



COMMONWEALTH OF KENTUCKY
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23-ORD-025

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In re: Joshua Powell/Lexington Police Department

Summary: The Lexington Police Department (“the Department”) did not violate the Open Records Act (“the Act”) when it denied inspection of a video recording of a field sobriety test because KRS 189A.100 requires the video to remain confidential under these facts.

Open Records Decision

On behalf of his client, Joshua Powell (“the Appellant”) submitted a request to the Department to inspect all body-worn camera footage taken during the Department’s response to a specific incident. The Appellant’s client is not the subject of the recordings. However, the Appellant notified the Department that he intended to use the recordings to impeach the person depicted in them if he testifies at his client’s criminal trial, which is unrelated to the events depicted in the requested recordings. In a timely response, the Department denied the Appellant’s request for body-worn footage under KRS 189A.100 because the footage “captures a DUI Investigation.” This appeal followed.¹

KRS 189A.100 establishes the procedure officers are to use when administering field sobriety tests to suspects during investigations of alleged driving under the influence of alcohol. Officers are permitted to record the suspect while administering these tests. KRS 189A.100(2)(a). However, such footage “shall be used for official purposes only.” KRS 189A.100(2)(b)5. The statute provides only three “official purposes” for which the footage may be used: (a) viewing “in court”; (b) viewing “by the prosecution and defense in preparation for a trial”; and (c) viewing

¹ The Appellant also requested emails between named individuals from “8/23/2022 to present.” The Department provided responsive records and redacted portions of the emails under KRS 61.878(1)(a). The Department’s redactions to the emails is not at issue in this appeal, as the Appellant objects only to the Department’s denial of the body-worn footage.

“for purposes of administrative reviews and official administrative proceedings.” *Id.* Otherwise, the recordings shall be considered “confidential records.” *Id.*² The Act exempts from inspection any records that are confidential under state statute. KRS 61.878(1)(l).

When interpreting statutes, Kentucky courts “presume that the General Assembly intended for the statute to be construed as a whole, for all of its parts to have meaning, and for it to harmonize with related statutes.” *Shawnee Telecom Res., Inc. v. Brown*, 354 S.W.3d 542, 551 (Ky. 2011) (internal citations omitted). Although KRS 189A.100(2)(b)5 states that viewing the footage “by the prosecution and defense in preparation for trial” is an official purpose for which the footage may be used, when viewing the statute as a whole, it is clear that “defense” refers to the person arrested on charges of driving under the influence, and “trial” means his or her criminal trial regarding that charge. The statute does not allow some other defendant in an unrelated criminal proceeding to use the video for his defense. KRS 189A.100(2)(b)1–4 provide the procedures for admitting the recording into evidence, and it clearly relates to the rights of the defendant depicted in the recording. For example, the recording must be shown in full “unless the defendant waives the showing of any portions not offered by the prosecution.” KRS 189A.100(2)(b)2. The right to waive the showing of the full recording is held by the person actually depicted in the video and charged with driving under the influence, and the recording would ordinarily be “offered by the prosecution” during the trial on that charge. *See also* KRS 189A.100(2)(b)4 (“*The* defendant or *his* counsel is afforded an opportunity to view the entire recording a reasonable time before *the* trial in order to prepare an adequate defense” (emphasis added)).

Although the Appellant here is defense counsel for a person charged with a crime, he is not defense counsel for the person depicted in the recording. The Appellant admitted that his intent is not to “prepare an adequate defense” for the person charged with driving under the influence and who is the subject of the recording. Rather, the Appellant seeks the recordings for purposes of potential impeachment if the person depicted in the video testifies against his client in an unrelated criminal case.³ The Appellant’s intended use of the video recordings does not come within the exceptions to KRS 189A.100. Therefore, the Department did not violate the Act when it denied inspection of body-worn camera footage depicting the pursuit, stop, or administration of field sobriety tests to a person suspected of driving under the influence.

² The unauthorized release of such video footage is a misdemeanor criminal offense. KRS 189A.100(2)(b)7.

³ This decision concerns only the question whether *the Act* permits access to the video recordings of the field sobriety tests. The Attorney General expresses no opinion concerning whether the Appellant’s client must be provided access to the video recordings under the Kentucky Rules of Criminal Procedure relating to discovery or other law.

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/ Zachary M. Zimmerer
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Distributed to:

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