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24-ORD-088

April 1, 2024

In re: Katherine Liles/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

Katherine Liles (“the Appellant”) submitted a request to KSP for the entire case file associated with a murder that occurred on November 13, 1992. In a timely response, KSP denied the request under KRS 61.878(1)(h) and KRS 17.150(2) because the “investigation is still ongoing and contains sensitive information that, if released to the public, would jeopardize the investigation and hinder the conclusion that has been sought for decades.” KSP also stated that premature release of the records could affect witnesses’ recollection of events. This appeal followed.

“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”).¹

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

¹ 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).

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).²

Here, KSP denied the Appellant's request because the investigation was ongoing, and the prosecution had not been declined. On appeal, KSP provides a statement from the lead investigator explaining that law enforcement received new information regarding potential suspects on December 29, 2021. Since then, KSP has again interviewed the victim's son and learned more information about potential witnesses. In June 2022, KSP requested that specific DNA evidence be re-tested by the KSP crime lab. Further, KSP has recorded phone calls of interviews with various individuals. KSP states that multiple potential suspects have been identified and it is still actively attempting to schedule interviews with these individuals. Given that KSP is actively engaged in forensic analysis of evidence in this case, and that several potential suspects have been identified but have yet to be interviewed, KSP 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).

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

² 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.

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Distributed to:

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