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26-ORD-148

April 2, 2026

In re: Daryl Day/Kentucky Department of Fish and Wildlife Resources

Summary: The Kentucky Department of Fish and Wildlife Resources (the Department) violated the Open Records Act (“the Act”) when it initially failed to give a sufficiently detailed explanation of how an exception to the Act applied to the records withheld. However, the Department did not violate the Act when it showed how KRS 61.878(1)(h) applied to the withheld records.

Open Records Decision

Daryl Day (“the Appellant”) submitted a request to the Department seeking “[r]eports, notes, photographs, body worn camera footage[,] and all other tangible items related to an accidental shooting” that occurred in Lincoln County on October 18, 2025. In a timely response, the Department denied the request under KRS 61.878(1)(h), stating that the “matter remains actively under investigation” and disclosure could “prejudice witnesses, reveal investigative strategies, and adversely affect any prospective law-enforcement or prosecutorial action.” This appeal followed.

Upon receiving a request to inspect public records, a public agency must determine within five business days whether to grant the request or deny it. KRS 61.880(1). If the agency chooses to deny the request, it “shall include 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.” *Id.* An agency response denying a request for records must explain the denial by “provid[ing] particular and detailed information,” not merely a “limited and perfunctory response.” *Edmondson v. Alig*, 926 S.W.2d 856, 858 (Ky. 1996). “The agency’s explanation must be detailed enough to permit [a reviewing] court to assess its claim and the opposing party to challenge it.” *Ky. New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76, 81 (Ky. 2013).

Here, the Department denied the Appellant's request under KRS 61.878(1)(h), which 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 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 or administrative adjudication." In *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 852 (Ky. 2013), the Supreme Court of Kentucky rejected the argument "that the mere fact that a law enforcement action remains prospective is enough to establish that disclosure of anything from a law enforcement file constitutes 'harm' under the exemption." Instead, the agency must "identif[y] the particular kinds of records it holds and explain[] how the release of each assertedly exempt category would harm the agency in a prospective law enforcement action." *Id.* at 851. Here, however, the Department denied the request without identifying the types of records responsive to the request and without explaining the risk of harm associated with each specific category. Thus, the Department's initial response violated the Act.

On appeal, however, the Department has supplemented its response. First, it explains that responsive records include: (1) "incident, narrative, CAD, [and] medical" reports; (2) "[p]hotographs of the victim, scene, physical evidence, and other investigative observations"; and (3) "[r]ecordings compiled in the investigation of this matter."

The Department has also more fully explained the harms that could result from disclosure of the requested records. First, disclosure of the reports "could reveal witness accounts, officer observations, investigative timelines, evidentiary assessments, and the development of the case in a manner that could influence witnesses or compromise the recollections of unidentified witnesses that might ultimately testify." Second, disclosure of the photographs "could reveal sensitive evidentiary details, the condition and location of physical evidence, and the visual documentation of the scene in a way that could shape or contaminate witness testimony, affect the recollection of persons later interviewed, or expose details relevant to charging decision that remain under review." Third, disclosure of the video recordings "could reveal the conditions and location of physical evidence, the layout and documentation of the scene, and other investigative details compiled in the course of the investigation." Disclosure of the video recording could also "prejudice witness testimony, influence recollections, and disclose evidentiary details and investigative information relevant to the pending prosecutorial review."

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.

Turning to the merits of the Department’s response on appeal, the Department has explained that disclosure would prejudice witness testimony and reveal details of evidence not currently known to the public. 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 expose ongoing leads not yet known to the public. *See* 25-ORD-177. Similarly, the Office has found that a KRS 61.878(1)(h) was adequately invoked when it explained that disclosure could prejudice the memories of potential witnesses. *See* 26-ORD-097. Accordingly, the Department has 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 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
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/s/ Zachary M. Zimmerer
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Distributed to:

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