



COMMONWEALTH OF KENTUCKY
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20-ORD-105

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In re: *Summary:* The Jefferson County Coroner's Office ("Coroner's Office") violated the Open Records Act ("the Act") by failing to cite the applicable statutory exception and explain how it applied in denying a request for a specified autopsy report. On appeal, however, the Coroner's Office properly invoked KRS 17.150(2) and justified its reliance on that provision with adequate specificity.

Open Records Decision

On May 12, 2020, *The Courier-Journal* ("Appellant") requested from the Coroner's Office an electronic copy of the "autopsy report for decedent Breonna Taylor . . . who died at 3003 Springfield Drive #4 in Louisville on March 13." Deputy Coroner Kimberly Smith responded the same day, but advised that "[t]his case is still under investigation, per [her] phone call with LMPD two days ago." She further advised that she would call Appellant when she obtained a release. Based upon the following, this Office finds the Coroner's Office violated KRS 61.880(1) initially when it failed to cite the statutory exception it was relying upon to deny the request and provide a brief explanation of how the exception applied. On appeal, however, the Coroner's Office invoked KRS 17.150(2) as the applicable exemption and justified its reliance on that exception with adequate specificity.

Under KRS 61.880(1), a "response denying, in whole or in part, inspection of any record shall 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." The Coroner's Office initially failed to cite any applicable

exception to justify withholding the document or provide a brief explanation of how the exception applied. For this reason, it violated the Act.

On appeal, the Coroner's Office cured its deficient response and justified its denial on the basis of KRS 17.150(2). Responding on behalf of the Coroner's Office, Assistant Jefferson County Attorney Paul V. Guagliardo explained the coroner's role:

Coroners are in fact part of law enforcement. They are peace officers. KRS 72.400; 72.415. Coroners are obligated by law to require post-mortem examinations (KRS 72.405(4)) when there has been a violent death. KRS 72.025(1). The Coroner is directed by statute to retain all evidence acquired in his/her investigation until it is needed by the prosecutor. KRS 72.020(2). In fact, by law, no one including police officers at the scene of a death can touch or remove a body until given permission by the coroner. KRS 72.020(1). Coroners are required to investigate all violent deaths. KRS 72.410 (1). And, of course, as peace officers, coroners are authorized, among other things, to conduct investigations into the cause and circumstances of a death and to seize evidence. KRS 72.415(1)(b) and (c).

The Coroner's Office further explained that, as a rule, the medical examiner performs the post-mortem examination and the coroner "must rely on investigators as to whether premature disclosure might thwart the integrity of their investigation." The Coroner's Office claims that if the Appellant had asked the Louisville Metro Police Department ("LMPD") for the autopsy report, LMPD would have denied the request because "premature release of the findings at an early stage of an investigation could color witnesses' or suspects' recollection of events and allow them to tailor their recollection to fit someone else's version of the facts." Thus, the Coroner's Office argues that at this time the records are exempt from inspection under both KRS 61.878(1)(h) and KRS 17.150(2).

"Intelligence 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 17.150 is incorporated into the Act pursuant to KRS 61.878(1)(l), which exempts "[p]ublic records or information the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly[.]" Although the term "criminal justice agencies" is not explicitly

defined, KRS 17.150(1) includes coroners among a list of “every other . . . criminal justice agency” in defining certain reporting obligations.

Because the Coroner’s Office is a “criminal justice agency” within the meaning of KRS 17.150(2), this Office must determine whether the exception applies to the requested autopsy report. The Attorney General has previously analyzed the underlying purpose of KRS 17.150(2) and KRS 61.878(1)(h), observing 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 “investigative reports” is “broad enough to extend to laboratory, forensic, and other reports generated in the course of an investigation.” 05-ORD-246, p. 2; *see also* 17-ORD-144. In 11-ORD-202, this Office specifically held that an autopsy report generated by the Western Kentucky Regional Medical Examiner was exempt from inspection until a prosecutorial decision had been made. Therefore, the autopsy report for Ms. Breonna Taylor is “subject to public inspection *if* prosecution is completed or a determination not to prosecute has been made.” KRS 17.150(2) (emphasis added).

Appellant argues that the mere potential for future prosecution is insufficient to withhold the autopsy report. However, that assertion is contrary to the express terms of KRS 17.150(2)(d). In addition, Appellant’s reliance on *City of Ft. Thomas v. Cincinnati Enquirer*, 406 S.W. 3d 842 (Ky. 2013), is inapposite. Relying on *Ft. Thomas*, Appellant argues that the Coroner’s Office must articulate the harm that could occur to the investigation. However, the Court in that case did not address the application of KRS 17.150(2), because the subject of the investigation in that case had already been prosecuted and convicted. *See id.* at 846. Notwithstanding the agency’s claim that the convicted defendant could still seek post-conviction relief, the Court found the agency failed to satisfy its burden under KRS 61.878(1)(h). *Id.* at 852. Thus, the holding in *Ft. Thomas* is inapplicable to KRS 17.150, and this Office has recognized that a public agency is not required to articulate a specific and concrete harm to a potential prosecution to justify invocation of that provision. Rather, KRS 17.150 merely requires the agency to provide a specific reason for withholding the records. *See* KRS 17.150(3); *see also*

14-ORD-154, (holding that *Ft. Thomas* does not apply in the context of KRS 17.150 and that the agency had properly denied the request).

On appeal, the Coroner's Office also relies upon letters sent by Assistant Deputy Attorney General Amy Burke and Special Agent in Charge James R. Brown, Jr. to Interim LMPD Chief Robert Schroeder. Assistant Deputy Attorney General Burke and Special Agent Brown confirmed that the Kentucky Office of the Attorney General and the Federal Bureau of Investigation, respectively, have received a copy of the relevant investigative files from LMPD to assist in their ongoing investigations of the circumstances that led to Ms. Taylor's death. Both letters confirm that disclosure of the requested autopsy report would have an adverse impact on those ongoing investigations and the potential prosecutions that may result from them. For these reasons, the Coroner's Office has stated with specificity that a prosecutorial decision has not been made and that KRS 17.150(2) applies to temporarily withhold the requested autopsy report. Furthermore, the Coroner's Office acknowledges that once a prosecutorial decision has been made, the autopsy report may be subject to inspection unless another statutory exemption applies. *See* KRS 17.150(3) ("Exemptions provided by this section shall not be used by the custodian of the records to delay or impede the exercise of rights granted by this section."). Accordingly, the Coroner's Office did not violate the Act in denying Appellant's request for the autopsy report at this time.

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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