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25-ORD-327

October 20, 2025

In re: Andre Regard/Lyon County Sheriff's Office

Summary: The Lyon County Sheriff's Office ("the Sheriff's Office") did not violate the Open Records Act ("the Act") when it withheld records the disclosure of which could harm its investigation by premature disclosure of information to be used in a prospective law enforcement action under KRS 61.878(1)(h).

Open Records Decision

Andre Regard ("Appellant") submitted a request to the Lee County Sheriff's Office seeking "reports, pictures, CAD Reports, interviews and recorded statements, written statements, Bodycam and Dashcam recordings, [the] APB sent to you from Marshall County Sheriff, and Communications related" to the APB and the shooting of a named individual. In response, the Sheriff's Office further explained that it was denying the request under KRS 61.878(1)(h) on behalf of the Kentucky State Police ("KSP"), which it identified as the investigating agency that would be harmed by disclosure of the records. The Sheriff's Office explained that the investigation would be harmed by disclosure of the records because: the "case investigation is not completed"; the records would identify a witness known to KSP but who has not yet been interviewed"; "Premature release could cause prejudice and taint a jury pool"; the agencies have not yet obtained a completed "Scale Diagram" or "Medical Examiner's Report" and release of associated "incomplete and unfinished test records . . . would present a risk of disseminating potentially incomplete or inaccurate information to the public"; and "Pretrial publicity is still a concern in this matter." This appeal followed.¹

¹ The Appellant's request is substantively similar to the request which was the subject of 25-ORD-188.

KRS 61.878(1)(h) exempts from disclosure “[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 could pose an articulable risk of 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.” However, this exemption “shall not be used by the custodian of the records to delay or impede the exercise of rights granted by” the Act. *Id.* When a public agency relies on KRS 61.878(1)(h) to deny inspection, it must “articulate a factual basis for applying it,” such that the risk of harm exists “because of the record’s content.” *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 law enforcement agency in *Shively* 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*, 406 S.W.3d at 852).

After the *City of Fort Thomas* and *Shively* cases were decided, the General Assembly amended KRS 61.878(1)(h) in 2025. The previous version of the statute allowed the exemption only when “the disclosure of the information would harm the agency,” rather than when disclosure “could harm the agency or its investigation.” The use of “would” instead of “could” in the previous version indicates “a more stringent standard.” 06-ORD-265 n.10. In *City of Fort Thomas*, the Court held that the prior language of the statute required “a concrete risk of harm to the agency,” as opposed to “a hypothetical or speculative concern.” 406 S.W.3d at 851. “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.” 25-ORD-290.²

² 25-ORD-290 more fully discusses the 2025 amendments to KRS 61.878(1)(h).

Turning to the merits of this appeal, the Sheriff's Office maintains that the release of the requested records would harm KSP's ongoing investigation.³ Specifically, the Sheriff's Office emphasizes that the final "medical examiner's report and a scale diagram" have not been received and release of the requested records would risk "disseminating potentially incomplete or inaccurate information to the public."⁴ 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 the Sheriff's Office's burden has been reduced, the release of such records "could pose an articulable risk of harm" to KSP or its investigation. Accordingly, Sheriff's Office properly invoked KRS 61.878(1)(h) to withhold and redact the requested records, and thus, did not violate the Act.⁵

The Appellant challenges the Sheriff's Office's reliance on KRS 61.878(1)(h) by describing the looming one-year statute of limitations motivating his request for records. According to the Appellant, the Sheriff's Office's denial under KRS 61.878(1)(h) hinders his investigation of a potential case of action. However, access to public records "does not turn on the purpose for which the request is made or the identity of the requester." *Zink v. Commonwealth, Dep't of Workers' Claims*, 902 S.W.2d 825, 828 (Ky. App. 1994); *see also* 17-ORD-056 (upholding the agency's delay of access to records under KRS 61.872(5) despite the appellant's description of a looming statute of limitations). Accordingly, here, the pending statute of limitations does not alter the Office's analysis of KRS 61.878(1)(h).

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

³ "An agency can assert an exemption on the behalf of another agency; however, the agency asserting the exemption on behalf of another agency must still meet the requirements to assert the exemption." 15-ORD-038 (finding that a local agency could invoke KRS 61.878(1)(h) to withhold records that would harm a KSP investigation). The Office notes that KSP did not violate the Act when it denied a similar request under KRS 61.878(1)(h). *See* 25-ORD-319.

⁴ The Sheriff's Office also states that certain witnesses have not been interviewed yet and the record's release could taint their statements.

⁵ The Appellant directs the Office's attention to 25-ORD-043, in which the Office stated that the "risk of harm" described by a law enforcement agency "must be concrete, amounting to 'something more than a hypothetical or speculative concern'" (quoting *Shively*, 701 S.W.3d at 438). However, 25-ORD-043 concerned whether the law enforcement agency had adequately invoked the prior version of KRS 61.878(1)(h). As explained above, KRS 61.878(1)(h) was amended in 2025. Thus, 25-ORD-043 describes a more stringent standard that is longer applicable.

any subsequent proceedings. The Attorney General will accept notice of the complaint emailed to OAGAppeals@ky.gov.

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/s/ Zachary M. Zimmerer
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