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22-ORD-127

June 8, 2022

In re: Jacta E. Alea/Kentucky State Police

Summary: The Kentucky State Police (“KSP”) did not violate the Open Records Act (“the Act”) when it relied on KRS 17.150(2) to deny inspection of audio and video recordings and photographs related to its investigations of pending criminal cases.

Open Records Decision

On February 28, 2022, Jacta E. Alea (“Appellant”) requested that KSP provide laboratory test results, audio and video recordings, statements and complaints, and “Dossiers” pertaining to the investigation of a pending criminal case against the Appellant in Oldham Circuit Court. On March 4, 2022, the Appellant made an identical request for records pertaining to the investigation of a pending criminal case against him in Henry Circuit Court. With the exception of “a copy of the initial KYIBRS report, before the narrative portion begins,” KSP denied both requests under KRS 17.150(2) and KRS 61.878(1)(h) on the grounds that “[p]remature 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.” These consolidated appeals followed.

Subsequent to the filing of these appeals, KSP made most of the requested records available to the Appellant, but redacted personal identifiers such as private addresses, phone numbers, dates of birth, and Social Security numbers under KRS 61.878(1)(a). *See Kentucky New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76 (Ky. 2013). Therefore, the portions of this appeal relating to the records disclosed by KSP are moot. 40 KAR 1:030 § 6. However, KSP has withheld from inspection all audio and video recordings and photographs under KRS 17.150(2) and KRS 61.878(1)(h).

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 records. In 21-ORD-098, this Office explained the difference between these two exemptions. KRS 61.878(1)(h) exempts “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.” 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 “justify the refusal with specificity.” KRS 17.150(3).

Here, KSP is unquestionably a criminal justice agency under KRS 17.150(2). With regard to both cases, KSP asserts that “criminal proceedings have just begun,” and the Appellant does not dispute that the prosecution is not yet completed. Furthermore, the category of “intelligence and investigative reports” is broad enough to include audio and video recordings and photographs. *See, e.g.*, 20-ORD-104; 18-ORD-043; 09-ORD-030. This Office has previously held that an agency may satisfy the requirements of KRS 17.150(3) by giving specific information to explain that prosecution of the criminal matter has not been completed or declined. *See, e.g.*, 21-ORD-259. Here, however, KSP has justified its refusal with further specificity by asserting that withholding the photographs and recordings is necessary to protect the identity of a confidential informant whose life could be endangered by their disclosure.¹ KSP states that it “cannot adequately separate protected material from those records to ensure the safety” of the informant. Accordingly, KSP has met its burden of proof that the withheld records are exempt under KRS 17.150(2). Thus, KSP did not violate the Act when it denied inspection of the photographs and audio and video recordings in these cases.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

¹ KSP additionally asserts that the Commonwealth’s Attorney does not intend to release the audio or video recordings in the discovery process.

² Because KRS 17.150(2) is dispositive of the issues on appeal, it is unnecessary to determine whether the records are exempt under KRS 61.878(1)(h). However, it is clear from the language of that exception that criminal investigative records of law enforcement agencies may be withheld “if the disclosure of the information would harm the agency by revealing the identity of informants not otherwise known.”

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/James M. Herrick
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Distributed to:

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