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20-ORD-090

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In re: Shannon James/Office of the Attorney General

Summary: The Office of the Attorney General ("Office") did not violate the Act; it properly relied upon KRS 17.150(2) to deny a request for investigation records relating to a pending or prospective special prosecution.

Open Records Decision

On March 16, 2020, Shannon James ("Appellant") made a request of this Office for copies of investigation records pertaining to the prosecution of an identified individual. On March 23, 2020, the Office denied the request under KRS 61.878(1)(h) and KRS 17.150(2), stating, "There is still pending prosecution in the case … [t]herefore, the public records associated with the case are exempt from disclosure."

On April 16, 2020, Appellant appealed the disposition of the request. On April 28, 2020, the Office responded, stating that it denied the "request under KRS 61.878(1)(h) because there is a pending prosecution against [the identified individual] within the Attorney General's Office of Special Prosecutions, and premature release of information while the prosecution remains pending would harm the agency." The Office did not identify a specific risk of harm that premature release of the records would create within the special prosecution. However, the Office also cited KRS 17.150(2), noting that the prosecution had not yet been completed.

In *City of Ft. Thomas v. Cincinnati Enquirer,* 406 S.W.3d 842 (Ky. 2013), the Kentucky Supreme Court held that a law enforcement agency must "articulate a factual basis for applying [KRS 61.878(1)(h)], only, that is, when, because of the record's content, its release poses a concrete risk of harm to the agency in the prospective action." *Id.* at 851. To carry its burden of proof that KRS 61.878(1)(h) applies, "[t]he agency should provide the requesting party . . . with sufficient information about the nature of the withheld record (or the categories of withheld records) and the harm that would result from its release[.]" *Id.* at 852.

In this case, however, it is not necessary to determine whether the Office met its burden of proof under KRS 61.878(1)(h) because the request was properly denied under KRS 17.150(2).[1] Under KRS 17.150(2) (emphasis added), "[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." Therefore, the completion of a prosecution or a decision not to prosecute is a condition precedent to public inspection. *See*, *e.g.*, 18-ORD-027 (finding that the completion of prosecution or a decision not to prosecute is the "deciding factor"). When an agency invokes KRS 17.150(2), "the burden shall be on the custodian to justify the refusal of inspection with specificity." KRS 17.150(3).

Because the Office explained that the special prosecution is still pending, it provided a specific justification for withholding the investigative records under KRS 17.150(2). Nevertheless, the records may become subject to public inspection following the conclusion of the prosecution, unless another exception applies. KRS 17.150(2). Therefore, the Office did not violate the Act as to the investigative records requested.

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court pursuant to 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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[1] The court in *City of Ft. Thomas* did not analyze KRS 17.150(2) because the records in that case related to a criminal matter in which the prosecution had concluded. The agency was unable to articulate how it would be harmed when only potential post-conviction litigation remained possible.

Daniel Cameron
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/s/ Marc Manley

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Distributed to:

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