



COMMONWEALTH OF KENTUCKY
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23-ORD-345

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In re: Kenneth Tracy/City of Frankfort

Summary: The City of Frankfort (“the City”) violated the Open Records Act (“the Act”) when it denied a request for records without explaining how the exception on which it relied applied to the records withheld.

Open Records Decision

On November 10, 2023, Kenneth Tracy (“the Appellant”) submitted a request to the City for records belonging to the Frankfort Police Department. Specifically, he sought a “copy of any and all records available with respect to the complaint and arrest of” an identified individual who had been arrested earlier that day. On November 14, 2023, the City issued a response denying the request under KRS 61.878(1)(h) because “the incident is still an active investigation.” The City advised the Appellant he could obtain the records after the criminal matter had been “adjudicated by the courts.” This appeal followed.

Within five business days of receiving a request for records under the Act, a public agency shall determine whether it will grant or deny the request. *See* KRS 61.880(1). If it denies the request, the public agency must cite an applicable exception and “briefly explain” how it applies to the records withheld. *Id.* Here, the City cited KRS 61.878(1)(h) as the basis for denial, which 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.” The Supreme Court of Kentucky has held that when a public agency relies on KRS 61.878(1)(h) to deny inspection, it must “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.” *City of Ft. Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 851 (Ky. 2013).

On appeal, the City admits its response was deficient because it did not articulate a concrete risk of harm to the law enforcement investigation. In its defense, the City explains the Appellant submitted his request the same day the subject of the request had been arrested and the City had not yet had an opportunity to review the records that had just been created when it received the request on November 13. Accordingly, it could not yet determine whether the release of the records would harm the criminal investigation. Nevertheless, the City had five business days from receipt of the request to obtain the records, review them, and determine whether their release would pose a concrete risk of harm to its investigation. Instead, it issued a “limited and perfunctory” response. *Edmondson v. Alig*, 926 S.W.2d 856, 858 (Ky. App. 1996). Accordingly, the City violated the Act.¹

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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s/ Marc Manley
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Distribution:

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¹ The City continues to “temporarily” withhold some records because it has not yet received word from the prosecutor as to whether their release would harm the investigation. The City must explain to the Appellant, in concrete terms, how release of these remaining records will harm its investigation or provide him with the records forthwith.