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23-ORD-018

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In re: Joshua Powell/Lexington Police Department

Summary: The Lexington Police Department ("the Department") violated the Open Records Act ("the Act") when its initial response to a request failed to explain how KRS 17.150(2) applied to withhold records. On appeal, the Department has carried its burden of proving that some of the intelligence reports are exempt under KRS 17.150(2) because those reports may be used in a prospective law enforcement action in which no decision has been made regarding future prosecution. However, the Department has not carried its burden of proving that KRS 17.150(2) allowed it to withhold other records.

Open Records Decision

On behalf of his client, Joshua Powell ("the Appellant") submitted a request to the Department seeking copies of emails or correspondence among Department employees in which "the topic of" his client "or [the] trial" of his client "was discussed in any manner." The Department notified the Appellant it did not possess any records related to the "trial" of his client, but it did locate records in which his client was discussed. The Department stated the records would be withheld under KRS 17.150(2)(c) and (d); though it quoted the statutory text, it did not specify how the exemptions applied to the records it withheld. This appeal followed.

KRS 17.150(2) exempts from inspection "intelligence and investigative reports" of "criminal justice agencies," *i.e.*, law enforcement agencies, but only if criminal prosecution has not concluded.[1] If a decision not to prosecute has been made, or if the

[1] The Appellant relies heavily on a recent Court of Appeals decision, *Courier–Journal, Inc. v. Shively Police Dep't*, No. 2021-CA-1120 (Ky. App. Nov. 10, 2022) (not yet final). However, that decision is not

prosecution has concluded, the records may still be exempt from inspection if one of the conditions of KRS 17.150(2)(a)–(d) applies. For example, even if no prosecution occurs, the law enforcement agency may still redact or withhold information that would reveal the identity of a confidential informant. KRS 17.150(2)(a). If a public agency denies inspection of records under KRS 17.150(2), it must explain its denial "with specificity." KRS 17.150(3). This "specificity" requirement requires the public agency to explain that a prosecution is ongoing, or a decision declining prosecution has not been made. Or, if prosecution has been declined and one of the conditions in KRS 17.150(2)(a)–(d) applies, the agency must state with specificity how one of those four conditions permits the agency to continue to deny inspection of the records.

In his request, the Appellant notified the Department that a criminal prosecution of his client had ended in the client's acquittal, and the Department did not dispute that claim in its response. Thus, responsive intelligence and investigative reports could only be withheld if one of the conditions in KRS 17.150(2)(a)–(d) applied. The Department was required under KRS 17.150(3) to specify how one of those exceptions applied to continue to withhold records, but it only parroted the text of KRS 17.150(2)(c) and (d). KRS 17.150(2)(c) allows a law enforcement agency to continue withholding an intelligence report even after prosecution has concluded if disclosure of the report would "endanger the life or physical safety of law enforcement personnel." But the Department did not provide any information about the records specifying how their contents would harm law enforcement.

Moreover, KRS 17.150(2)(d) allows a law enforcement agency to withhold intelligence reports if they will be used in "a prospective law enforcement action" separate from the prosecution that had concluded. But here, the Department did not provide any information about any alleged separate and prospective law enforcement action. Rather, the Department's response, in which it failed to describe the records withheld and merely parroted the text of the exemption on which it relied, was "limited and perfunctory," in violation of the Act. *See Edmondson v. Alig*, 926 S.W.2d 856, 858 (Ky. App. 1996).

On appeal, the Office asked the Department to provide the records it withheld. *See* KRS 61.880(2)(c). Although the Office cannot fully disclose the content of these records, it is helpful to categorize them based on the topics of the purported

yet final and a motion for discretionary review is currently pending before the Supreme Court of Kentucky. *See Shively Police Dep't v. Courier–Journal, Inc.*, No. 2023-SC-0033 (motion for discretionary review filed Jan. 19, 2023). Accordingly, the Court of Appeals' decision does not bind the Office's decision in this case.

"prospective law enforcement actions" for which the Department alleged they will be used.

In one category, the Appellant's client was the subject of a call alleging a domestic disturbance to which Department officers responded. These records indicate the Appellant's client was not arrested in connection with this investigation, and there is no indication from these records that he would be prosecuted in the future for this event. Some of the records are emails containing a report solely about this incident,[2] and other records included this incident among others in what could be described as a list containing summaries of various investigations. As for the records containing a list of summaries of various investigations, all the summaries not related to the Appellant's client are unresponsive to the request and may be redacted. *See* KRS 61.878(4). But the summary pertaining to the domestic disturbance call, and the records that are solely about the domestic disturbance call, are not exempt under KRS 17.150(2). The records themselves indicate the investigation concluded without arrest or a plan to prosecute, and the Department has not specified how these records will be used in a potential law enforcement action against the Appellant's client. Nor is there any indication law enforcement personnel would be endangered if these records were provided to the Appellant. Accordingly, the Department violated the Act by withholding these records.

The other category of records do appear related to a separate "prospective law enforcement action" regarding a vehicle fleeing the scene of an accident. The records indicate that a decision to prosecute that crime has not yet been made. Release of this information could result in the suspect of that crime being notified he or she is a suspect. Moreover, the reports contain information about witnesses' recollection of events. Accordingly, the Department properly withheld these records under KRS 17.150(2)(d).

Finally, the Department withheld one record it describes as "an intra-agency email exchange between detectives summarizing the findings of a review of a specific social media account as part of an ongoing criminal investigation." The Department withheld this record under KRS 17.150(2)(d) "because the premature release could

[2] The Department describes the records that contain information only about this investigation as reports regarding gang activity. The Department claims that release of this information would endanger officer safety. Although the subject line of the email containing the report refers to it as "gang intelligence," the report itself does not contain any information about specific gangs or gang activity. One sentence in the report mentions an "alert" about gang activity without providing specifics. But it does not contain any information that would appear to endanger officer safety. The report appears to be similar to a CAD report, but containing more personally identifying information.

alert persons not yet charged with a crime to the fact that they are considered a suspect in a crime, making it difficult to further the criminal investigation." This record does not appear related to either the domestic disturbance investigation or the investigation regarding the fleeing vehicle. The record contains discussions among law enforcement officials regarding evidence obtained from social media accounts, and the Department claims no prosecutorial decision has been made regarding that investigation. Because this record contains a description of evidence that may be used in a potential law enforcement action in which no prosecutorial decision has been made, the Department properly withheld this record under KRS 17.150(2)(d).

In sum, the Department violated the Act when its "limited and perfunctory" response to the Appellant's request failed to explain how KRS 17.150(2) applied to the records withheld. After reviewing the withheld records, the Office finds the records regarding the investigation of a domestic disturbance cannot be withheld under KRS 17.150(2)(d) because those records on their face indicate no prosecution will occur with respect to that investigation. Moreover, for those records containing a summary of both the domestic disturbance investigation and other investigations, information related to the other investigations must be redacted under KRS 61.878(4) because that information is not responsive to the request and could be related to other prospective law enforcement actions. However, the Department is authorized to withhold the other records under KRS 17.150(2) because those records do indicate a potential law enforcement action and the Department has stated that no prosecutorial decision has been made with respect to those records.

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.

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Distributed to:

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