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22-ORD-206

October 7, 2022

In re: Dennis Bell/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 did not issue a timely response to a request to inspect records. However, the Sheriff's Office did not violate the Act when it withheld records that are related to an ongoing criminal prosecution under KRS 17.150(2), or when it redacted from other police records personally identifying information about suspects under KRS 61.878(1)(a).

Open Records Decision

On August 29, 2022, Dennis Bell ("Appellant") submitted a request containing four subparts to the Sheriff's Office. First, the Appellant requested to inspect a recorded interview of a specific person he claims was conducted on a certain date. Second, he requested all emails and text messages exchanged between a specific deputy and an officer, during a specified period of time, about two individuals. Third, he requested "[a]ll search warrants applied for and/or obtained by" a specific deputy during a specific period of time. Finally, he requested "[a]ll citations resulting in arrest of the offender made by" the same deputy for the same time period. On September 8, 2022, having received no response from the Sheriff's Office, the Appellant initiated this appeal.¹

¹ The Appellant claims that the Sheriff's Office violated KRS 519.060. This Office has historically found that an open records appeal is not the appropriate forum for issues other than alleged violations of the Act. KRS 61.880(2); *see also* 22-ORD-119; 21-ORD-256; 19-ORD-206; 19-ORD-043; 18-ORD-039; 17-ORD-186.

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). On appeal, the Sheriff's Office admits it failed to issue a timely response to the Appellant's request. Thus, it violated the Act.²

After the appeal was initiated, the Sheriff's Office issued a response denying subparts one and two of the Appellant's request under KRS 17.150(2) and KRS 61.878(1)(h). The Sheriff's Office granted subparts three and four of the request, but redacted from responsive records the addresses, dates of birth, and Social Security numbers of suspects under KRS 61.878(1)(a). 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.

The Sheriff's Office relied on KRS 61.878(1)(h) and KRS 17.150(2) to deny the first and second subparts of the request.³ 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). This Office has held that an agency satisfies the requirements of KRS 17.150(3) when it gives specific information to explain that prosecution of the criminal matter has not been completed or declined. *See, e.g.*, 21-ORD-259. Furthermore, the category of "intelligence and investigative reports" is broad enough to include an audio or video recording of an interview. *See, e.g.*, 22-ORD-127; 20-ORD-104.

² On appeal, the Sheriff's Office claims an agency that violates the Act by issuing an untimely response can "mitigate" this violation through "subsequent remedial measures" and "delivery of a substantive response." It cites 05-ORD-002 and 10-ORD-098 as authority for this proposition. However, for the reasons stated in 22-ORD-205, issued contemporaneously with this decision, the Office does not find the Sheriff's Office's violation to be "mitigated."

³ The Sheriff's Office also relied on KRS 62.878(1)(j) to deny inspection of the second subpart of the Appellant's request. However, because the Office finds the Sheriff's Office met its burden under KRS 17.150(2) to withhold these records, it is unnecessary to decide whether it could also withhold the records under KRS 61.878(1)(h) or (j).

Here, the Sheriff's Office is clearly a "law enforcement agency" under KRS 17.150(2). The Sheriff's Office states that there is an open "investigation and on-going prosecution" related to the records requested in subparts one and two. The Sheriff's Office also claims that "witnesses' recollections would be tainted if they learned information regarding the investigation" if recorded interviews relating to this investigation were released. For all the foregoing reasons, the Sheriff's Office has carried its burden on appeal to show that the withheld records are related to an ongoing criminal prosecution and exempt from inspection under KRS 17.150(2). Thus, the Sheriff's Office did not violate the Act when it denied the first and second subparts of Appellant's request under KRS 17.150(2).

Regarding subparts three and four of the request, in which the Appellant sought all search warrants and criminal citations previously issued by a specific deputy during a specific period, the Sheriff's Office provided responsive records but redacted the addresses, dates of birth, and Social Security numbers of suspects under KRS 61.878(1)(a). The Sheriff's Office did not redact the names of the suspects.

KRS 61.878(1)(a) exempts from disclosure "[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." When reviewing an agency's denial of an open records request based on the personal privacy exemption, Kentucky courts and this Office balance the public's right to know what is happening within government against the personal privacy interest at stake in the record. *See Zink v. Commonwealth, Dept. of Workers' Claims*, 902 S.W.2d 825, 828 (Ky. App. 1994). However, under KRS 61.878(4), "[i]f any public record contains material which is not excepted . . . the public agency shall separate the excepted and make the nonexcepted material available for examination."

Some personally identifying information, such as home addresses, telephone numbers, driver's license numbers, and Social Security numbers, may be categorically redacted under KRS 61.878(1)(a). *See Kentucky New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76 (Ky. 2013). Here, the Sheriff's Office redacted only that personally identifying information which the *Kentucky New Era* held may be routinely redacted from public records. Accordingly, the Sheriff's Office did not violate the Act by redacting the addresses, dates of birth, and Social Security numbers of suspects.

In sum, the Sheriff's Office violated the Act when it did not issue a timely response to the Appellant's request. However, the Sheriff's Office did not violate the

Act when it denied inspection of records that are related to an ongoing criminal prosecution under KRS 17.150(2), or when it redacted from certain police records only the addresses, dates of birth, and Social Security numbers of suspects appearing the records under KRS 61.878(1)(a).

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
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s/Matthew Ray
Matthew Ray
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Distributed to:

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