20-ORD-002

January 10, 2020

In re: Kathleen McIntosh/Kentucky State Police

Summary: The Kentucky State Police ("KSP") did not violate the Open Records Act ("the Act") in denying a request for all reports and uniform citations pertaining to a specified case in which KSP has not declined prosecution, because it ultimately provided a specific reason to justify its denial as to any existing reports pursuant to KRS 17.150(2)(d), incorporated into the Open Records Act by operation of KRS 61.878(1)(l). KSP cannot provide the requester with nonexistent citations and ultimately satisfied its burden per KRS 61.880(2)(c) of justifying the denial as to uniform citations based on the nonexistence of such records.

Open Records Decision

The question presented in this appeal is whether KSP violated the Act in denying Kathleen McIntosh's ("Appellant") November 14, 2019, request for "any and all copies of [KSP] report number 13-19-0678 and any uniform citations issued for the same report." By letter dated November 25, 2019, the Official Custodian of Records responded on behalf of KSP. She asserted that such records are "part of an investigation that is still open; accordingly, your request is denied pursuant to KRS 17.150(2)(d) and 61.878(1)(h), (l)." KSP further stated that "[p]remature release of any records related to an ongoing investigation in a public forum could result in prejudice to the witnesses and may adversely affect their recollection of the events." Citing prior decisions by this Office, including 17-ORD-121, Appellant initiated this appeal by letter dated December 4, 2019.

KSP responded and first reiterated its position that any responsive documents "are part of an open investigation, as prosecution has not been declined or completed." However, KSP enclosed a copy of the "initial KYIBRS[1] report, before the narrative portion begins[.]"[2] KSP identified Trooper Joshua Collett as the investigating officer and confirmed that "he is still actively investigating the case as he is awaiting receipt of relevant lab results. Due to the case being actively investigated, prosecution has not been declined and any of the requested records may become evidence in a criminal trial." KSP argued that release of the records in dispute "would also harm the investigation by tipping off potential witnesses or defendants that may be unaware they are a subject of the investigation by revealing information that may influence their statements or testimony." With regard to any uniform citations, KSP denied the request "as there are no responsive records in KSP's possession." Citing a number of prior decisions by this Office, KSP maintained that a public agency cannot provide a requester with nonexistent records.

In support of its denial, KSP provided the December 20, 2019, affidavit of Trooper Collett. He reiterated that "[r]elease of any records at this time related to case 13-19-0678 could result in prejudice to witnesses and result in bias to a potential jury pool." Trooper Collett further attested that, as of that date, KSP had not issued any citations relating to Case No. 13-19-0678.

On appeal, KSP argued that "contacting the investigating officer satisfies the standard [to make a good faith effort] required as a search of that type can reasonably be expected" to enable KSP to identify and locate any existing responsive documents. Relying on *Bowling v. Lexington-Fayette Urban Cty. Gov't*,

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[1] Kentucky Incident Based Reporting System.

[2] "'[P]olice incident reports, as opposed to investigative files, are not generally exempt from disclosure.'" 16-ORD-199, p.3; *see also* 04-ORD-188; 08-ORD-105; 09-ORD-205; 16-ORD-085. Moreover, existing legal authority validates the agency's redaction of personal information such as date of birth, social security number, telephone number, etc. regarding private citizens on the basis of KRS 61.878(1)(a). *See Ky. New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76, 88-89 (Ky. 2013) (rejecting the practice of "blanket denials" of requests made per KRS 61.880(1), but affirming the policy of "categorical redaction" per KRS 61.878(1)(a) of private citizens' personal information, including victims, witnesses, and uncharged suspects, in addition to names of juveniles, from law enforcement records).

172 S.W.3d 333, 341 (Ky. 2005), and prior decisions by this Office, KSP noted this Office has consistently affirmed public agency denials of requests based upon the nonexistence of responsive public records in the absence of a *prima facie* showing that certain records existed in the possession of the agency. Consistent with existing legal authority construing KRS 17.150, incorporated into the Act by operation of KRS 61.878(1)(l), this Office affirms KSP's denial of the request.

Unless exempted by other provisions of the Act, public records "shall be open after enforcement action is completed or a decision is made to take no action." KRS 61.878(1)(h). Similarly, KRS 17.150(2) provides that "[i]ntelligence and investigative reports maintained by criminal justice agencies are subject to public inspection if prosecution is completed or a determination not to prosecute has been made."[3] In comparing these two statutory provisions, the Attorney General has observed that "[i]nvestigative reports are nearly always withheld from public inspection to protect sources of information and techniques of investigations and also to prevent premature disclosure of the contents to the targets of investigation, which could thwart law enforcement efforts." OAG 83-123, p. 2 (citing *Privacy: Personal Data and the Law,* National Association of Attorneys General (1976)). This Office later determined that the term "investigative report" is "broad enough to extend to laboratory, forensic, and other reports generated in the course of an investigation." 05-ORD-246, p. 2; 07-ORD-095; 09-ORD-030; 19-ORD-025. When viewed jointly, these provisions mean that only those investigative files "pertaining to a named suspect after that suspect has been prosecuted or a decision has been made not to prosecute him" are subject to public inspection. 04-ORD-041, p. 4 (citation omitted). Neither has occurred here.

In 14-ORD-154, a decision dispositive of this appeal, this Office was asked to determine whether the Lakeside Park-Crestview Hills Police Authority violated the Act in denying an attorney's request for investigative records pertaining to his client in the context of a motion to set aside a conviction. The Attorney General found that denial was appropriate under KRS 17.150, reasoning as follows:

[3] However, KRS 17.150(2) also provides that "portions of the records may be withheld from inspection if the inspection would disclose" certain categories of information.

> While evidence of a prospective action is insufficient to demonstrate harm under the *Ft. Thomas* case, that case did not address KRS 17.150. Rather, *Ft. Thomas* addressed the explicit showing of harm requirement in KRS 61.878(l). As KRS 17.150 does not include such a showing of harm, the canon of statutory interpretation known as the plain meaning rule requires the statute be read without a harm element. [Internal citation omitted.] Accordingly, KRS 17.150 does not require the agency to demonstrate a showing of harm. It merely requires the agency to provide a specific reason for withholding the records. KRS 17.150, therefore, makes the records at issue exempt from disclosure until there is no prospective law enforcement action, so long as the agency specifies what that action is or could be.

14-ORD-154, pp. 4-5. The Attorney General also explained, "[w]hen a demand for the inspection of the records is refused by the custodian of the records, the burden shall be upon the custodian to justify the refusal of inspection with specificity." 14-ORD-154, p. 3. Moreover, the exemptions codified at KRS 17.150(2) "shall not be used by the custodian of records to delay or impede the exercise of rights granted by this section." KRS 17.150(3).

Likewise, in 14-ORD-228, at p. 4, this Office determined that KSP properly withheld responsive investigative records where it specified that the records were part of "an active, open investigation," and that "prosecution has not been declined." *See* 15-ORD-077; 16-ORD-087; 16-ORD-246; 18-ORD-035. KSP has stated as much in this case. Because KSP's denial pursuant to KRS 17.150(2)(d) was appropriate, this Office makes no finding relative to KRS 61.878(1)(h). Here, as in 14-ORD-223, "the records in question may become evidence in a criminal trial." *Id.*, p. 3; 15-ORD-105. Thus, KSP provided "a 'specific reason' for withholding the records, and [its final response] was therefore sufficient under ... KRS 17.150[.]" 16-ORD-199, p. 5; 16-ORD-244; 16-ORD-275; 18-ORD-035. Accordingly, this appeal presents no basis to depart from the foregoing line of authority. This Office affirms the denial by KSP. *See* 17-ORD-144.

This Office also affirms KSP's denial of "any uniform citations" connected to the KYBRIS report. KSP cannot produce nonexistent citations, nor is the agency expected to "prove a negative" in order to refute a claim that certain

records exist under the rule announced in *Bowling v. Lexington-Fayette Urban Cnty Gov't*, 172 S.W.3d 333 (Ky. 2005). *See* 11-ORD-037 (denial of request for nonexistent records upheld in the "absence of any facts or law importing the records' existence"); 11-ORD-091. *But see, Eplion v. Burchett*, 354 S.W.3d 598, 604 (Ky. App. 2011) (declaring that "when it is determined that an agency's records do not exist, the person requesting the records is entitled to a written explanation for their nonexistence"); 11-ORD-074 (recognizing that the "existence of a statute, regulation, or case law directing the creation of the requested record creates a presumption of the record's existence, but this presumption is rebuttable").

Although the intent of the Act has been statutorily linked to the intent of KRS Chapter 171, pertaining to management of public records,[4] the Act only regulates access to records that are "prepared, owned, used, in the possession of or retained by a public agency." KRS 61.870(2). In other words, the Act only applies to records that already exist, and which are in the possession or control of the public agency to which the request is directed. *See* 97-ORD-17 (evaluations not in University's custody because written evaluations were not required by regulations of the University); 00-ORD-120; 17-ORD-036. When, as in this case, a public agency denies that any responsive documents exist in the agency's possession or control, and the record on appeal supports that position, further inquiry is not warranted absent objective proof to the contrary. 05-ORD-065, pp. 8-9; 17-ORD-215; 18-ORD-057. A public agency's response violates KRS 61.880(1), when it fails to advise the requesting party whether the records exist, but a public agency discharges its duty under the Act when it affirmatively indicates that certain records do not exist, and explains why, as KSP ultimately did here. 04-ORD-205, p. 4; 12-ORD-056; 11-ORD-122; 18-ORD-057. In the absence of any legal authority requiring KSP to create or maintain the requested citations, or any objective proof to refute its position that no such records were created, the Attorney General affirms the denial by KSP in this regard as well.

Finally, this Office notes that KRS 17.150(3) does not permit a public agency to withhold investigation files permanently. Although KSP cannot postpone access to the records in dispute indefinitely by characterizing the investigation as open or active, it has adequately substantiated that

[4] *See* KRS 61.8715.

characterization here. However, upon completion of the investigation or a determination not to prosecute, any investigative records that are responsive to Appellant's request will be subject to disclosure unless those records are specifically excluded from application of the Act by another statutory exception.

Either party may appeal this decision by initiating action in the appropriate circuit court per KRS 61.880(5) and KRS 61.882. 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 proceeding.

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