COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

RUSSELL COLEMAN
ATTORNEY GENERAL

1024 CAPITAL CENTER DRIVE
SUITE 200
FRANKFORT, KY 40601
(502) 696-5300

24-ORD-033

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In re: Danielle Guminski/Kentucky State Police

Summary: The Kentucky State Police ("KSP") did not violate the Open Records Act ("the Act") when it denied a request for intelligence and investigative reports before prosecution has concluded or a determination declining prosecution has been made.

Open Records Decision

Danielle Guminski ("the Appellant") submitted a request to KSP for all documents, reports, communications, and body-worn camera footage associated with a specific investigation that began in October 2018. In a timely response, KSP denied the request under KRS 61.878(1)(h) and KRS 17.150(2), which is incorporated into the Act by KRS 61.878(1)(l). Although it cited both "law enforcement exceptions," KSP primarily relied on KRS 17.150(2) and several Attorney General decisions explaining that intelligence and investigative reports are not subject to public inspection until a prosecution has concluded or a determination not to prosecute is made. However, KSP provided the Appellant with a copy of the KYIBRS[1] report with the narrative portion and portions containing personally identifiable information redacted. The Appellant then initiated this appeal, claiming KSP's denial was improper and it failed to address her request for video footage.

"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." KRS 17.150(2) (emphasis added). 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; *see also* OAG 90-143 ("investigative files and reports maintained by criminal justice agencies are not subject to public inspection until after prosecution is completed or the investigation has been concluded and a determination has been made not to prosecute

[1] Kentucky Incident Based Reporting System.

the matter").[2] Although the Office has previously found that the first page of a KYIBRS report, which contains only discrete forms of demographic information, is not an exempt "intelligence of investigative report," the "narrative portion" of the same report is properly characterized as an "investigative report" exempt under KRS 17.150(2) because it contains information related to the unique facts of the investigation. *See, e.g.*, 17-ORD-144; 09-ORD-205.

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; 17-ORD-144; 14-ORD-154. However, the Office has also found that a law enforcement agency cannot indefinitely rely on KRS 17.150(2) to deny inspection of cases that have been languishing without any real potential for resolution. In such cases, a *de facto* determination not to prosecute, in essence, has been made. *See, e.g.*, 21-ORD-128 (KSP improperly denied inspection of a 53-year-old cold case).[3]

Here, KSP denied the Appellant's request because the investigation was ongoing and prosecution had not been declined. Moreover, on appeal, KSP explains that it has attempted multiple times to interview the suspect but has been unable to make contact with him or her. KSP states that the premature release of records related to the investigation could assist the suspect in learning key details of the allegations or create an alibi. Although KSP recognizes that five years is not a brief amount of time to investigate the criminal allegation against an identified suspect, KSP states it is still actively investigating the matter and attempting to interview the suspect. Thus, KSP did not violate the Act when it denied inspection of intelligence and investigative reports, or the narrative portion of the KYIBRS report, related to a criminal investigation in which prosecution has not concluded and a determination declining prosecution has not been made.[4]

The Appellant also claims KSP failed to address her request for body-worn camera and dashboard camera footage. However, the Appellant did not originally ask

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[2] While the Office recognizes its decades-long interpretation of KRS 17.150(2) has recently been called into doubt by the Kentucky Court of Appeals, that decision is not yet final and is currently pending review before the Supreme Court of Kentucky. *See Courier-Journal, Inc. v. Shively Police Dep't*, No. 2021-CA-1120, 2022 WL 16842295 (Ky. App. Nov. 10, 2022), *disc. rev. granted*, No. 2023-SC-0033 (Ky. Aug. 16, 2023).

[3] Of course, a long lapse in time does not mean that a future prosecution is legally barred. Indeed, there is no statute of limitation for prosecuting felonies in Kentucky, and such prosecutions "may be commenced at any time." *See* KRS 500.050(1). Rather, in the context of withholding records under the Act, a *de facto* determination not to prosecute only means that the prosecutor has no plans to initiate prosecution for the foreseeable future.

[4] Because KSP properly relied on KRS 17.150(2) to deny inspection of the requested records, it is unnecessary to determine whether it also properly relied on KRS 61.878(1)(h).

for dashboard camera footage. Rather, KSP mentioned dashboard camera footage in its original response, stating that such recordings "fall within the parameters of KRS 17.150(2)." KSP did not, however, address the Appellant's request for body-worn camera footage. Thus, KSP's response was deficient to the extent it did not address the Appellant's request for body-worn camera footage. *See, e.g.*, 21-ORD-090 (finding that a "public agency cannot ignore portions of a request").

But on appeal, KSP now explains that no video footage exists that is responsive to the Appellant's request. KSP did not begin using body-worn cameras until 2023, so there is no body-worn camera footage available. The investigating officer did not have a dashboard camera installed in his vehicle at the time he approached the Appellant's residence in October 2018 to interview her, so there is also no dashboard camera footage. Once a public agency states affirmatively that it does not possess the requested records, the burden shifts to the requester to present a *prima facie* case that the requested records exist. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov't*, 172 S.W.3d 333, 341 (Ky. 2005). If the requester establishes a *prima facie* case that the requested records do or should exist, "then the agency may also be called upon to prove that its search was adequate." *City of Ft. Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 848 n.3 (Ky. 2013) (citing *Bowling*, 172 S.W.3d at 341). To support a claim that the agency possesses responsive records that it did not provide, the Appellant must produce some evidence that calls into doubt the adequacy of the agency's search. *See, e.g.*, 95-ORD-96. Here, however, the Appellant has not made a *prima facie* case that video footage does or should exist. Moreover, even if she had, KSP explains why it does not possess responsive video footage, *i.e.*, the investigating officer did not possess a dashboard camera at the time of the investigation and no KSP officer possessed a body-worn camera at that time. Accordingly, KSP did not violate the Act when it did not provide video footage that does not exist.[5]

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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[5] On appeal, the Appellant also demands KSP provide her with an update regarding the status of the investigation. However, she did not originally ask KSP to provide her with such an update. Even if she had, the Act does not require public agencies to answer questions or provide information. Rather, the Act only requires a public agency to make public records available for inspection. KRS 61.872; *Dep't of Revenue v. Eifler*, 436 S.W.3d 530, 534 (Ky. App. 2013) ("The ORA does not dictate that public agencies must gather and supply information not regularly kept as part of its records."); *see also* 21-ORD-166 (holding an agency does not violate the Act when it denies a request for information).

Russell Coleman
Attorney General

/s/ Marc Manley
Marc Manley
Assistant Attorney General

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Distributed to:

Danielle Guminski
Samantha A. Bevins