



COMMONWEALTH OF KENTUCKY
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22-ORD-053

March 29, 2022

In re: Sam Aguiar/Louisville Metro Police Department

Summary: The Louisville Metro Police Department (“the Department”) violated the Open Records Act (“the Act”) when it failed to respond to a request for public records within five business days. The Department also violated KRS 61.872(5) by failing to give the earliest date when additional responsive records would be available for inspection. However, the Department substantiated on appeal that it properly withheld cell phone records under KRS 17.150(2) because disclosure would impede a pending investigation by the Federal Bureau of Investigation (“FBI”) by revealing information to be used in a prospective law enforcement action.

Open Records Decision

On February 15, 2022, Sam Aguiar (“Appellant”) requested that the Department provide all documents obtained in response to search warrants issued in February 2020 for cell phone records pertaining to a specific individual. Having received no response by March 1, 2022, the Appellant initiated this appeal.

Under the Act, a public agency has five business days to fulfill a request for public records or deny such a request and explain why. KRS 61.880(1). On appeal, the Department admits that it “inadvertently missed” the Appellant’s request and its response “was unfortunately tardy.” Thus, the Department violated the Act by failing to issue a timely response.

The Department asserts that the records obtained through the search warrants are exempt from disclosure under KRS 17.150(2) because they “are

being used in an ongoing law enforcement investigation by the FBI.” 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.” In 20-ORD-090, this Office ruled 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).

When an agency relies upon 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). The Department asserts that the records pertain to an ongoing investigation by the FBI into the circumstances that led to the death of Ms. Breonna Taylor. The Department has provided correspondence from the FBI acknowledging that, as of March 2, 2022, the FBI is still actively investigating the incident for potential criminal prosecution and is requesting that records in the Department’s investigative files not be released.

In 20-ORD-104, this Office concluded that similar substantiating information provided enough specificity to determine that a prosecutorial decision had not been made. As a result, the Department’s denial of a request for a Professional Integrity Unit investigative file relating to the March 13, 2020, officer-involved shooting was justified under KRS 17.150(2)(d). Likewise, in the present appeal, the Department has established conclusively that a potential federal prosecution remains entirely possible concerning the incident, and that disclosure of the records in dispute would impede the ability of the FBI to investigate the incident by disclosing information to be used in potential prosecutions. As in 20-ORD-104, upon completion of the ongoing investigation or a determination not to prosecute, any records that are responsive to the Appellant’s request will be subject to disclosure unless those records are specifically excluded from application of the Act by another statutory exception.

The Department further states that “there are potentially responsive records in the work email address” of a former Department employee and that the Department “is working with Open Records Department staff to search for these potentially responsive emails.”¹ However, the Department has not stated

¹ It is unclear, from the Department’s statement, whether those records would be duplicative of the records that have been provided to the FBI, or whether the Department intends to withhold those records under a different exception to the Act. Accordingly, the exempt status of those potential records is not ripe for a determination by this Office.

the earliest date upon which these potentially responsive records will be available. “If [a] public record is in active use, in storage or not otherwise available,” a public agency must not only explain the cause for delay but give the “earliest date on which the public record will be available for inspection.” KRS 61.872(5). By failing to give a date by which any further responsive records will be available, the Department 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 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.

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/s/ James M. Herrick

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