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OFFICE OF THE ATTORNEY GENERAL

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25-ORD-401

December 15, 2025

In re: Henry Foster/Kentucky State Police

Summary: The Kentucky State Police (“KSP”) did not violate the Open Records Act (“the Act”) when it withheld records under KRS 61.878(1)(h) that, if disclosed, could harm its investigation through the premature disclosure of information to be used in a prospective law enforcement action.

Open Records Decision

Henry Foster (“Appellant”) submitted a request to KSP seeking all written and video records related to the shooting of an identified individual. In response, KSP denied the request under KRS 61.878(1)(h) and explained that disclosure would harm the agency and its investigation by “creating bias in the jury pool from which the Grand Jury will be selected.” This appeal followed.¹

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).

¹ KSP produced some responsive records with information redacted under KRS 61.878(1)(a). The Appellant has not challenged those redactions.

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 *Shively* was 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

Turning to the merits of this appeal, KSP explains that disclosure would harm its investigation by revealing the identity of witnesses “whose identities remain confidential, which would expose them to danger and harassment.” The Office has found that a law enforcement agency adequately invoked KRS 61.878(1)(h) when it explained that disclosure of requested records would lead to the disclosure of witness identities not previously known to the public and expose them to danger. *See* 25-ORD-333.³ Separately, KSP also explains that disclosing the record would expose ongoing leads and identify witnesses not yet known to the public. The Office has also found such articulations of harm satisfy KRS 61.878(1)(h). *See* 25-ORD-177.

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

³ KSP also states that a relative of the subject of the request called a KSP Post and threatened the life of the KSP officer who shot the subject of the request. There is currently an outstanding arrest warrant for that individual. For this reason, KSP explains, disclosure of records that would identify that officer would harm KSP and its investigation by exposing that officer to harm. The Office agrees.

To rebut KSP's invocation of KRS 61.878(1)(h), the Appellant asserts that KSP's investigation has concluded because a certified death certificate for the subject of the request has been issued and—citing KRS 25-ORD-044—complains that KSP has not articulated “non-speculative” risks of harm. Regarding his first assertion, the Appellant does not explain why the issuance of a death certificate necessitates a finding that KSP's related investigation has concluded. Rather, the Office accepts as true KSP's statement that the records related to a “prospective law enforcement action” both because the related investigation has not concluded and because the Commonwealth's Attorney has not declined prosecution. Second, 25-ORD-044 is a decision interpreting a prior version of KRS 61.878(1)(h). As explained above, KRS 61.878(1)(h) has been amended, meaning 25-ORD-044 is inapplicable to the extent it articulates a different standard.

Thus, the Office finds that the release of the requested 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.

**Russell Coleman
Attorney General**

/s/ Zachary M. Zimmerer
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