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26-ORD-448

October 6, 2026

In re: Melissa Davis Jones/City of London

Summary: The City of London ("the City") initially violated the Open Records Act ("Act") by failing to cite the applicable statutory exception and explain how it applied to records being withheld, as KRS 61.880(1) requires. However, the City remedied these deficiencies on appeal by citing KRS 61.878(1)(h) and explaining how disclosure of the records would harm an ongoing criminal investigation. The City did not violate the Act by denying the request for those records that are not within its possession, custody, or control.

Open Records Decision

On July 24, 2026, ("the Appellant") submitted a request to the City for copies of the following records: (1) "[c]amera Server Logs showing any outages or when London City Hall cameras off [*sic*] and every person who accessed it"; (2) "[v]ideo footage from [the] [C]ity [H]all basement hallway and lobby [on] July 23[, 2026,] from [4:00 p.m.] until 12:00 [a.m.]"; (3) "[n]ames and dates of appointment of each and every member of the London . . . Ethics Board and their terms"; (4) "[t]he reason [that the] London[,]Ky[.] City [H]all was closed on Friday[, July 24, 2026,] and any proof that any notice of the closure was provided to the public"; (5) "any communication, including text messages or emails between the [C]ity [C]lerk, the current [M]ayor, [the City Attorney], and [C]ity employees about the office closure [on July 24, 2026]"; and (6) "[a]ny text or email [messages] that show if the London City Council members were made aware of [C]ity [H]all being closed on [July 24, 2026,] or information [showing] that they were not made aware."

On July 29, 2026, the City denied parts 1 and 2 of the request by stating, "Investigative Records," without further comment or explanation. Regarding part 3, the City advised it had posted a draft of the Order by the Mayor appointing the members of the Ethics Board and listing a term for each of the members on its website, a copy of which it attached. The City also denied parts 4 to 6 of the request by stating, "No documents exist." This appeal followed.

On appeal, the Appellant does not challenge the City's disposition of part 3, but asks the Office to review the City's response to parts 1 and 2 of the request, which "does not identify any statutory exception under KRS 61.878, nor does it explain how any particular exception applies to the requested records." Likewise, the Appellant requests that the Office "determine whether the City's bare statement that 'No documents exist' adequately establishes that a reasonable search for responsive public records was conducted" regarding parts 4 to 6 of the request. As discussed below, the Office finds that the City's initial response failed to comply with KRS 61.880(1) but affirms the City's ultimate disposition of the Appellant's request.

Under KRS 61.880(1), a public agency must determine within five business days whether to grant a request for public records or deny it and notify the requester, in writing, of its decision. When a public agency denies a request under the Act, 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). Its response cannot be merely "limited and perfunctory." *Edmondson v. Alig*, 926 S.W.2d 856, 858 (Ky. 1996); KRS 61.880(2)(c). In other words, "[t]he 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). However, a public agency is not "obliged in all cases to justify non-disclosure on a line-by-line or document-by-document basis." *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 851 (Ky. 2013).

Here, the City responded within five business days of receiving the Appellant's request but did not initially cite any of the statutory exceptions codified in KRS 61.878(1). Nor did it provide any explanation of how the relevant exception, KRS 61.878(1)(h), applies to surveillance video(s) it withheld on that basis. The City stated only, "Investigative Records," in denying parts 1 and 2 of the Appellant's request, implicitly relying on KRS 61.878(1)(h). This perfunctory response failed to comply with KRS 61.880(1) and, thus, violated the Act.

Upon receiving notification of this appeal from the Office, the City Attorney responded on behalf of the City.[1] In defending its reliance on KRS 61.878(1)(h) to

[1] Citing KRS 61.872(2)(a), the City first states that, "absent an affirmative representation that Ms. Davis-Jones was a resident of the Commonwealth under KRS 61.870(10)(a) to (f), there was no legal obligation to respond whatsoever." But KRS 61.872(2)(a) does not relieve a public agency of its existing duty to comply with KRS 61.880(1) by responding within five business days, even if that response only denies the request based on the requester's failure to provide a statement of residency. Because the City did not deny the Appellant's request based on her failure to provide a statement of residency, as KRS 61.872(2) permits a public agency to require, further discussion is unwarranted.

deny parts 1 and 2 of the request, the City explains that the requested surveillance video(s):

> corresponds with a law enforcement matter that involved an enforcement/investigation matter conducted by certain members of the City of London Police Department, certain members of the Kentucky State Police ["KSP"], and certain members of the Federal Bureau of Investigation ["FBI"]. The video in question depicts law enforcement activities at City Hall in relation to an open investigation by these agencies.
>
> The video in question contains details of those activities, and the City and its Police Department, which has possession of the video in question and is a cooperating agency in this investigation. The release may compromise the investigation because it involves the disclosure of both agent identities, as well as contains information about what specifically was being investigated and where within City [H]all law enforcement was undertaking their activities, and that it poses the risks of tainting witness testimony, creates difficulty in locating cooperating witnesses for fear of retaliation and privacy concerns of the cooperating parties, and poses the risk of harm to assessing the validity of new information. Further, release poses particular risks to the investigation as it may tip off the subjects of this investigation and potentially cause the destruction of evidence by those persons.

In summary, the City states that the London Police Department is a law enforcement agency, "and the records were compiled in the course of detecting or investigating violations of the law – that is the entire purpose of the security footage. Finally, the issue is whether there is a risk of harm – not actual harm, in light of the release at issue. And that burden has also been met."[2] The Office agrees that the City has now met its burden of citing the applicable statutory exception, KRS 61.878(1)(h), and providing the required explanation of how it applies.

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

[2] The City addresses not only the Appellant's July 24, 2026, request (26-337), but also the Appellant's July 29, 2026, request (26-376), which implicates the requested surveillance video(s); however, the Appellant did not challenge the City's disposition of her July 29 request in this appeal, nor did she provide the Office with a copy of the City's response to it. Accordingly, an appeal is not perfected as to her July 29 request, and the Office does not have jurisdiction to review the City's disposition of it under KRS 61.880(2)(a).

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 a request for investigation records, 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*, 406 S.W.3d at 851.

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 what is required for law enforcement agencies to successfully invoke that exception. 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, however, the General Assembly amended KRS 61.878(1)(h) in 2025. The previous version of KRS 61.878(1)(h) allowed this exception only when "the disclosure of the information would harm the agency," as opposed to 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 KRS 61.878(1)(h) 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.[3] Accordingly, the agency invoking KRS 61.878(1)(h) must only explain the *possibility* that disclosure of the information contained in the responsive records could harm it or the related investigation. The City has done this on appeal here.

To justify the invocation of KRS 61.878(1)(h) here, the City confirmed that the requested video relates to an ongoing criminal investigation by the London Police

[3] 25-ORD-290 more fully discusses the amendments to KRS 61.878(1)(h).

Department, KSP, and the FBI, and has identified four potential harms associated with disclosure of the video while that investigation remains active: (1) revealing "case details known only to those directly involved"; (2) "tainting witness testimony"; (3) impeding the City's ability to locate cooperating witnesses due to a fear of retaliation and concerns for the privacy interests of those individuals; and (4) interfering with the City's ability to assess the validity of newly discovered information. The Office has previously recognized that a public agency satisfied its burden of proof relative to KRS 61.878(1)(h) by explaining that premature disclosure of the records in dispute could expose leads in the investigation not yet known to the public, 25-ORD-177, create a risk of witness retaliation, 25-ORD-044, or could "could compromise the recollections of witnesses or cause potential jurors to develop preconceived opinions," 25-ORD-300. Accordingly, the Office finds that the City has adequately demonstrated the harm that could result from premature disclosure of the surveillance video(s) in dispute as necessary to justify its denial under KRS 61.878(1)(h).

The remaining question is whether the City erred in denying the Appellant's request as to nonexistent records (identified in parts 4 to 6).[4] Notwithstanding the City's cursory initial response to parts 4 to 6 of the Appellant's request, on appeal the City states affirmatively that it does not possess any "proof" that public notice of City Hall's closure on July 24, 2026, was provided or exists. Regarding part 5, the City again states that it does not possess any responsive "communications, including text messages and emails" between the specified officials or City employees, but clarifies that would not, "of course, preclude phone conversations or in person conversations" regarding the closure, which are not documented in a public record. Likewise, the City does not possess any text messages or emails reflecting that members of City Council were notified of the closure, but it states the nonexistence of documents would not preclude verbal conversations, and "if no records exist, no records exist." In summary, the City argues that the Appellant has not made a *prima facie* case that documentary proof responsive to part 4 exists, nor has the Appellant done so regarding written communications responsive to parts 5 and 6. The Office agrees.

Once a public agency states affirmatively that a record does not exist, the burden shifts to the requester to make a *prima facie* case that the requested record exists. *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 record does or should exist, then the public agency "may also be called upon to prove that its search was adequate." *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 848 n.3 (Ky. 2013) (citing *Bowling*, 172 S.W.3d at 341). However, a requester's bare assertion that

[4] On appeal, the City does not address part 1 of the request—asking for "Camera Server Logs"—directly. The City also denied part 1 by merely stating, "Investigative Records," just as it did regarding part 2, and it responds to parts 1 and 2 jointly on appeal. Accordingly, the Office notes that its analysis of KRS 61.880(1) and KRS 61.878(1)(h) is equally controlling as to part 1 of the Appellant's request.

a public agency must possess the requested record is not adequate to make a *prima facie* case that the agency does, in fact, possess the record. *See*, e.g., 22-ORD-040. Rather, to make a *prima facie* case that the agency does or should possess the requested record, the requester must provide a statute, regulation, or factual support for that contention. *See, e.g.*, 21-ORD-177; 11-ORD-074. Here, the Appellant has not made a *prima facie* case that the City possesses any records responsive to parts 4 to 6 of the request and, therefore, did not violate the Act in denying those parts of the request.

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/ Michelle D. Harrison
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Distributed to:

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