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23-ORD-265

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In re: Joseph Bilyk/Richmond Police Department

Summary: The Richmond Police Department ("the Department") did not violate the Open Records Act ("the Act") when it denied inspection of intelligence and investigative reports related to its investigation of a pending criminal case as authorized under KRS 17.150(2), or when it denied inspection of records concerning alleged sexual abuse of a juvenile victim under KRS 61.878(1)(a). However, the Department failed to meet its burden to sustain its decision to withhold the entire incident report rather than providing a redacted version, as required under KRS 61.878(4).

Open Records Decision

On August 24, 2023, Joseph Bilyk ("Appellant") requested "access to all records including police reports, notes, evidence, correspondence, [and] relevant documents, etc. relating to" an investigation into alleged criminal abuse of his daughter by her mother's boyfriend. The Department denied the request under KRS 61.878(1)(a) because of the "substantial privacy interest" in the identities of victims of sexual offenses, and because juvenile victims of crime have a heightened privacy interest. The Department further stated "there is little to no legitimate interest that can be served by the disclosure of a report that has nearly pornographic details of the acts allegedly perpetrated." The Department also denied the request under KRS 61.878(1)(h) "because the investigation to which the records are related is open and active." In an affidavit, the investigating officer stated the requested records constituted "an intelligence and investigative report[,] the status of which is open and ongoing investigation," and "there is [a] pending prosecution and premature release of information while the prosecution remains pending would harm the agency by prematurely releasing information that would be used in a prospective law

enforcement action, such as identities of witnesses, evidence, and summaries of interviews." This appeal followed.

Around the same time the Appellant initiated this appeal, the Department informed him its investigation had been concluded and "[n]o criminal charges were" or would be initiated. Nevertheless, on appeal, the Department asserts it properly denied the request because "at the time the request was received the investigation to which the records are related was open and active."

Under KRS 17.150(2), "intelligence 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."[1] Accordingly, "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). 20-ORD-090. If a law enforcement agency denies access to a record under KRS 17.150(2), it must "justify the refusal with specificity." KRS 17.150(3). The agency may satisfy the requirements of KRS 17.150(3) by giving specific information to explain that prosecution of the criminal matter has not been completed or declined. *See, e.g.,* 21-ORD-259. Here, when the Department denied the Appellant's request, the investigation was ongoing and prosecution had not been declined. Thus, the Department did not violate the Act when, at the time the request was made, it denied inspection of intelligence and investigative reports in this case.

Nevertheless, not all law enforcement records are exempt from disclosure under KRS 17.150(2). Specifically, police incident reports are not "intelligence and investigative reports," and thus are not exempt from inspection under that provision. *See, e.g.,* 21-ORD-136; 20-ORD-138. Accordingly, the Department may not rely on KRS 17.150(2) to withhold the incident report relating to this investigation.

Nor are police incident reports generally exempt from disclosure under KRS 61.878(1)(h), which exempts "[r]ecords of law enforcement agencies . . . 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." *See, e.g.,* 20-ORD-122; 09-ORD-205. Under KRS 61.880(2)(c), the public agency bears the burden of proof to sustain its denial. To meet its burden when relying on KRS 61.878(1)(h), the Department must establish that, "because of the record's content, its release poses a concrete risk of harm to the agency in the prospective action. A concrete risk, by definition, must be something more than a hypothetical or speculative concern." *City of Ft. Thomas v. Cincinnati Enquirer,* 406 S.W.3d 842, 851 (Ky. 2013). Because the Department did not articulate

[1] Although the Department did not expressly cite KRS 17.150(2), its response articulated the necessary elements to make a showing under that provision.

how release of the information contained in the incident report would pose a concrete risk of harm to the agency, it has not met this burden with respect to that document.

However, the Department also invoked KRS 61.878(1)(a), which exempts from disclosure "[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." It is well established that "persons who ha[ve] been sexually victimized" have a substantial privacy interest in "information about which the public would have little or no legitimate interest, but which would be likely to cause serious personal embarrassment." *Lexington–Fayette Urb. Cnty. Gov't v. Lexington Herald–Leader Co.,* 941 S.W.2d 469, 472 (Ky. 1997) (citing *Ky. Bd. of Exam'rs of Psychologists v. Courier–Journal & Louisville Times Co.,* 826 S.W.2d 324 (Ky. 1992)). Further, juvenile victims of crime have a "heightened privacy interest[,] particularly in the context of records pertaining to . . . intensely personal crimes." *Ky. New Era, Inc. v. City of Hopkinsville,* 415 S.W.3d 76, 85 (Ky. 2013). Therefore, the privacy interest of the victim in this case is particularly strong.

"Once a protectable privacy interest is established, proper application of the [Act] requires a 'comparative weighing of the antagonistic interests'—the privacy interest versus the policy of openness for the public good." *Cape Publ'ns v. City of Louisville,* 147 S.W.3d 731, 734 (Ky. App. 2003) (quoting *Ky. Bd. of Exam'rs,* 826 S.W.2d at 327)). "At its most basic level, the purpose of disclosure focuses on the citizens' right to be informed as to what their government is doing." *Zink v. Commonwealth, Dep't of Workers' Claims, Labor Cabinet,* 902 S.W.2d 825, 829 (Ky. App. 1994).[2] The disclosure of police incident reports serves this public interest by allowing the public to "scrutinize the police to ensure they are complying with their statutory duties." *Cape Publ'ns,* 147 S.W.3d at 733 (quotation omitted). Therefore, the public interest in disclosure is not insubstantial.

In cases of sexual offenses committed against juveniles, the Office has consistently affirmed an agency's decision to redact the name and other personally identifiable information of the victim from a police incident report. *See, e.g.,* 08-ORD-146; 05-ORD-259; 96-ORD-115; 93-ORD-42. Here, given the age of the victim and the nature of the alleged crime, the balance similarly weighs in favor of redacting all personal identifiers of the victim. In no case, however, has the Office previously upheld an agency's decision to withhold an incident report in its entirety; nor has the Department presented a specific justification for doing so here. Accordingly, the

[2] The Appellant states he is seeking the records for use "in an emergency hearing in Ohio Court to ensure the safety of the child." Thus, it is not clear from this record whether the Appellant is the legal guardian of the child. Moreover, nothing in the Act would prevent the Appellant from using compulsive legal process as part of the Ohio case, such as by a subpoena, to obtain the requested records from the Department.

Department has not met its burden to sustain its action to entirely withhold the incident report related to this investigation. Therefore, the Department violated the Act when it failed to provide a redacted version of the incident report as required under KRS 61.878(4) ("If any public record contains material which is not excepted under this section, the public agency shall separate the excepted and make the nonexcepted material available for examination.").[3]

A party aggrieved by this decision may appeal it by initiating an 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.

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[3] Because the Office concludes the Department properly relied on KRS 17.150(2) to withhold all but the incident report, it is not necessary at this time to determine whether the remaining records could also be withheld under KRS 61.878(1)(a), especially given the lack of evidence in the record demonstrating that the Appellant has legal custody of the child. Of course, the Appellant may certainly renew his request now that the Department has stated the case is closed and neither law enforcement exception continues to apply. If the Appellant renews his request to the Department and provides proof of custody, and if the Department again denies the request under KRS 61.878(1)(a), the Appellant may initiate a new appeal challenging the Department's disposition of the new request.

Moreover, given the potential for the Appellant to renew his request, the Office will address a couple of other statutory arguments raised by the parties in this appeal. The Appellant cites KRS 620.050(7), which provides, "Nothing in this section shall prohibit a parent or guardian from accessing records for his or her child providing that the parent or guardian is not currently under investigation by a law enforcement agency or the cabinet relating to the abuse or neglect of a child." However, KRS 620.050 concerns the confidentiality of records in the possession of the Cabinet for Health and Family Services or a children's advocacy center, not the records of a police department. *See* KRS 620.050(5); KRS 620.050(6). Therefore, KRS 620.050(7) does not apply to the Department's records.

The Department, in contrast, cites KRS 610.320(3), which states "[a]ll law enforcement and court records regarding children who have not reached their eighteenth birthday shall not be opened to scrutiny by the public," with exceptions including KRS 610.320(4), under which "the law enforcement records shall be made available to the child, family, guardian, or legal representative of the child involved." The Department claims the Appellant has not proven he is entitled to the records under KRS 610.320(4). But KRS 610.320 is also inapplicable here because it applies only to records related to juvenile offenders or children who are the subject of proceedings in juvenile court. *See* 10-ORD-066. Criminal records concerning an *adult* suspect are not confidential under KRS 610.320(3) merely because the victim is a juvenile. *See, e.g.,* 10-ORD-073; 10-ORD-066; 09-ORD-201; 93-ORD-42. Therefore, the Appellant need not show he is entitled to the records under KRS 610.320(4). However, proof of the Appellant's parental rights or relationship to the victim may be needed for him to obtain the records if the Department again invokes KRS 61.878(1)(a).

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Distributed to:

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