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**22-ORD-025**

February 16, 2022

In re: Josh Woods/Louisville Metro Police Department

**Summary:** The Louisville Metro Police Department (“the Department”) violated the Open Records Act (“the Act”) when it failed to provide records in a timely manner and did not properly invoke KRS 61.872(5). The Department’s reliance on KRS 61.878(1)(m) to withhold certain records was misplaced, but the records are nevertheless exempt under KRS 17.150(2).

***Open Records Decision***

In October and November 2021, Josh Woods (“the Appellant”) submitted three requests to the Department to inspect records. Having received no response by January 20, 2022, he initiated this appeal.

Under KRS 61.880(1), upon receiving a request for records under the Act, a public agency “shall determine within five (5) [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 five (5) day period, of its decision.” Here, the Department failed to respond to the Appellant’s requests until months later, after this appeal was initiated. Thus, it violated the Act.

On appeal, the Department provides the Appellant with all records responsive to two of his requests. However, for his third request, the Appellant sought all “situational awareness reports” and “analytical assessments” created by the Department between May 25, 2020 and June 10, 2020. The Appellant specified that the types of reports sought were described in Section 11.8 of the Department’s “Standard Operating Procedures.” The Department

has withheld seven pages of records responsive to the Appellant's request under KRS 61.878(1)(m).

"Public records the disclosure of which would have a reasonable likelihood of threatening the public safety by exposing a vulnerability in preventing, protecting against, mitigating, or responding to a *terrorist act*" are exempt under KRS 61.878(1)(m) (emphasis added). The exemption defines "terrorist act" to mean "a criminal act intended to intimidate or coerce a public agency or all or part of the civilian population; disrupt a system identified in subparagraph 1.f. of this paragraph; or cause massive destruction to a building or facility owned, occupied, leased, or maintained by a public agency." KRS 61.878(1)(m)2. (cleaned up).

KRS 61.878(1)(m) is further limited to exempt only those public records relating to preventing terrorist acts that include "criticality lists resulting from consequence assessments"; "vulnerability assessments"; "antiterrorism protective measures and plans"; "counterterrorism measures and plans"; "security and response needs assessments"; and other records not relevant here. KRS 61.878(1)(m)1. By its express terms, KRS 61.878(1)(m) is a narrow exception that applies to potential "terrorist acts" as defined. Thus, this Office has found that public agencies carry a heavy burden to explain how the exception applies. *See, e.g.*, 09-ORD-100 (finding that an agency failed to carry its burden that the designs of a 300-foot radio antenna were exempt under KRS 61.878(1)(m)). This Office has found that records that merely expose a security vulnerability are not exempt under KRS 61.878(1)(m) in the absence of proof that a "reasonable likelihood" exists that the information could be used to carry out a "terrorist act." *See, e.g.*, 15-ORD-041 (rejecting a law enforcement agency's claim that security footage inside the agency's facility was exempt under KRS 61.878(1)(m) despite its potential to show the camera's "blind spots").

According to the Department's Standard Operating Procedure, the records the Appellant seeks are described as:

Reports that include analytic activities that enable the [Department] to identify and understand trends, causes, and potential indicators of threats to public safety, criminal activity, or terrorism. These reports may also include assessments on First

Amendment protected events or large gatherings that may require a law enforcement presence for public safety.<sup>1</sup>

The reports are used in connection with the Department's policy of using social media for "crime and intelligence analysis, situational awareness reports, criminal intelligence development, and criminal investigations support."<sup>2</sup> On appeal, the Department claims that releasing the withheld records "would expose the [Department's] tactical and intelligence information designed to protect the public from criminal behaviors and prevent the exposure of any potential vulnerabilities."

Under KRS 61.880(2)(c), this Office has reviewed the withheld records. One record, consisting of one page, discusses the need for increased Department situational awareness following a witness's social media post that warned of rumors of planned attacks on police officers during specific protests. The other record, consisting of six pages, provides an observational assessment of tactics used by protestors and those engaging in criminal acts towards the end of major protest events. The report also describes potential suspects of criminal activity, as well as vulnerabilities to law enforcement officers based on tactics used by some individuals. The report makes recommendations to mitigate those vulnerabilities during future protests.

Having reviewed the records, this Office finds that the records are not exempt under KRS 61.878(1)(m) because the release of the information would not lead to a reasonable likelihood of a "terrorist act" as specifically defined. A "terrorist act" is a criminal act intended to "[i]ntimidate or coerce a public agency or all or part of the civilian population." KRS 61.878(1)(m)2.a. Protests, themselves, are not "criminal acts." They are First Amendment protected activities. Although the report discusses criminal acts committed by some towards the end of the protests or after the protests concluded, those criminal acts included vandalism and looting. There is no evidence that the vandalism and looting of private property was "intended" to "[i]ntimidate or coerce a public agency or all or part of the civilian population."<sup>3</sup> According to the report, the motivations of looters appeared to be financial.

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<sup>1</sup> Section 11.8.3, Louisville Metro Police Department Standard Operating Procedures, available at <https://www.louisville-police.org/DocumentCenter/View/615/Standard-Operating-Procedures-PDF> (last accessed Feb. 15, 2022).

<sup>2</sup> *Id.* at § 11.8.1.

<sup>3</sup> One criminal act included in the report was a note that some individuals attempted to start fires in the Louisville Hall of Justice. Thus, of all the criminal acts, the only one that

Although this Office concludes that the reports are not exempt under KRS 61.878(1)(m), because the criminal acts analyzed were not “terrorist acts” within the meaning of the exemption, that does not mean the records are subject to inspection. These records are clearly “intelligence reports.” And 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.” This Office has previously found that the conclusion of a prosecution, or a decision not to prosecute, is a condition precedent to inspection of intelligence reports exempt under KRS 17.150(2). *See, e.g.*, 20-ORD-139. But even if prosecution has concluded, or a decision not to prosecute has been made, records exempt under KRS 17.150(2) can still be withheld if inspection would reveal:

- (a) The name or identity of any confidential informant or information which may lead to the identity of any confidential informant;
- (b) Information of a personal nature, the disclosure of which will not tend to advance a wholesome public interest or a legitimate private interest;
- (c) Information which may endanger the life or physical safety of law enforcement personnel; or
- (d) Information contained in the records to be used in a prospective law enforcement action.

KRS 17.150(2). A public agency relying on KRS 17.150(2) to deny inspection of records must do so with “specificity.” KRS 17.150(3).

Several aspects of these reports could “endanger the life or physical safety of law enforcement personnel.” The reports describe tactics used by more combative individuals present during the protests, and measures law enforcement should take to mitigate those tactics. If the public had knowledge of these tactics and the Department’s plans to mitigate them, then law enforcement could be in physical danger during future similar events. The reports also identify subjects of interest, but it is unclear whether those subjects of interest have ever been charged. Kentucky courts have long recognized that uncharged suspects retain an expectation of privacy in law enforcement records in which they appear. *See Kentucky New Era v. City of Hopkinsville*, 415 S.W.3d 76, 88 (Ky. 2013). The same is true of the witness

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arguably intended to intimidate a public agency was the attempted arson of the Hall of Justice. The report, however, does not reveal vulnerabilities to the Hall of Justice.

who alerted the Department of rumors regarding potential attacks on law enforcement. Those individuals also retain a privacy interest in not being revealed, because they could be subject to reprisal for assisting law enforcement. *Id.*

There is no doubt that these records reveal “vulnerabilities” unique to public protests that could place law enforcement in physical danger. The distinction, however, is that protests are not themselves “criminal acts.” And the criminal acts that were documented in the report were property crimes that were not “intended” to “intimidate” the Department or the public at large. While this finding does not diminish the real injuries caused by such criminal behavior, it is important to note that not all criminal acts are terrorist acts. KRS 17.150(2)(c) exempts records that would place officers in physical danger regardless of whether the threat is a terrorist act or a mere criminal act. The Department thus violated the Act because it failed to carry its burden that KRS 61.878(1)(m) applied to the records withheld. Nevertheless, this Office’s independent review of the records, and the risk to the physical safety of Department personnel, requires a finding that the records are exempt under KRS 17.150(2).

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 within 30 days from the date of this decision. 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. The Attorney General will accept notice of the complaint e-mailed to OAGAppeals@ky.gov.

**Daniel Cameron**  
**Attorney General**

/s/Marc Manley  
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Distributed to:

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