 312, passed during the 2021 Regular Session of the General Assembly, took effect.

[2] Historically, an agency was required to respond within three business days. During the state of emergency that was already in effect at the time of the Appellant's request, public agencies were required to respond to requests to inspect records within ten calendar days. *See* 2020 Senate Bill 150 §1(8). The parties do not dispute that the Department issued its initial response in a timely manner under SB 150. This Office notes, however, that effective June 29, 2021, the deadline for a public agency to respond to a request under KRS 61.880(1) has been increased to five business days. A public agency should no longer rely on SB 150 when calculating the deadline to respond to a request received after June 29, 2021.

The Appellant claims that the Department subverted the Act when it delayed access to records for nearly eight months. In determining whether a delay is reasonable, this Office has previously considered the number of the records, the location of the records, and the content of the records. *See, e.g.*, 01-ORD-140; OAG 92-117. Weighing these factors is a fact-intensive inquiry. Some delays are warranted. *See, e.g.*, 12-ORD-228 (finding a six-month delay to review over 200,000 e-mails was reasonable). Some delays are not. *See, e.g.*, 01-ORD-140 (finding that a delay of two weeks to produce three documents was unreasonable). At all times, however, a public agency must substantiate the need for any delay and that it is acting in good faith. *See* KRS 61.880(2)(c) (placing the burden on the public agency to substantiate its actions).[3]

The Department has not met its burden here. On appeal, the Department asserts only that "[t]here is not a keyword search in the system" and that the Appellant's "request was voluminous and required searches through multiple coded entries to find all response documents" to explain why an eight-month delay was necessary. To carry its burden, the Department was required to put forth some evidence to demonstrate why it was unable to locate and process 444 pages of records in less than eight months. How many case files did the Department have to review? Where were they located? How voluminous were the files? The Department's response sheds no light on these questions, and it has failed to provide any specific information to meet its burden under KRS 61.880(2)(c). Thus, the Department subverted the intent of the Act by denying the Appellant's access to the requested records for an unreasonable time.

The Department also violated the Act when it failed to explain how KRS 17.150(2) applied to deny inspection of 15 case files. 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).

Under KRS 17.150(2), "[i]ntelligence and investigative reports maintained by criminal justice agencies are subject to public inspection if

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[3] One way that a public agency can demonstrate its good faith, especially when it claims such a lengthy delay is required, would be to release batches of processed records on an ongoing basis.

prosecution is completed or a determination not to prosecute has been made." 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). But not all law enforcement records are exempt under KRS 17.150(2). Only "intelligence and investigative reports" come within the scope of the exemption. While many categories of law enforcement records are properly considered "intelligence and investigative reports," others are not. *See, e.g.,* 20-ORD-138; 20-ORD-122 (finding that police incident reports are outside the scope of KRS 17.150(2)). When a criminal justice agency relies on KRS 17.150(2) to deny a request to inspect records, "the burden shall be on the custodian to justify the refusal of inspection with specificity." KRS 17.150(3).

Here, the Department partially met its burden by confirming that prosecution has been neither completed nor declined in the 15 cases at issue. However, the Department did not identify the types of records it deemed to be "intelligence and investigative reports." As noted in 20-ORD-138, police incident reports are not "intelligence and investigative reports," and are not exempt from inspection under KRS 17.150(2). Thus, the Department has not established with specificity that all of the records it withheld are within the scope of KRS 17.150(2). *See* KRS 17.150(3).

Likewise, the Department failed to provide the Appellant with a brief explanation as to how KRS 61.878(1)(q) applied to all of the photographs it withheld. KRS 61.878(1)(q) exempts from inspection "photographs or videos that depict the death, killing, rape, or sexual assault of a person." The Department, however, merely quoted this provision without explaining what was depicted in any of the photographs it withheld. The Appellant requested case files relating to drug overdoses during 2019, regardless of whether a death occurred. Therefore, there may or may not be responsive photographs that do *not* depict the death of individuals. By failing to provide any particular or detailed information about the content of the photographs withheld, the Department violated the Act.[4]

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[4] Moreover, KRS 61.878(1)(q) did not exist as an exemption at the time of the Appellant's request. During the 2021 Regular Session, the General Assembly enacted House Bill 273, which amended KRS 61.878(1) to exempt from inspection "photographs or videos that depict the death, killing, rape, or sexual assault of a person. *See* KRS 61.878(1)(q). Given that the Department failed to explain how KRS 61.878(1)(q) applied to these photographs, it is unnecessary to decide whether the Department could delay inspection of records for nearly eight months, and then claim a new exemption applies which did not exist at the time the request was made.

The Department also withheld certain photographs under KRS 61.168(4)(a) because they were taken inside a private residence. A "public agency may elect not to disclose body-worn camera recordings containing video or audio footage that includes the interior of a place of a private residence where there is a reasonable expectation of privacy." KRS 61.168(4)(a) (cleaned up). "Body-worn camera" means "a video or audio electronic recording device that is carried by or worn on the body of a public safety officer. This definition does not include a dashboard mounted camera or recording device used in the course of clandestine investigations." KRS 61.168(1). And "body-worn camera recording" or "recording" means "a video or audio recording, or both, that is made *by a body-worn camera* during the course of a public safety officer's official duties." KRS 61.168(4) (emphasis added). Thus, only video or audio recordings, and not photographs, made using a "body-worn camera," as defined, are exempt from inspection under KRS 61.168(4) when certain other conditions are met.

In its response to the Appellant's request on March 29, 2021, the Department quoted KRS 61.168(4), but improperly included within its quote "photos." The statute as written, however, contains no reference to "photos." KRS 61.168 applies only to video or audio recordings, and only if such recordings are made using a "body-worn camera." Photographs taken by ordinary cameras are not exempt from inspection under KRS 61.168. Therefore, the Department violated the Act when it withheld photographs, as opposed to body-worn camera video or audio recordings, in reliance on KRS 61.168(4).

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/ James M. Herrick

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