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22-ORD-228

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In re: Rachel Gholson/Kentucky State Police

Summary: The Kentucky State Police ("KSP") violated the Open Records Act ("the Act") when it failed to respond to a request to inspect records within five business days. However, KSP did not violate the Act when it withheld from inspection under KRS 17.150(2) intelligence and investigative reports regarding a criminal case in which the prosecution has not concluded.

Open Records Decision

On July 20, 2023, Rachel Gholson[1] ("the Appellant") submitted a request to KSP to inspect the Computer Aided Dispatch ("CAD") report, 911 calls, and all audio and video files related to a specific criminal case. On July 29, 2023, KSP partially denied the request under KRS 17.150(2) because the criminal investigation was ongoing and the prosecution had not yet concluded. However, KSP provided the Appellant a copy of the Kentucky Incident-Based Reporting System ("KYIBRS") report associated with the case. This appeal followed.[2]

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[1] After this appeal was initiated, the Office received several emails from a person who refused to provide his last name, claimed to have filed this appeal, and demanded a decision. When this person finally disclosed his last name, the Office determined he was the *subject* of the records at issue in this appeal, but he had not filed the appeal. Rather, his wife filed this appeal. Moreover, he is not a Kentucky resident because he resides in Florida, according to the record KSP provided the Appellant. *See* KRS 61.870(10). The Office does not discuss any pending Open Records appeal with non-parties to the appeal.

[2] The Appellant also claims KSP failed to respond to her request from March 2023. However, the Appellant did not provide a copy of that request. Therefore, any dispute involving that request is not properly before the Office. *See* KRS 61.880(2)(a) (requiring a person claiming not to have received a response to a request to inspect records to provide the Office a copy of the request and a statement that no response was received).

Upon receiving a request for records under the Act, a public agency "shall determine within five (5) [business] days . . . after the receipt of any such request whether to comply with the request and shall notify in writing the person making the request, within the five (5) day period, of its decision." KRS 61.880(1). In its response, KSP acknowledged receiving the request on July 21, 2023, but the response was dated July 29, 2023, which was a Saturday. On appeal, KSP does not claim the date of its response is inaccurate. Because KSP received the request on July 21, 2023, its response was due five business days later on July 28, 2023. However, KSP issued its response one day late, and therefore, it violated the Act.

Regarding the merits of the Appellant's appeal, there are two so-called "law enforcement exemptions" to the Act. The first, 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." The other exemption states "[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." KRS 17.150(2) (emphasis added). Although it does not appear in the Act itself, KRS 17.150(2) is incorporated by reference under KRS 61.878(1)(l), which exempts from inspection "[p]ublic records or information the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly."

The Office has explained the difference between these two exceptions in numerous decisions.[3] *See, e.g.*, 21-ORD-098; 20-ORD-139; 20-ORD-104. Briefly stated, KRS 17.150(2) applies *only* to "intelligence and investigative reports" of "criminal justice agencies," *i.e.*, law enforcement agencies, and *only* if criminal prosecution has not concluded. *See, e.g.*, 20-ORD-090 (holding the completion of a prosecution or a decision not to prosecute is "a condition precedent to public inspection" of records within the scope of KRS 17.150(2)). If a decision not to prosecute has been made, 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

[3] A recent decision of the Kentucky Court of Appeals has called into doubt the Office's decades-long interpretation of KRS 17.150(2). *See Courier-Journal, Inc. v. Shively Police Dep't*, No. 2021-CA-1120, 2022 WL 16842295 (Ky. App. Nov. 10, 2022) (decision not final). But that decision is not yet final, and thus is not binding on the Office, because the Supreme Court of Kentucky has granted discretionary review in the case. *Shively Police Dep't v. Courier-Journal, Inc.*, No. 2023-SC-0033 (Ky.) (discretionary review granted Aug. 16, 2023). Accordingly, the Office's interpretation of KRS 17.150(2) remains unchanged, unless and until overruled by the Supreme Court.

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.

KRS 61.878(1)(h), on the other hand, applies to a broader category of law enforcement records. First, it is not limited to "intelligence and investigative reports," unlike KRS 17.150(2). Second, it also applies to investigations conducted by administrative agencies in connection with investigating the violations of regulatory provisions. Put another way, all KRS 17.150(2) records are also KRS 61.878(1)(h) records, but not all KRS 61.878(1)(h) records are KRS 17.150(2) records.

If an agency relies on KRS 61.878(1)(h), it must prove the exception applies, which requires the agency to articulate the "harm" that will affect the law enforcement investigation. In *City of Ft. Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842 (Ky. 2013), the Supreme Court of Kentucky held that investigative files of law enforcement agencies are not categorically exempt from disclosure under 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.

The Court did not address the application of KRS 17.150(2) because the subject of the investigation had already been prosecuted to conviction. *See id*. at 846. Notwithstanding the agency's claim that the convicted defendant could still seek post-conviction relief, the Court found the agency had not satisfied its burden under KRS 61.878(1)(h). *Id*. at 852. As explained above, KRS 17.150(2) provides that "[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." The fact that KRS 17.150 only applies before a prosecution has concluded, and that it further does not require a "showing of harm," is a recognition that the premature release of information prior to a criminal trial could damage either the criminal defendant, the Commonwealth, or both. That is because the criminally accused are afforded certain rights that are not available to those

facing administrative discipline. For example, the criminally accused have the right to a fair and impartial jury, and the Commonwealth and the defendant both have an interest in witnesses not having access to evidence that could change their testimony.

Under KRS 17.150(2), the question of "harm" is secondary to the question, "Has the prosecution concluded?" If the prosecution has not concluded, then it is evident that premature release of records into the public sphere may affect the impartiality of potential jurors or provide an opportunity for witnesses to change their testimony. That is why the General Assembly enacted KRS 17.150(2) and limited its application to criminal prosecutions. If the prosecution is over, or a decision not to prosecute has been made, then any concerns about fair and impartial juries or changes to witness testimony are no longer relevant. But the records may also be used in other prospective law enforcement actions unrelated to criminal prosecution, such as an administrative investigation into police misconduct. Therefore, the records may still be exempt under KRS 61.878(1)(h), but to properly invoke this exemption, a public agency must articulate a concrete risk of harm to the investigation that will occur if the records are released. *City of Ft. Thomas*, 406 S.W.3d 842.

Here, KSP claims the criminal case is ongoing and prosecution has not concluded. Indeed, the Appellant admits prosecution is ongoing because the reason she requested these records was to assist her husband in defending himself, *pro se*, from the criminal charges. The Appellant claims KSP's refusal to provide the records violates her husband's constitutional rights, but this is not so. A criminal defendant need not rely on the Act to obtain copies of records exempt under KRS 17.150(2) or KRS 61.878(1)(h) because he or she may obtain any relevant documents in the possession, custody, or control of the Commonwealth through discovery under the Kentucky Rules of Criminal Procedure.[4] *See* RCr 7.24(2); *see also* 22-ORD-059 (noting criminal defendants are entitled to records pertaining to their case through the discovery rules applicable to criminal cases, but not through the Act). Simply put, the Office has already found CAD reports qualify as "intelligence and investigative reports" under KRS 17.150(2), and therefore, are not subject to inspection until the

[4] The Appellant also claims KSP provided these records to others who asked for them, and therefore, KSP must provide them to her. In response, KSP admits it released only the CAD report and 911 audio recordings in response to a request it received a few days earlier. KSP, however, states it released those records in error and it did not release all records related to the case. KSP argues it should not be required to "compound" its original error by continuing to release otherwise exempt records. Given the Appellant's husband has other means to access these records, the Office agrees that KSP is not barred from withholding them under KRS 17.150(2) simply because of its previous error. *See Edmondson v. Alig*, 926 S.W.2d 856, 859 (Ky. App. 1996) (requiring the release of otherwise exempt information as a sanction against a public agency for failure to comply with the procedural requirements of the Act is reversible error).

prosecution concludes or a decision declining prosecution is made. *See, e.g.*, 20-ORD-106; 17-ORD-144; 11-ORD-171. The same is true for recordings of 911 calls, *see, e.g.*, 21-ORD-194; 15-ORD-123, as well as audio and video recordings intended to be used at trial, *see, e.g.*, 20-ORD-104; 07-ORD-095; 04-ORD-234. Such records will remain exempt until the prosecution concludes or a decision not to prosecute is made. Accordingly, KSP did not violate the Act by denying the Appellant's request to inspect these records under KRS 17.150(2).

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.

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s/ Marc Manley
Marc Manley
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Distributed to:

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