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26-ORD-159

April 9, 2026

In re: Scott Crosbie/Lexington Police Department

Summary: The Lexington Police Department ("the Department") violated the Open Records Act ("the Act") when it failed to meet its self-imposed deadline under KRS 61.878(5). The Department did not violate the Act when it withheld records under KRS 61.878(1)(h), (i), and (j). The Department did not violate the Act when it did not produce records that were not prepared, owned, used, in the possession of, or retained by the Department. And the Department did not violate the Act when it did not produce additional records in response to a "deficiency notice."

Open Records Decision

On October 27, 2025, Scott Crosbie ("the Appellant") submitted a 16-part request to the Department, including five general categories of records. Those categories include: (1) "personnel and employment records relating" to the Appellant's client; (2) "records concerning any 'investigative inquiry'"; (3) "records related to external and oversight agencies"; (4) Department "policies and procedures"; and (5) "additional records." In response, on November 3, 2025, the Department stated that, "due to the volume of requested records and the fact that the records are not centrally located," the Appellant's "request will be completed by Wednesday, November 12, 2025." On November 12, 2025, using the same reasoning, the Department said it would need until November 19, 2025, to respond to the request. The Department then issued its final response, granting the request in part and denying it in part, on November 14, 2025.

In its final response, in relevant part, the Department redacted a law enforcement officer's name, and withheld that officer's "memo, audio interview, and transcript" under KRS 61.878(1)(h), explaining that the administrative investigation into that officer would be harmed because release of the officer's identity or the identified documents would taint the "involved parties' or witness's recollection of events." The Department also withheld the complaint and related documents regarding the unnamed officer under KRS 61.878(1)(i) and (j), explaining that those

records remain preliminary while the investigation associated with that complaint is ongoing. Finally, the Department did not provide text messages located on its officer's personal devices, explaining that those texts are not public records as defined by KRS 61.870(2).

Subsequently, on December 15, 2025, the Appellant sent the Department a "Deficiency Notice," which took issue with the Department's cited exemptions and identified 12 categories of records he believed should have been produced in response to the October 27 request. The Department responded by informing the Appellant that it considered his request "closed" and advising him how he could submit a new request for additional records. This appeal followed.

On appeal, the Appellant alleges that the Department violated the Act by: (1) failing to timely respond to his request; (2) withholding records under KRS 61.878(1)(h), (i), and (j); (3) maintaining that text messages on its officer's personal devices are not public records; and (4) not producing additional records upon receipt of his December 15 deficiency notice. The Office will address each claim in turn.

Under KRS 61.880(1), a public agency has five business days to fulfill or deny a request for public records. This period may be extended if the records are "in active use, in storage or not otherwise available," but the agency must give "a detailed explanation of the cause . . . for further delay and the place, time, and earliest date on which the public record[s] will be available for inspection." KRS 61.872(5). Under KRS 61.880(4), a person may petition the Attorney General to review an agency's action if the "person feels the intent of [the Act] is being subverted by an agency short of denial of inspection, including but not limited to . . . delay past the five (5) day period described in [KRS 61.880(1) or] excessive extensions of time."

Here, the Department's initial response did not grant or deny the Appellant's request. Instead, the Department stated that it needed seven additional business days to respond. However, although the Department stated the records would be available for inspection on November 12, it did not make any records available until November 14. The Office has found that a public agency does not comply with KRS 61.872(5) when it notifies the requester of the earliest date on which requested records would be available but then misses its self-imposed deadline. *See, e.g.*, 25-ORD-086; 23-ORD-079; 21-ORD-011. Here, the Department extended its response deadline and then missed that deadline. Therefore, the Department subverted the intent of the Act by delay and excessive extensions of time, within the meaning of KRS 61.880(4), when it failed to make a final disposition of the Appellant's request by the date on which it said the records would be made available.

Next, the Department maintains that it correctly withheld the unnamed officer's "memo, audio interview, and transcript" under KRS 61.878(1)(h). KRS 61.878(1)(h) 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." 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 *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.[1]

In its original response, the Department explained that disclosure of the identified records would harm its ongoing administrative investigation by disclosing "intimate details" not known to the public and, therefore, "tainting involved parties' or witness's recollection of events" and preventing "a fair and impartial investigation"

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

into the matter. The Office has previously found that such an articulation of harm is sufficient to invoke KRS 61.878(1)(h). *See* 25-ORD-319.

To rebut the Department's invocation of KRS 61.878(1)(h), the Appellant asserts that the requested records "relate" to his client and must be disclosed. Under KRS 61.878(3), "[n]o exemption in this section shall be construed to deny, abridge, or impede the right of a public agency employee, including university employees, an applicant for employment, or an eligible on a register to inspect and to copy any record including preliminary and other supporting documentation that relates to him or her." However, "a public agency employee . . . shall not have the right to inspect or to copy any examination or any documents relating to ongoing criminal or *administrative investigations* by an agency." *Id.* (emphasis added).

Here, the Department has explained that the withheld records relate to an ongoing administrative investigation into an unnamed officer. As such, even if those records do relate to the Appellant's client, KRS 61.878(3) does not give him a right of access to those records. Accordingly, the Department properly invoked KRS 61.878(1)(h) to withhold the requested records, and thus, did not violate the Act.

The Appellant also challenges the Department's reliance on KRS 61.878(1)(i) and (j) to withhold records associated with the complaint that serves as the basis of the administrative investigation. KRS 61.878(1)(j) exempts from inspection "[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended." KRS 61.878(1)(i) exempts from inspection "[p]reliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency."

Kentucky courts have long held that complaints giving rise to a formal investigation of a public employee may be withheld from inspection under KRS 61.878(1)(i) and (j), but only until the investigation is completed and final action is taken. *See Ky. Bd. of Med. Licensure v. Courier–Journal & Louisville Times Co.*, 663 S.W.2d 953, 956 (Ky. App. 1983) (holding that "once final action is taken by the [agency], the initial complaints must be subject to public scrutiny"); *Palmer v. Driggers*, 60 S.W.3d 591, 595–97 (Ky. App. 2001) (holding that an employee's resignation before the agency's investigation concluded constituted "final action" such that the initiating complaint lost its preliminary status). Here, the Department explains that it has withheld the original complaint and associated records related to an ongoing administrative investigation. Because that investigation is ongoing, the Department properly relied on KRS 61.878(1)(i) and (j) to withhold the specified records.

Regarding text messages on its employees' devices, the Department explains that it produced one screenshot of a text message that was in its possession prior to receiving the Appellant's request and that it does not possess any other responsive text messages.[2] Once a public agency states affirmatively that no responsive records exist, the burden shifts to the requester to make a *prima facie* case that the records do exist. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov't,* 172 S.W.3d 333, 341 (Ky. 2005). If the requester makes a *prima facie* case that the records do or should exist, "then the agency may also be called upon to prove that its search was adequate." *City of Fort Thomas,* 406 S.W.3d at 848 n.3 (citing *Bowling,* 172 S.W.3d at 341). A requester must provide some evidence to make a *prima facie* case that requested records exist, such as the existence of a statute or regulation requiring the creation of the requested record or other factual support for the existence of the records. *See, e.g.*, 21-ORD-177; 11-ORD-074. A requester's bare assertion that certain records should exist is insufficient to make a *prima facie* case that the records actually do exist. *See, e.g.*, 22-ORD-040. Moreover, a public agency "is responsible only for those records within its own custody or control." *City of Fort Thomas,* 406 S.W.3d at 856 (citing *Kissinger v. Reporters Comm. for Freedom of the Press,* 445 U.S. 136 (1980)). Here, the Appellant has not made a *prima facie* case that any responsive records exist on devices in the Department's possession, custody, or control.

On appeal, the Appellant argues that the Department must undertake a search of its employees' personal devices for additional responsive text messages. "Public records," as defined by the Act, are records "prepared, owned, used, in the possession of or retained *by a public agency*." KRS 61.870(2) (emphasis added). However, the Department's employees are not public agencies. *See* 24-ORD-118 (finding that "mere employees of a public agency," who were not "appointed by the Governor or confirmed by the Senate" but were "hired by the [state agency]," were not state government officers for purposes of the Act); *see also* 23-ORD-349. Here, similarly, the Appellant has not established that the police officers in question are "local government officer[s]" who are a "public agenc[ies]" in their own right. *See* 26-ORD-069 (noting that "in the context of incompatibility analysis, the Office has found that not every law enforcement officer is a 'state officer.'"). As such, the Department's officers' text messages are not public records by virtue of being in their possession.

The Appellant next argues that the Department has "used" its officers' text messages, thus making them public records. He cites a Department policy authorizing officers to submit an "incident notification" either "via text or verbal" and provides the Office with the transcript of a deposition taken of a Department officer. There, the deponent describes occasions where text messages have been used for Department business. Thus, the Appellant maintains that the Department has used

[2] This portion of the Appellant's request sought "text messages . . . referencing" the Appellant's client or "investigative inquiries" sent between "supervisory personnel," the Department's "Public Integrity Unit," or personnel involved in any "investigative inquiry."

the text messages on its employees' personal devices and must therefore search those devices for additional responsive records. Although this policy[3] may show that there are text messages that have been "used" by the Department for the purpose of submitting an "incident notification," the Appellant did not specifically request those types of records. Therefore, the Appellant has not made a *prima facie* case that there are any text messages responsive to the present request and "used" by the Department.[4]

Finally, the Appellant complains that the Department did not produce additional records in response to his December 15 "Deficiency Notice" describing records he believed should have been produced in response to his original request. In response to that notice, the Department advised that the Appellant could submit a new request to its records custodian. The Appellant now complains that the Department's instruction to submit another request imposed a condition not required by the Act.

If a requester believes that a public agency's response to his or her request violated the Act, he or she may petition the Office to review the public agency's response, *see* KRS 61.880(2)(a), or may seek circuit court review of the alleged violation of the Act, *see* KRS 61.882. The Act does not authorize a requester to submit a "deficiency notice" to the public agency or provide that such a notice requires any action by the agency. Because the Act imposed no obligation on the Department related to the Appellant's "deficiency notice," its response to that notice could 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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[3] Because the policy provides that incident notification can occur either via text *or verbally*, it does not necessarily follow that there must be a text message documenting an incident notification.

[4] On appeal, the Department stated that there were certain text messages "that begat the investigation leading to this appeal," which "are not public records." Pursuant to KRS 61.880(2)(c), the Office asked the Department to further explain this contention. Subsequently, the Department explained that the specific text messages that led to the subject investigation were part of the investigatory record, are public records, and were provided to the Appellant.

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Distributed to:

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