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26-ORD-153

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In re: Tara Bassett/Lawrenceburg Police Department

Summary: The Lawrenceburg Police Department (“the Department”) violated the Open Records Act (“the Act”) when it failed to provide a “specific exception” authorizing it to withhold requested records or any “explanation” of how any exception applies to the records it withheld. On appeal, the Department has not adequately invoked KRS 61.878(1)(h) to withhold the requested records.

Open Records Decision

Tara Bassett (“Appellant”) submitted a request to the Department for “any documents photos, videos, including details of charges against [two specific people] for recent arrests for animal cruelty and child welfare offenses.” In response, the Department denied the request, stating it is “premature in nature and [it] will not be able to proceed with your request.” The Department said the Appellant could resubmit her request “after the case is adjudicated through the courts.” This appeal followed.

If an agency denies a request to inspect records, its written response must “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.” KRS 61.880(1). Although the explanation in support of denial may be “brief,” it cannot be “limited and perfunctory.” *Edmondson v. Alig*, 926 S.W.2d 856, 858 (Ky. App. 1996). In *Edmondson*, the agency’s response to a request merely stated that “the information you seek is exempt under KRS 61.878(1)(a)(k)(l) [sic].” *Id.* The agency failed to explain how any of the exemptions applied to the records withheld, and for that reason, the court held, it violated KRS 61.880(1). *Id.*

Here, the Department's response did not provide a "specific exception" which authorized it to withholding the requested records or any "explanation of how the exception applies to the record withheld" as required by KRS 61.880(1). Thus, the Department's response violated the Act.

On appeal, the Department explains that the records are exempt under KRS 61.878(1)(h). That statute 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."

The Supreme Court of Kentucky has 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." *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 852 (Ky. 2013) 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. Moreover, 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).

On appeal, the Department states only that "this case is being actively investigated" and "[t]here are more witness interviews currently being conducted and other evidence being collected which could lead to more criminal charges being filed." Thus, the Department argues the records are exempt "under KRS 61.878(1)(h)," because "they contain law enforcement records currently under investigation." The Department has failed to describe the harm that could result from the requested records being released or how that disclosure could cause those harms. Instead, the Department has only explained that the investigation is ongoing. But that bare

assertion is insufficient to invoke KRS 61.878(1)(h). *See City of Fort Thomas*, 406 S.W.3d at 852. Accordingly, the Department has not adequately invoked KRS 61.878(1)(h) to withhold the requested records.

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
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/s/ Matthew Ray
Matthew Ray
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#194

Distributed to:

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