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23-ORD-324

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In re: Zachary Kirk/Winchester Police Department

Summary: The Winchester Police Department (“the Department”) violated the Open Records Act (“the Act”) when it denied a request to inspect records without explanation and based on inapplicable statutes. The Department also failed to meet its burden to support withholding the records under KRS 61.878(1)(a) and (h).

Open Records Decision

Zachary Kirk (“Appellant”) submitted a request to the Department seeking the “[w]ritten [r]eport and body camera footage of [the] first responding officer associated with the arrest of” a specific individual on February 8, 2023. In response, the Department stated that the subject of the request “is not a matter of public interest” and cited “KRS 61.884(1)(a)” and KRS 61.168(5)(b) as statutory authority for the 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 denies 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.* An agency response denying a request for records must explain the denial by “provid[ing] particular and detailed information,” not merely a “limited and perfunctory response.” *Edmondson v. Alig*, 926 S.W.2d 856, 858 (Ky. 1996). “The agency’s explanation must be detailed enough to permit [a reviewing] court to assess its claim and the opposing party to challenge it.” *Ky. New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76, 81 (Ky. 2013).

Here, the Department stated that the subject of the request “is not a matter of public interest” and cited KRS 61.884(1)(a)¹ and KRS 61.168(5)(b) as authority. It did not explain how those statutes applied to the records it withheld. Accordingly, the Department’s limited and perfunctory response violated the Act.

On appeal, the Department clarifies that it meant to cite KRS 61.878(1)(a) rather than KRS 61.884(1)(a). KRS 61.878(1)(a) 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.” This exception requires a “comparative weighing of the competitive interests” between personal privacy and the public interest in disclosure. *Ky. Bd. of Exam’rs of Psychologists v. Courier-Journal & Louisville Times Co.*, 826 S.W.2d 324, 327 (Ky. 1992). However, when the public agency fails to articulate a privacy interest, “the balance is decisively in favor of disclosure.” 10-ORD-082; *see also* 20-ORD-033; 19-ORD-227. The burden of proof rests with the public agency to sustain its denial of a request to inspect public records. KRS 61.880(2)(c).

Here, the Department states that individuals with personal identifiable information in the footage “have a privacy interest that outweighs [the Appellant’s] claim of public interest.” But the Department has not explained which individuals possess a privacy interest in the footage, how that privacy interest would be implicated, or what information would be revealed by the release of the footage. Further, the Department does not state that the “written report” requested by the Appellant contains any information that implicates a “privacy interest.” By merely citing KRS 61.878(1)(a) without articulating a significant personal privacy interest at stake, the Department failed to meet its burden to sustain its denial. Thus, the Office finds the Department violated the Act when it denied the request.

The Department also relies on KRS 61.168(5)(b) to justify its denial. However, KRS 61.168(5)(b) is not an exemption to inspection. It is an exception to the discretionary exemption set forth in KRS 61.168(4). Under KRS 61.168(4), a law enforcement agency *may* deny inspection of body camera footage depicting any of 14 enumerated subjects. However, notwithstanding the discretion provided under KRS 61.168(4), if the body-camera footage depicts “an incident which leads to the detention or arrest of an individual” then “the disclosure of the record shall be governed solely by the provisions of KRS 61.870 to 61.884, including all of the

¹ KRS 61.884 states, “Any person shall have access to any public record relating to him or in which he is mentioned by name, upon presentation of appropriate identification, subject to the provisions of KRS 61.878.” As such, the statute contains no subsections and there is no KRS 61.884(1)(a).

exceptions contained therein.” KRS 61.168(5)(b). In other words, if body-camera footage depicts an incident leading to the arrest of a person, then a law enforcement agency must cite an exemption under KRS 61.878(1) to support denial of the footage, not a provision of KRS 61.168. Thus, the Department violated the Act when it cited KRS 61.168(5)(b) to justify its denial of records.

On appeal, the Department claims for the first time that KRS 61.878(1)(h) exempts the requested records because “there is still an active warrant relating to court action” that is relevant to the subject of the request. KRS 61.878(1)(h) 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.” 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). However, the Department’s response did not articulate how release of the information contained in the written report or body camera footage would pose a concrete risk of harm to the agency, and therefore, its response to the Appellant’s request violated KRS 61.880(1).

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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