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24-ORD-064

March 15, 2024

In re: Ashley Gruner/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

Ashley Gruner (“the Appellant”) submitted a request to KSP for the entire case file associated with seven investigations across the Commonwealth, many of which were opened decades ago. In a timely response, KSP granted the Appellant’s request with respect to three case files, although it redacted some information that is exempt under KRS 61.878(1)(a) and other exceptions, which the Appellant does not dispute.

However, KSP provided only a copy of the KYIBRS¹ reports associated with the three² other case files and denied the remainder of the records under KRS 61.878(1)(h) and KRS 17.150(2). The three files KSP withheld included the files associated with the murders of police officers in 1971 and 1988, and an arson investigation that began in 1996. KSP explained that these three investigations were still ongoing, and prosecution had not been declined. Specifically, with respect to the 1988 case file, the lead detective had submitted DNA evidence to the KSP crime lab and was waiting on results. KSP also claimed to have “new leads” in the 1971 and 1996 investigations, but had not yet been able to interview those “individuals.” KSP stated the premature release of these records could create “bias in the jury pool from

¹ Kentucky Incident Based Reporting System.

² KSP originally denied the Appellant’s request for the seventh case file because it claimed no responsive records existed. However, on appeal, KSP states the Appellant’s request contained a typographical error associated with the case number, which caused it to conclude no responsive records existed. After the appeal was initiated, KSP located the case file and has provided the responsive records to the Appellant with similar redactions to the three other case files it provided. Accordingly, any dispute regarding case no. 11-87-1975 is now moot. See 40 KAR 1:030 § 6.

which the Grand Jury will be selected if the Commonwealth’s Attorney decides to prosecute this matter.” This appeal followed.³

“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 the matter”).⁴ 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).⁵

Here, KSP denied the Appellant’s request because the investigation was ongoing and prosecution had not been declined. With respect to the 1988 murder investigation, KSP has also provided proof on appeal that the investigation is

³ After the appeal was initiated, KSP provided the Appellant with the case file associated with the 1996 arson investigation. As such, any dispute regarding those records is also moot. *See* 40 KAR 1:030 § 6. Therefore, the only records that remain at issue in this appeal are the case files associated with the murders that occurred in 1971 and 1988.

⁴ 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).

⁵ 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.

currently active. As recently as January 26, 2024, KSP received a complaint alleging two suspects may have committed the murder. One of the suspects “has fingerprints on file” in the FBI database. On February 5, 2024, KSP submitted the suspect’s fingerprints that are on file with the FBI to the KSP crime lab to compare against fingerprint evidence gathered during the case. KSP is also analyzing DNA evidence it “located” in 2004 that did not return any matches at that time. Given that KSP is actively engaged in forensic analysis of evidence in this case, and that a new suspect has been identified but has yet to be interviewed, it has provided enough “specificity” that the investigation is ongoing and a decision whether to prosecute has not been made. Thus, despite the length of time this case has been open, KSP has carried its burden that the requested records are exempt under KRS 17.150(2).

The 1971 murder investigation, however, is a closer call. On appeal, KSP has provided supplemental case reports demonstrating no activity has occurred since December 10, 2021. The other supplemental reports all document actions taken in 2020 in which “nothing of investigative interest was learned.” KSP also provides an affidavit from the lead investigator stating only that he is “pursuing active leads regarding the homicide” and he plans to interview “individuals who may have direct knowledge and perhaps participation in the crime.” Unlike the current status of the 1988 case, in which active forensic analysis is occurring as recently as one month ago and potential suspects have been identified by name, this 53-year-old cold case has continued to languish for the last two years. The lead detective states that a potential suspect has been identified, but his reports from 2020 to 2022 make no mention of a potential suspect. It is not clear from this record how long KSP has been attempting to interview this suspect or what steps it has taken to obtain such an interview.

This situation is similar to that at issue in 21-ORD-128, where the Office determined a *de facto* decision not to prosecute had been made in a 53-year-old cold case. However, in 21-ORD-128, KSP admitted it was highly likely that all but one of the witnesses in the case were deceased. The one surviving witness was not a suspect, but nevertheless, he or she had already been interviewed. Further, KSP had issued press releases stating it needed public assistance with the case. Essentially, the investigation at issue in 21-ORD-128 had exhausted all of its leads and there was no evidence to conclude that a prosecution may be forthcoming. Here, in contrast, KSP states there is still one potential suspect who is alive and needs to be interviewed. Further, it has not yet admitted, through press releases, that it is incapable of moving forward without public assistance. Because one potential suspect remains to be interviewed, and the premature release of information could potentially affect that suspect’s statements, KSP has carried its burden that a decision declining prosecution has not been made and the records are therefore exempt under KRS

17.150(2).⁶ As such, it did not violate the Act when it denied inspection of these case files.

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

#61

Distributed to:

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⁶ 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).