COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

DANIEL CAMERON
ATTORNEY GENERAL

CAPITOL BUILDING, SUITE 118
700 CAPITAL AVENUE
FRANKFORT, KENTUCKY 40601
(502) 696-5300
FAX: (502) 564-2894

23-ORD-212

August 11, 2023

In re: Michael Bryant/Richmond Police Department

Summary: The Richmond Police Department (the "Department") violated the Open Records Act ("the Act") when it denied a request for a record under KRS 61.878(1)(h) and KRS 17.150 without explaining how those exceptions apply to the records it withheld.

Open Records Decision

Michael Bryant ("Appellant") submitted a request to the Department "for any and all police reports initiated by either the City of Richmond or by [its] City Manager . . . for the month of September 2020." In a timely response, the Department informed the Appellant that it had located one record responsive to his request, but it denied his request because the "case remains open, but inactive" and "it is exempted from inspection by KRS 61.878(1)(h)." The Department also cited 06-ORD-092 in support of its denial. This appeal followed.

Upon receiving a request to inspect public records, a public agency must determine within five business days whether to grant the request or deny it. KRS 61.880(1). If the agency chooses to deny the request, it "shall include a statement of the specific exception authorizing the withholding of the record and a brief explanation of how the exception applies to the record withheld." *Id*. Although KRS 61.880(1) requires the explanation in support of denial to be "brief," the response cannot be "limited and perfunctory." *Edmondson v. Alig*, 926 S.W.2d 856, 858 (Ky. App. 1996). In *Edmondson*, the agency's response to a request stated only that "the information you seek is exempt under KRS 61.878(1)(a)(k)(l) [*sic*]." *Id*. The agency

failed to explain how any of the three exemptions applied to the records withheld, and for that reason, the court held, it violated KRS 61.880(1). *Id*.

KRS 61.878(1)(h) exempts from inspection "[r]ecords 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 or administrative adjudication." Under KRS 61.880(2)(c), a public agency bears the burden of proof in sustaining its action.

In its initial response, the Department stated it located one responsive record, but denied the request under KRS 61.878(1)(h). The Department did not explain how that exception applied to the record it withheld. Rather, the Department stated only that it had referred the investigation to the Attorney General's Office on September 14, 2020, but had not yet received correspondence regarding the status of the investigation.[1] It therefore considers the case to open, but inactive. Although the Department may have described the status of the case, it did not explain how KRS 61.878(1)(h) applied to the record it withheld. Instead, it merely cited the Office's decision in 06-ORD-092. Accordingly, the Department's "limited and perfunctory response" violated the Act. *Edmondson*, 926 S.W.2d at 858.

In 06-ORD-092, the Office held that a law enforcement agency had properly relied upon KRS 61.878(1)(h) to deny a request because the investigation to which the records are related is open and active. However, KRS 61.878(1)(h) requires three elements to sustain the exemption. First, the records must be "records of law enforcement agencies or agencies involved in administrative adjudication." Second, the agency must show the records were "compiled in the process of detecting and investigating statutory or regulatory violations." Finally, the agency must show release of the records "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 or administrative adjudication."

However, since the Office's 2006 decision, the Supreme Court of Kentucky has interpreted KRS 61.878(1)(h) to require more of law enforcement agencies than a mere statement that an investigation is open. In *City of Ft. Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842 (Ky. 2013), the Court held that investigative files of law enforcement agencies are not categorically exempt from disclosure under

[1] The Attorney General's Office has declined to prosecute and has no open file.

KRS 61.878(1)(h). Rather, when a record pertains to a prospective law enforcement action, KRS 61.878(1)(h) "is appropriately invoked only when the agency can articulate a factual basis for applying it, only, that is, when because of the record's content, its release poses a concrete risk of harm to the agency in the prospective action." *Id.* at 851. Thus, in more recent decisions, the Office has required law enforcement agencies relying on KRS 61.878(1)(h) to show that each of the three elements of the exemption applies. *See, e.g.,* 23-ORD-128 n.1; 23-ORD-106; 22-ORD-249.

Here, it is undisputed that the Department is a law enforcement agency under KRS 61.878(1)(h). However, when an agency relies on KRS 61.878(1)(h), it must also show that the record was "compiled in the process of detecting and investing statutory or regulatory violations" and the release of the record will cause harm to the investigation. Here, the Department has not stated whether the record it withheld was "compiled in the process of detecting and investigating statutory or regulatory violations" or explained how the record would harm the investigation if released. Accordingly, the Department has not carried its burden that KRS 61.878(1)(h) applies to the record withheld.

On appeal, the Department alternatively claims the record is also exempt under KRS 17.150(2). Under that exemption, "[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 . . . [i]nformation contained in the records to be used in a prospective law enforcement action." KRS 17.150(2)(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, although the Department claims KRS 17.150(2) permits it to deny the Appellant's request, it does not adequately explain how KRS 17.150(2) applies to the record it withheld. More specifically, because the Department has not described the record it withheld, it has not demonstrated how the record qualifies as an "[i]ntelligence and investigative report" within the meaning of KRS 17.150(2). As a result, the Department violated the Act when it failed to show that KRS 17.150 applies to the record it withheld.

A party aggrieved by this decision may appeal it by initiating an 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
Attorney General

s/ Matthew Ray
Matthew Ray
Assistant Attorney General

#314

Distributed to:

Michael Bryant
Amanda Stasi
Rodney Richardson
Tyler Frazier