



COMMONWEALTH OF KENTUCKY
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20-ORD-065

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In re: James Harrison/Kentucky State Police

Summary: The Kentucky State Police (“KSP”) violated the Act in failing to timely respond to a request for records submitted under the Open Records Act (“the Act”). However, KSP did not violate the Act in denying the request.

Open Records Decision

On March 10, 2020, James Harrison (“Appellant”) requested to inspect “any documentation associated with the seizure and custodian [sic] records relating to approximately one thousand three hundred and thirty-seven (\$1,337) confiscated from [a certain individual] on or about January 25, 2019 by [KSP] Officer J. Neace[.]” Having received no response, Appellant initiated this appeal on March 25, 2020. On appeal, KSP advised that its records custodian mailed a response to Appellant on March 25, 2020, along with a redacted copy of the responsive Kentucky Incident Based Reporting System (“KYIBRS”) Report. In that response, KSP advised:

[These records are] part of an investigation that is still open, and prosecution has not been declined; accordingly, your request is denied pursuant to KRS 17.150(2) and 61.878(1)(h), which exempt law enforcement records from disclosure until such time as prosecution is declined or completed. Premature 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. However, a copy of the KYIBRS report, before the narrative portion begins . . . is subject to disclosure regardless of the status of the investigation pursuant to [09-ORD-205]. Therefore, a copy of that report is enclosed.

On appeal, KSP also stated that release of the remaining investigative records in dispute would “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. Further, public disclosure could also result in bias to a potential jury pool.” However, KSP did not offer any explanation for the apparent delay in processing Appellant’s March 10 request; nor did KSP deny receiving the request prior to this appeal.

Under KRS 61.880(1), a public agency “shall determine within three (3) [business] days . . . after the receipt of any such request whether to comply with the request and shall notify in writing the person making the request, within the three (3) day period of its decision.” KRS 61.880(2)(c) places the burden of proof on the public agency to sustain its action. Here, KSP has not claimed that it received the request late nor has it provided any explanation or proof as to why it did not issue a response until eleven business days later on March 25. Accordingly, KSP failed to carry its burden of establishing that it timely responded under KRS 61.880(1) and therefore violated the Act.

Nevertheless, KSP properly denied the request. Public records of a law enforcement agency’s investigation of criminal acts are exempt from disclosure if their release would harm the agency’s enforcement action. KRS 61.878(1)(h). However, those same records “shall be open after enforcement action is completed or a decision is made to take no action.” *Id.* Similarly, “[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.” KRS 17.150(2)(emphasis added). KRS 61.878(1)(l) exempts from public inspection records made confidential by an enactment of the General Assembly. Through KRS 17.150(2), the General Assembly has rendered certain records confidential and exempt prior to prosecution under specified circumstances. Here, KSP specifically explained the potential for prosecution still exists and that premature release of these records may be detrimental because it could permit the

subjects of KSP's investigation to coordinate testimony. As such, KSP properly withheld the records under KRS 17.150(2) and KRS 61.878(1)(l).

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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/s/ Michelle D. Harrison

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