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25-ORD-290

October 2, 2025

In re: Cola Panish/Kentucky State Police

Summary: The Kentucky State Police ("KSP") violated the Open Records Act ("the Act") when its initial response did not comply with KRS 61.880(1). KSP did not violate the Act when it withheld video records under KRS 61.878(h) and (q) and KRS 61.168(4)(g).

Open Records Decision

Cola Panish ("the Appellant") submitted a request seeking any "surveillance videos recording the incident resulting in the death" of a named individual. In response, KSP denied the request as to certain videos under KRS 61.878(1)(q) because they depict "death or serious harm." KSP also withheld certain body-camera footage because it did not capture "the incident" or because it "it contains images of a deceased individual," and thus is exempt under KRS 61.168(4)(g). This appeal followed.

On appeal, KSP explains that responsive video was withheld under either KRS 61.878(1)(q), KRS 61.168(4)(g), or KRS 61.878(1)(h). The Office will address each exemption in turn.

KRS 61.878(1)(q)[1] exempts from inspection "photographs or videos that depict the death, killing, rape, or sexual assault of a person." KSP explains that it withheld video footage that was provided to it by witnesses and depicts the death of the named individual. Thus, KSP did not violate the Act when it withheld video depicting the deceased individual.[2]

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[1] This exemption applies to certain photographs and videos "[e]xcept as provided in KRS 61.168," which relates to "body-worn camera recordings."

[2] Records normally exempt under KRS 61.878(1)(q) "shall be made available by the public agency to the requesting party for viewing" if the requester falls within one of three categories of persons. The Appellant does not claim to qualify under any of those three categories.

Under KRS 61.168(4)(g), "a public agency may elect not to disclose body-worn camera recordings containing video or audio footage that . . . [i]ncludes the body of a deceased individual." Here, KSP explains the requested body-worn camera footage "include[s] the body of a deceased individual."

Notwithstanding KRS 61.168(4)(g), if the footage "[d]epicts an encounter between [*sic*] a public safety officer where there is a use of force, the disclosure of the record shall be governed solely by" the Act. KRS 61.168(5)(a).[3] Here, however, KSP explains that officers wearing body-worn cameras arrived on the scene after the named individual's death, and the footage does not depict the use of force by any KSP trooper. But it does contain "the body of a deceased individual." Accordingly, KSP did not violate the Act when it withheld a body-worn camera recording that contains footage of a deceased body, and which does not fall under any of the exceptions in KRS 61.168(5).

Finally, KSP explains that the rest of the requested footage—"witness-obtained videos that do not include the death" of the named individual—were withheld under KRS 61.878(1)(h).

When a public agency denies a request to inspect records, it must provide "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. KRS 61.880(1). Here, KSP's initial response described certain harms that would result if the footage was released but did not cite KRS 61.878(1)(h) as its basis for denial. Accordingly, KSP's initial response violated KRS 61.880(1).

At its most recent session, the General Assembly enacted House Bill 520, 2025 Ky. Acts ch. 97 ("HB 520"), which made significant changes to KRS 61.878(1)(h). Before addressing those changes, it is helpful consider the previous language of the exemption. Previously, KRS 61.878(1)(h) exempted, in relevant part:

> Records of law enforcement agencies or agencies involved in administrative adjudication that were compiled in the process of detecting and investigating statutory or regulatory violation if the disclosure of the information would harm the agency by revealing the identify of informants not otherwise known or by premature release of information to be used in a prospective law enforcement action or administrative adjudication.

[3] KRS 61.168(5) also provides that body-worn camera footage shall be subject to the Act in three other circumstances. See KRS 61.168(5)(b)–(d). Neither the Appellant nor KSP asserts that any of these three circumstances applies to the footage at issue here.

Interpreting this language, the Supreme Court of Kentucky held that, to invoke the law enforcement exemption, "the agency must show (1) that the records to be withheld were compiled for law enforcement purposes; (2) that a law enforcement action is prospective; and (3) that premature release of the records would harm the agency in some articulable way." C*ity of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 850 (Ky. 2013). Further explaining the third prong, the Court stated that a public agency 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. A concrete risk, by definition, must be something more than a hypothetical or speculative concern." *Id.* at 851.[4]

> Now, after the enactment of HB 520, KRS 61.878(1)(h) exempts:
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> Records 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 disclosure of the information ***could pose an articulable risk of*** [~~would~~] harm ***to*** the agency ***or its investigation*** by revealing the identity of informants ***or witnesses*** not otherwise known or by premature release of information to be used in a prospective law enforcement action or administrative adjudication.

Thus, agencies no longer need to demonstrate that disclosing the information "would" harm result in harm. Rather, they need only show that such disclosure "could pose an articulable risk of harm."[5]

The shift from requiring agencies to demonstrate how the release of information "*would* harm the agency" to now only needing to explain how release of the information "*could* pose an articulable risk of harm to the agency or its investigation" alters the analysis of an agency's effort to satisfy the third prong of KRS 61.878(1)(h).[6] "Would" and "could" have different meanings. To find otherwise

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[4] More recently, in *Shively Police Department v. Courier Journal, Inc.,* 701 S.W.3d 430 (Ky. 2024), the Supreme Court interpreted this third prong to require a law enforcement agency to provide a "minimum degree of factual justification" to "draw a nexus between the content of the specific records" at issue and the agency's "purported risks of harm associated with their release." *Id*. at 439.

[5] Additionally, after HB 520, the subject of the harm allowing disclosure now specifically includes both "the agency" or, alternatively, "its investigation." And the disclosure of unidentified witnesses also is a category of harm authorizing the withholding of records.

[6] Notably, HB 520 does not eliminate the requirement that an agency articulate a harm associated with release of the records. Rather, the inclusion of "articulable risk of harm" in the statute enshrines case law into the statute. *See City of Fort Thomas*, 496 S.W.3d at 850 ("[T]he agency must show . . . that premature release of the records would harm the agency *in some articulable way*."). Thus, an agency that states only that release of responsive records could harm it or its investigation without identifying a relationship between the records and the possible harm has not adequately invoked KRS 61.878(1)(h).

would effectively render a portion of HB 520 meaningless.[7] According to Merriam-Webster's Dictionary,[8] "would" may be used "to express probability or presumption in past or present time.[9] Meanwhile, "could" may be used "to indicate possibility."[10]

Under KRS 61.878(1)(h), the use of "would" in the prior version of the statute suggested a likelihood or probability that release of information "pose[d] a concrete risk of harm to the agency." *City of Fort Thomas*, 496 S.W.3d at 852. Now, the use of "could" in place of "would" suggests that agencies need only articulate a *possibility* that release of information poses a threat of harm to the agency or its investigation.

This change should be viewed in the context of the previous interpretation of KRS 61.878(1)(h). Under the prior version of the statute, the Court required a public agency to articulate a "concrete risk of harm" that "must be something more than a hypothetical or speculative concern." *City of Fort Thomas*, 496 S.W.3d at 852. Under the amended version of the statute, where an agency need only articulate the *possibility* that release of information poses a threat of harm to the agency (or its investigation), the "risk of harm" that must be articulated will look more like "hypothetical or speculative" harms. *See, e.g.,* 06-ORD-265 n.10 (stating that the use of "would" instead of "could" indicated "a more stringent standard").

In summary, after the enactment of HB 520, the general outline of a proper invocation of KRS 61.878(1)(h) is the same. A public agency must still show (1) that the records to be withheld were compiled for law enforcement purposes, (2) that a law enforcement action is prospective, and (3) articulate a harm associated with release of records. *See* C*ity of Fort* Thomas, 406 S.W.3d at 850. However, the law enforcement agency's burden to satisfy the third prong is reduced. Now, a law enforcement agency invoking KRS 61.878(1)(h) to withheld records must explain the *possibility* that either it or its investigation will be harmed by the release of information contained in responsive records.

Turning to the merits of this appeal, KSP explains that the records were compiled as part of its investigation into the named individual's death and a law enforcement action remains a possibility. Regarding the harm to its investigation,

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7 "We presume that the General Assembly intended for the statute to be construed as a whole, *for all of its parts to have meaning*, and for it to harmonize with related statutes." *Shawnee Telecom Res., Inc. v. Brown*, 354 S.W.3d 542, 551 (Ky. 2011) (emphasis added).

8 The Office has previously referred to Merriam-Webster's Dictionary when determining the common meaning of words not defined by the Act. *See, e.g.*, 25-ORD-141; 20-ORD-061; 08-ORD-140.

9 *See* Would, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/would (last accessed Oct. 2, 2025).

10 Merriam-Webster's Dictionary defines "could" as the "past tense of can." *See* Could, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/could (last accessed Oct 2, 2025). The dictionary also states that "can" may be used "to indicate possibility." *See Can*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/can (last accessed Oct. 2, 2025).

KSP explains the release of the video footage would disclose confidential information prior to KSP being able to fully evaluate it as part of its investigation. Further, KSP states that release of the video footage would make it difficult to determine the trustworthiness of witnesses who have yet to be interviewed or identified. Finally, KSP points to the potential release of incomplete or inaccurate information due to its investigation still ongoing. The Office has previously agreed that the release of records from an incomplete investigation presents the risk of disseminating incomplete or inaccurate information to the public, which constitutes a concrete risk of harm to the agency. 25-ORD-188. Here, where KSP's burden has been reduced, the release of such records "could pose an articulable risk of harm" to KSP or its investigation. Accordingly, KSP properly invoked KRS 61.878(1)(h) to withhold and redact the requested records, and thus, did not violate the Act.

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.

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Attorney General

/s/ Zachary M. Zimmerer
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