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-041**

February 20, 2024

In re: Gabrielle Lehrmann/Louisville Metro Police Department

***Summary:*** The Louisville Metro Police Department ("the Department") violated the Open Records Act ("the Act") when it denied a request to inspect records without explaining how the cited exception applied to the records withheld. However, the Department has corrected its violation on appeal and has properly denied a request for intelligence and investigative reports before prosecution has concluded or a determination declining prosecution has been made.

***Open Records Decision***

Gabrielle Lehrmann ("the Appellant") submitted a request to the Department for all documents, reports, communications, and body-worn camera footage associated with a specific investigation at an apartment complex that began on August 24, 2023. In a timely response, the Department denied the request, stating the records "are part of an open investigation and are not releasable at this time in accordance with KRS 61.878(1)(h): records of law enforcement agencies or agencies involved in administrative adjudication investigating statutory or regulatory 13 [*sic*] violations if disclosure of the records would harm the agency by premature release." The Department further stated the "records may be inspected after enforcement action is completed or a decision is made to take no action, unless they were compiled and maintained by a county of Commonwealth's attorney or unless another exemption applies." 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 chooses to deny 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*. Although KRS 61.880(1) requires the explanation in support of denial to be "brief," the response cannot be "limited and perfunctory." *Edmondson v. Alig*, 926 S.W.2d 856, 858 (Ky. App. 1996). In *Edmondson*, the agency's response to a request stated only that "the

information you seek is exempt under KRS 61.878(1)(a)(k)(l) [*sic*]." *Id*. The agency failed to explain how any of the three cited exemptions applied to the records withheld, and for that reason, the court held, it violated KRS 61.880(1). *Id*.

Here, the Department's initial response merely stated the investigation was "open" and quoted the text of KRS 61.878(1)(h), 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." However, if a law enforcement agency relies on KRS 61.878(1)(h) to deny investigative records, it must articulate, based on the content of the records, how their release will pose a concrete risk of harm to the investigation. *See City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 851 (Ky. 2013). Therefore, the Department's "limited and perfunctory" response, which merely quoted the exception and failed to articulate how release of the records would harm its investigation, did not comply with the Act.

On appeal, the Department now supplements its original response to rely on KRS 17.150(2), the other "law enforcement exception," which is incorporated into the Act by KRS 61.878(1)(l).[1] In 21-ORD-098, the Office explained that KRS 61.878(1)(h) requires a law enforcement agency to provide more details with respect to the harm its investigation will suffer than if it relies on KRS 17.150(2). That is because the latter provision states 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." KRS 17.150(2) (emphasis added). Unlike KRS 61.878(1)(h), KRS 17.150(2) does not explicitly require a showing of harm to the investigation by the premature release of "intelligence and investigative reports." *See* 14-ORD-154. 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

[1] The Department claims it issued its supplemental response on February 7, 2024, the same day notice of this appeal was issued. It is not clear whether the Department supplemented its response before or after receiving notice of this appeal. It further claims its original response "articulate[d] the necessary elements" of KRS 17.150(2) despite not expressly citing that exception. Relying on 23-ORD-265, it argues its original response was not deficient. However, the law enforcement agency's response in 23-ORD-265 expressly stated it was withholding "intelligence and investigative reports" and that the premature release of the records would harm the agency by revealing "identities of witnesses, evidence, and summaries of interviews." The Department's initial response made no reference to intelligence or investigative reports or articulate any type of harm that could follow from the release of the records, and therefore, is not similar to the agency's response at issue in 23-ORD-265.

until after prosecution is completed or the investigation has been concluded and a determination has been made not to prosecute the matter").[2]

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), instead of by showing a concrete risk of harm to its investigation, KRS 61.878(1)(h). 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.

The Department is now denying the Appellant's request under KRS 17.150(2) and has specified that the investigation is ongoing and prosecution had not been declined. The Department has further explained that premature release of the records "could result in tipping off witnesses and potential suspects as to the direction of the criminal investigation/prosecution and impact witness recollection of events." The Department also states the premature release of the records could "taint the jury pool by permitting the 'case' [to] be tried in the court of public opinion rather than in a court with the benefit of procedural and evidentiary rules." Accordingly, it has now justified its denial with the specificity KRS 17.150(3) requires.

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.

**Russell Coleman**
**Attorney General**

/s/ Marc Manley
Marc Manley
Assistant Attorney General

#48

[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).

Distributed to:

Gabrielle Lehrmann
Nicole Pang
Annale Taylor
Megan Metcalf
Jacinta Scruggs