



COMMONWEALTH OF KENTUCKY
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22-ORD-205

October 7, 2022

In re: Phillip Hamm/McCracken County Sheriff's Office

Summary: The McCracken County Sheriff's Office ("the Sheriff's Office") violated the Open Records Act ("the Act") when it failed to respond to a request for records within five business days. The Sheriff's Office did not violate the Act when it relied on KRS 17.150(2) to deny inspection of a video recording related to its investigation of a pending criminal case.

Open Records Decision

On July 13, 2022, Phillip Hamm ("Appellant") requested the Sheriff's Office allow him to view a recording of a witness interview in a case involving the Appellant. On September 8, 2022, the County Attorney responded to the request on behalf of the Sheriff's Office and denied the request under KRS 17.150(2) and KRS 61.878(1)(h) because the record "would disclose information . . . to be used in a prospective law enforcement action, including further investigation by investigators, and the review and assessment of the evidence by prosecutors as they prepare the matter for final disposition and/or trial." The Sheriff's Office further asserted that public disclosure of the recording would taint the recollection of witnesses at trial and "would prejudice the interests of the criminal justice system's uniform operation by permitting inspection beyond the scope of which such information may discovered [*sic*] under Kentucky's rules of criminal procedure." This appeal followed.

The Appellant complains that the Sheriff's Office did not issue a timely response to his request. 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.¹ KRS 61.880(1).

¹ This time may be extended if the records are "in active use, in storage or not otherwise available," but the agency must give "a detailed explanation of the cause . . . for further delay and the place, time, and earliest date on which the public record[s] will be available for inspection." KRS 61.872(5).

Here, the Sheriff's Office did not respond to the request within five business days. Therefore, the Sheriff's Office violated the Act.

On appeal, the agency claims that its failure to respond timely to the Appellant's request should be considered "mitigated" based on its subsequent conduct. First, the Sheriff's Office asserts that the Appellant's request "escap[ed the] attention" of the County Attorney, who had recently assumed the responsibility of responding to open records requests on behalf of all county agencies. The Sheriff's Office further claims that the county has since enacted "remedial measures" to ensure compliance with the Act in the future. The Sheriff's Office cites 05-ORD-002, in which this Office found that a police department had failed to issue a timely response to an open records request, but the violation was "mitigated" by corrective action which included counsel advising agency employees of the requirements of the Act. The Sheriff's Office also cites 10-ORD-098, in which an employee of the University of Louisville, who was not the official custodian of records, had issued a denial that failed to state an exception to the Act or explain how it applied. This Office found that "the University mitigated its error" on appeal by immediately issuing a proper response to the request.

However, in these decisions the Office never explained the significance of the term "mitigated." Although a circuit court may consider actions taken by an agency to "mitigate" a potential finding that it *willfully* violated the Act, a finding that could subject it to fines and attorney's fees under KRS 61.882(5), this Office does not determine whether violations are "willful."² All the Office can decide is whether the agency's response violated the Act. KRS 61.880(2)(a). Here, the Sheriff's Office failed to issue a timely response, so it violated KRS 61.880(1). It cannot undo that procedural violation by implementing subsequent remedial measures.

Although the Sheriff's Office committed a procedural violation when its response was untimely, the Sheriff's Office did not substantively violate the Act by withholding the requested records. Under KRS 17.150(2), "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).

² Although the Sheriff's Office asks this Office to find that it has mitigated its violation, the Appellant asks this Office to find the Sheriff's Office intentionally violated the Act. Just as the Office cannot find violations to be "mitigated," it also cannot find such violations to be "willful" or "intentional." Thus, the Office will not find the Sheriff's Office violation to be mitigated or willful. The Office finds only that the Sheriff's Office violated the Act when it failed to issue a timely response to the Appellant's request. KRS 61.880(1).

Here, the Sheriff's Office is unquestionably a criminal justice agency under KRS 17.150(2). The Sheriff's Office asserts that the underlying criminal investigation is ongoing and that the case is still in preparation for trial, 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. *See, e.g.,* 20-ORD-104; 18-ORD-043. 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. 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. Here, the Sheriff's Office has met its burden of proof that the withheld record is exempt under KRS 17.150(2). Thus, the Sheriff's Office did not violate the Act when it denied inspection of the video recording in this case.³

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/James M. Herrick
James M. Herrick
Assistant Attorney General

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Distributed to:

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Sheriff Ryan Norman
Ms. Jana King

³ Because KRS 17.150(2) is dispositive of the issue on appeal, it is unnecessary to determine whether the recording is exempt under KRS 61.878(1)(h).