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20-ORD-114

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In re: Scott Horn/Lexington Police Department

Summary: Lexington Police Department ("Department") violated the Open Records Act ("the Act") by failing to state affirmatively that it searched for responsive records upon receipt of a request. The Department did not violate the Act in denying a request to inspect records that are exempt under KRS 61.878(1)(h).

Open Records Decision

On June 16, 2020, Scott Horn ("Appellant") submitted a request to the Department to inspect all body camera or other footage retained by the Department depicting certain acts by protestors. Appellant also requested any footage depicting the arrest of 20 protestors during the event. In a timely response, the Department stated that the incident "is associated with an open court matter. As such the body camera videos, CCTV, and other video footage (if they exist) are currently unavailable pursuant to KRS 61.878(1)(h)[.]" The Department further stated that premature release of the requested videos could cause "potential hazards" such as "tainting witness testimony," and could alert potential suspects that they are under investigation. The Department also expressed concerns that it would be difficult to locate cooperating witnesses, who might fear retaliation or might have privacy concerns. Thereafter, Appellant appealed to this Office challenging the adequacy of the Department's search and its reliance on KRS 61.878(1)(h).[1]

[1] After filing his appeal, Appellant sought to "amend" the appeal by including additional correspondence between himself and the Department. The parties engaged in extensive back-and-

KRS 61.880(1) requires a public agency to respond in writing within three business days of receipt of a request to inspect records and to notify the requester whether the agency will comply with the request. If the agency denies the request, it "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." *Id*. Prior to issuing its response, the agency must first search for responsive records to determine if they exist and if an exception applies to deny the request. *See e.g.* 19-ORD-198 (holding that a police department violated the Act in failing to search for records.). An initial search will also reveal the number of records involved, and whether the request imposes an unreasonable burden on the agency.

In its initial response, the Department did not indicate that it searched for responsive records. Rather, it stated "if they [the videos] exist," then KRS 61.878(1)(h) would apply to deny inspection. On appeal, the Department explained that it located 239 responsive videos totaling 61.5 hours of footage. By failing to state affirmatively whether responsive records existed in its initial response, the Department's initial response violated the Act.

However, on appeal the Department has sufficiently explained that inspection was appropriately denied under KRS 61.878(1)(h). That subsection permits law enforcement agencies to withhold records obtained in the course of investigating statutory violations if the premature release would cause harm to the investigation. An agency cannot simply assert that KRS 61.878(1)(h) applies, but must instead explain the "concrete risk of harm" it will face if the records are provided. *City of Ft. Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 851 (Ky. 2013). "A concrete risk, by definition, must be something more than a hypothetical or speculative concern." *Id*.

On appeal, the Department explained several risks associated with the premature release of these records, including the risk that potential suspects may learn that they are under investigation, that the release of videos may taint witness testimony, and that witnesses may refuse to cooperate out of fear of retaliation.

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forth about the propriety of the amendment. But KRS 61.880(2) requires the Attorney General to issue a decision within twenty business days. Thus, this Office declines to address arguments not included in the original petition or the Department's original response on appeal.

Considering that this investigation is still in its infancy, and that some suspects have been charged but others have not, the Department has met its burden that its investigation will be harmed if the videos are released at this time. *See*, *e.g.*, 15-ORD-105 (finding that the pretrial status of the investigation weighed strongly in favor of affirming the use of KRS 61.878(1)(h) when, in part, premature release could taint witness testimony.). Accordingly, the Department did not violate the Act in withholding the requested records.

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 proceedings.

Daniel Cameron
Attorney General

/s/ Marc Manley
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Distributed to:

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