



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

DANIEL CAMERON
ATTORNEY GENERAL

CAPITOL BUILDING, SUITE 118
700 CAPITAL AVENUE
FRANKFORT, KENTUCKY 40601
(502) 696-5300
FAX: (502) 564-2894

22-ORD-132

June 20, 2022

In re: Marcus Green/Louisville Metro Police Department

Summary: The Louisville Metro Police Department (the “Department”) violated the Open Records Act (“the Act”) when it failed to issue a response to a request within five business days or invoke KRS 61.872(5) to delay access. The Department also violated the Act when it failed to explain how its cited exceptions allowed it to withhold some records and restrict access to other records. However, the Department did not violate the Act when it denied a request for records under KRS 197.025(1) as a security threat.

Open Records Decision

On February 7, 2022, Marcus Green (“Appellant”) submitted a request to the Department for the Department’s “investigations for each death in a Louisville Metro Department of Corrections (LMDC) facility from January 1, 2019 until February 7, 2022.” On the same day, the Department acknowledged receipt of the request. On March 28, the Appellant emailed the Department to ask why the Department had failed to respond to his request. On March 30, the Department replied and stated that it was “still working on this request, [and it] hope[s] to provide [the Appellant] a date records will be available by [close of business] 4/1/22.” On April 11, 2022, having received no further response from the Department, the Appellant initiated this appeal.

On appeal, the Department admits that it did not respond timely to the Appellant’s request. The Department claims that the request was “very time-consuming,” but that it “was able to provide the majority of existing records to [the Appellant] on April 29, 2022.” The Department, however, continued to withhold 8

additional responsive records to review and redact them. The Department stated that these records would be provided to the Appellant by May 4, 2022.

Upon receiving a request to inspect records, a public agency must decide within five business days whether to grant the request, or deny the request and explain why. KRS 61.880(1). A public agency may also delay access to responsive records if such records are “in active use, storage, or not otherwise available.” KRS 61.872(5). A public agency that invokes KRS 61.872(5) to delay access to responsive records must also notify the requester of the earliest date on which the records will be available, and provide a detailed explanation for the cause of the delay. Here, the Department admits that it did not timely respond to the Appellant’s request because the request was “very time-consuming.” However, the Department did not invoke KRS 61.872(5) to delay the Appellant’s access to the requested records. Thus, it violated the Act.

Although the Department eventually provided some responsive records to the Appellant, it did not provide him with all responsive records. Instead, the Department withheld certain surveillance video of the correctional facility because release of those records would “constitute a threat to the security of the inmate, any other inmate, correctional staff, the institution, or any other person pursuant to KRS 197.025(1) . . . Release of the requested video footage is a security threat as it can be viewed by others to assess the technology and/or procedures used by [the Department] and other law enforcement agents in the management of inmates. It may be viewed to develop strategies used to overtake [Department] staff and possibly other law enforcement agents. Further, the footage can be used to study the camera’s range of sight which can be used to smuggle contraband and other strategies to takeover or escape.” Moreover, citing KRS 61.168(5)(d), the Department stated that it would make the body-worn camera footage that the Appellant requested available for inspection, but only at the Department’s premises. Finally, the Department stated that “redactions were made to the provided records pursuant to KRS 61.878(1)(a) to protect personal and private information.” The Department did not describe the “personal and private information” that it was redacting, or explain how that exception applied to the redacted information.

Under KRS 61.880(1), “[a]n agency response denying, in whole or in part, inspection of any record shall include a statement of the specific exception authorizing the withholding of the record and a brief explanation of how the exception applies to the record withheld.” KRS 61.878(1)(a) exempts from inspection “[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.” But here, the

Department merely stated that it had redacted “personal and private information” without describing the information to which it was referring, or explaining how the exception applied.¹ Thus, the Department violated the Act when it failed to explain how KRS 61.878(1)(a) applied to the redactions made to the records it provided.

The Department has also withheld surveillance video of the correctional facility because release of the video would constitute a security threat. Under KRS 197.025(1), “no person shall have access to any records if the disclosure is deemed by the commissioner of the department or his designee to constitute a threat to the security of the inmate, any other inmate, correctional staff, the institution, or any other person.” KRS 197.025(1) is incorporated into the Act under KRS 61.878(1)(l), which prohibits the disclosure of public records “the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly[.]” Historically, this Office has deferred to the judgement of correctional facilities in determining whether the release of information constitutes a security threat under KRS 197.025(1). Specifically, this Office has upheld a detention center’s denial of security camera footage multiple times. *See, e.g.*, 22-ORD-038; 18-ORD-074; 13-ORD-022; 10-ORD-055. The release of security footage poses a security risk because it may disclose the “methods or practices used to obtain the video, the areas of observation and blind spots for the cameras.” *See, e.g.*, 22-ORD-038; 17-ORD-211; 15-ORD-121; 13-ORD-022.

Here, the Department explained that the release of these records could be used to “study the camera’s range of site” or “to develop strategies used to overtake [it’s] staff and possibly other law enforcement agents.” Thus, the Department did not violate the Act by withholding the surveillance video, because it has adequately explained how KRS 197.025(1) applied to the records withheld.

Finally, the Department has authorized the Appellant’s inspection of body-worn camera footage, but only if the Appellant conducts his inspection in-person at the Department’s facility. But the Department has misapplied KRS 61.168.

Under KRS 61.168(2), “the disclosure of body-worn camera recordings shall be governed by the [Act]” unless KRS 61.168 states otherwise. Moreover,

¹ Kentucky courts have found that a public agency may categorically redact information such as addresses, phone numbers, social security numbers, and driver's license information under KRS 61.878(1)(a). *See Kentucky New Era, Inc., v. City of Hopkinsville*, 415 S.W.3d 76, 89 (Ky. 2012). Public agencies may also categorically redact dates of birth from public records under KRS 61.878(1)(a). *See, e.g.*, 18-ORD-022; 16-ORD-120. But the Department did not state that these were the types of “personal and private information” that it was redacting.

[U]nless the request meets the criteria provided under [KRS 61.168(5)], a public agency *may elect* not to disclose bodyworn camera recordings containing video or audio footage that . . . [i]ncludes the areas inside of a correctional facility when disclosure would reveal details of the facility that would jeopardize the safety, security, or wellbeing of those in custody, the staff of the correctional facility, or law enforcement officers.

KRS 61.168(4)(d) (emphasis added). Thus, the Department has discretion whether to allow the Appellant to inspect body-worn camera footage containing the same security concerns as the surveillance video of the facility. However, the Department does not have this discretion when the video is requested “by a person or other entity or the personal representative of a person or entity that is directly involved in the incident contained in the bodyworn camera recording.” KRS 61.168(5)(d). When a person or entity who was directly involved in the incident requests to inspect the body-worn camera footage, the footage “shall be made available by the public agency to the requesting party for viewing on the premises of the public agency, but the public agency shall not be required to make a copy of the recording except as provided in KRS 61.169.”² *Id.*

Here, the Department cites KRS 61.168(5)(d) to claim that the Appellant must view the recording on the Department’s premises. That is incorrect. The Department could have exercised its discretion to completely deny the request under KRS 61.168(4)(d), because there is no evidence in this record that the Appellant was directly involved in the incident. However, the Department did not exercise its discretion in this way, and has stated that the Appellant may inspect the footage. The Department may not rely on KRS 61.168(5)(d) to require the Appellant’s inspection in-person at its facility. Stated another way, an agency’s discretion under KRS 61.168(4) is all or nothing. If the video may be inspected, then it may be inspected like any other record, including by providing copies. But the agency does not have the discretion to deny, outright, a similar request made by a person (or their representative) involved in the incident. In those situations, the agency must allow in-person inspection at the agency’s facility. KRS 61.168(5)(d). Accordingly, once the Department exercised its discretion under KRS 61.168(4) to allow the Appellant’s inspection, it was not allowed to restrict his inspection to the Department’s premises. By restricting the Appellant’s access in this way, the Department violated the Act.

² KRS 61.169 authorizes attorneys representing the individuals depicted in the video to obtain copies, subject to certain restrictions.

In sum, the Department violated the Act when it failed to issue a timely response to the Appellant's request. The Department further violated the Act when it failed to explain how the personal privacy exemption applied to the records that were redacted. The Department violated the Act a third time when it exercised its discretion to allow the Appellant to inspect body-worn camera footage, yet restricted his inspection of such footage to in-person inspection at the Department's facility. However, the Department did not violate the Act when it denied the Appellant's request for surveillance video of the correctional facility.

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court under KRS 61.880(5) and KRS 61.882 within 30 days from the date of this decision. Under 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 emailed to OAGAppeals@ky.gov.

Daniel Cameron
Attorney General

s/Matthew Ray
Matthew Ray
Assistant Attorney General

#127

Distributed to:

Marcus Green
Natalie Johnson
Deandrea Baltimore