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25-ORD-249

September 5, 2025

In re: Beattyville Fire Department/Kentucky State Police

Summary: The Kentucky State Police ("KSP") did not violate the Open Records Act ("the Act") when it properly invoked KRS 61.878(1)(h) to withhold records.

Open Records Decision

On April 21, 2025, Russell H. Davis, on behalf of the Beattyville Fire Department ("the Appellant"), submitted a request seeking "all records, drawings, reports, memorandums, photographs, videos or other writings related to a cause and origin investigation" related to a "fire loss that occurred on September 4, 2022." The Appellant, in his request, identified the address at which the fire occurred and the individual who died in that fire. In a timely response, KSP denied the request under KRS 61.878(1)(h) because disclosure of the records would harm KSP and its investigation by revealing "key pieces of evidence/details that only the suspect would know and making that public could endanger the lives of possible witnesses." KSP also stated that early release of records containing witness statements would "create bias in the jury pool."[1] This Appeal followed.[2]

KRS 61.878(1)(h)[3] exempts from disclosure "[r]ecords of law enforcement agencies or agencies involved in administrative adjudication that were compiled in the process of detecting and investigating statutory or regulatory violations if the

[1] KSP did release a copy of the initial Kentucky Incident-Based Report System (KIBRS) Report, excluding the narrative portion with personal information redacted under KRS 61.878(1)(a). Those redactions have not been challenged in this appeal.

[2] After the appeal was initiated, KSP made certain photographs available to the Appellant. This appeal is moot as to those photographs. 40 KAR 1:030 § 6.

[3] During its 2025 session, the General Assembly enacted House Bill 520, 2025 Ky. Acts ch. 97 ("HB 520"), which amended KRS 61.878(1)(h). The newly amended version of KRS 61.878(1)(h) went into effect on June 27, 2025. Because the Appellant's request was submitted before HB 520 took effect, the former version of the statute is at issue here.

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." KRS 61.878(1)(h). 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 Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 851 (Ky. 2013).

In *Shively Police Department v. Courier Journal, Inc.,* 701 S.W.3d 430 (Ky. 2024), the Supreme Court re-examined KRS 61.878(1)(h) and its proper invocation by law enforcement agencies. The Office has addressed the impact of that decision in 25-ORD-043 and 25-ORD-044.

The *Shively* decision reaffirmed the Court's previous decisions requiring agencies to describe a "risk of harm [that] must be concrete, amounting to 'something more than a hypothetical or speculative concern.'" *Shively*, 701 S.W.3d at 438. In *Shively*, the law enforcement agency described two potential risks of harm: "that the requested records could potentially compromise the recollections of some unnamed or unknown witnesses and that the release of the records might taint a future grand jury proceeding." *Id.* at 439. The Court held that, although those "may, perhaps, be legitimate concerns," the agency had "failed to provide even a 'minimum degree of factual justification,' that would draw a nexus between the *content of the specific records* requested in *this* case and the purported risks of harm associated with their release." *Id.* (quoting *City of Fort Thomas*, 496 S.W.3d at 852) (emphasis added).[4]

The *Shively* decision also "posit[ed] that [KRS 61.878(1)(h)'s] 'harm' requirement is perhaps an even greater burden for law enforcement agencies to bear at the outset of a criminal investigation, when the agency has yet to fully determine what facts, evidence, or records are material to its ongoing or impending law enforcement action." *Id.* Thus, when determining whether an agency has as many facts and details as reasonably possible to support their justification for denial" under KRS 61.878(1)(h), the Office notes that "at the early stage of an investigation," the "harm requirement imposes 'an even greater burden,' [and] the degree of 'facts and details' that is 'reasonably possible' is lesser than it is at later stages of an investigation." 25-ORD-044 (citing *Shively*, 701 S.W.3d at 439).

[4] The Court also noted that these concerns, without additional factual justification, "would seemingly apply universally to any criminal investigation turned felony prosecution." *Shively*, 701 S.W.3d at 439.

Turning to the merits of this appeal, KSP has explained that disclosure of the records would reveal "key pieces of evidence" that contain "details that only the suspect would know." Further, KSP asserts, "making these details public could endanger the lives of possible witnesses if the witnesses' names or statements are released to the public." Thus, KSP explains, disclosure of this information would harm the investigation by "compromising KSP's ability to discern credible evidence from witnesses."

KSP's original reference to bias in a potential jury pool is the type of harm that "would seemingly apply universally to any criminal investigation turned felony prosecution." *Shively*, 701 S.W.3d at 439; *see also* 25-ORD-044. The Office has previously determined that that disclosure of new leads that would lead to the identification of an individual not yet known to the public is a legitimate harm, *see* 25-ORD-177, but here, KSP does not argue that disclosure of the records would reveal new leads. Rather, it explains that disclosure would make public certain information only known by the suspect which would, in turn, harm KSP's ability to "discern credible evidence from witnesses." This disclosure, like that in 25-ORD-177, is a legitimate harm. Thus, KSP has met its burden under KRS 61.8781(h) by explaining how disclosure of the requested records would lead to the described harms. Accordingly, KSP properly invoked KRS 61.878(1)(h) to withhold the requested records, and thus, did not violate the Act.[5]

A party aggrieved by this decision may appeal it by initiating an action in the appropriate circuit court under KRS 61.880(5) and KRS 61.882 within 30 days from the date of this decision. Under 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.

[5] In his appeal, the Appellant asserts he should have received an autopsy report. In response, KSP explains that it does not possess the autopsy report, and it identifies the Office of the State Medical Examiner within the Justice and Public Safety Cabinet as the agency likely to possess those records. *See* KRS 61.872(4).

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