



COMMONWEALTH OF KENTUCKY
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23-ORD-123

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In re: Stephen Bratcher/Elizabethtown Police Department

Summary: The Elizabethtown Police Department (“the Department”) violated the Open Records Act (“the Act”) when it failed to meet its burden of proof to sustain its denial of a request for records under KRS 17.150.

Open Records Decision

On March 9, 2023, Stephen Bratcher (“Appellant”), an investigator with the Kentucky Department of Public Advocacy (“DPA”), made a request to the Department for copies of all reports, documentation, recordings, and photographs relating to a case involving one of DPA’s clients. In response, the Department stated that, “after speaking with” the Elizabethtown City Attorney, it could not “release any records pertaining to this request pursuant to KRS 17.150” and the Appellant should “seek a discovery [*sic*] for this information.” The Appellant forwarded the Department’s response to the City Attorney and asked him to clarify whether the Department was “denying each specific request due to KRS 17.150.” The Appellant also argued the Department was required to provide the records under KRS 61.878(5), notwithstanding its reliance on KRS 17.150 to deny the request. The City Attorney replied that KRS 61.878(5) is permissive, and therefore, did not change the Department’s disposition. However, he did not address the Appellant’s question about whether the Department was denying every part of his request under KRS 17.150. This appeal followed.

The Appellant argues that, under KRS 61.878(5), he is entitled to obtain copies of records from any public agency because he is an agent of DPA, even if the requested records are exempt from disclosure. KRS 61.878(5) provides that the exemptions under KRS 61.878(1) “shall in no way prohibit or limit the exchange of public records or the sharing of information between public agencies when the exchange is serving

a legitimate governmental need or is necessary in the performance of a legitimate governmental function.”¹ However, this Office has consistently found that disclosure of exempt records under KRS 61.878(5) is within each agency’s discretion. *See, e.g.*, 22-ORD-228; 19-ORD-185; 05-ORD-133; 96-ORD-177. Accordingly, KRS 61.878(5) does not entitle the Appellant to obtain copies of records if they are exempt under the Act.

The question remains, however, whether the requested records are indeed exempt.² Under KRS 17.150(2), “[i]ntelligence 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. However, portions of the records may be withheld from inspection if the inspection would disclose” specific types of information described in subsections (a) through (d). When an agency invokes KRS 17.150(2), “the burden shall be upon the custodian to justify the refusal of inspection with specificity.” KRS 17.150(3).

Here, the Department merely claims the requested records are exempt under KRS 17.150. The Department has provided no information about the status of the prosecution or the types of exempt information purportedly contained in the records, or otherwise described how KRS 17.150 applies to the records withheld. *See* KRS 61.880(1) (an agency denying a request must cite the applicable exception and provide “a brief explanation of how the exception applies to the record withheld”). Thus, the Department has failed to meet its burden of proof to sustain its action. *See* KRS 61.880(2)(c). Accordingly, the Department violated the Act when it denied the Appellant’s request.

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 emailed to OAGAppeals@ky.gov.

¹ The Appellant claims that because the word “shall” is mandatory, KRS 61.878(5) requires a public agency to disclose exempt records to another public agency. But the text in KRS 61.878(5) is “shall in no way prohibit,” not “shall disclose.” The absence of a prohibition is a permission, not a mandate.

² On appeal, the Appellant asserts that KRS 17.150 does not apply to an initial incident report. *See, e.g.*, 20-ORD-122. However, the Department has subsequently agreed to provide that document to the Appellant, albeit in redacted form. The Appellant affirmatively states he is not seeking “unredacted” copies of records and has not objected to any redactions the Department made to the record. Accordingly, that issue is now moot. *See* 40 KAR 1:030 § 6.

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s/ James M. Herrick
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