



COMMONWEALTH OF KENTUCKY  
OFFICE OF THE ATTORNEY GENERAL

DANIEL CAMERON  
ATTORNEY GENERAL

CAPITOL BUILDING, SUITE 118  
700 CAPITAL AVENUE  
FRANKFORT, KENTUCKY 40601  
(502) 696-5300  
FAX: (502) 564-2894

**20-ORD-122**

August 13, 2020

In re: Lee Metzger/Kentucky State Police

**Summary:** Kentucky State Police ("KSP") did not violate the Open Records Act ("the Act") by denying a request for a dispatch report under KRS 17.150(2) when prosecution of a criminal case remained prospective. KSP violated the Act by withholding an incident report under KRS 17.150(2) and KRS 61.878(1)(h).

***Open Records Decision***

On June 30, 2020, attorney Lee Metzger ("Appellant") requested a copy of KSP's case file on a matter in which he represented a defendant in United States District Court. KSP's response, however, described Appellant's request as one for "a copy of CAD and/or incident report" relating to the case. The record before this Office does not indicate whether those are the only records in KSP's case file, or whether KSP possesses other records not addressed in its response.

KSP denied Appellant's request for the Computer-Aided Dispatch ("CAD") report and incident report on the basis of KRS 17.150(2)(d) and KRS 61.878(1)(l), as well as 61.878(1)(h). KSP explained that "[t]his information is part of an investigation that is still open" and "[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."

Under KRS 17.150(2), "[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." In 20-ORD-090,

this Office found that “the completion of a prosecution or a decision not to prosecute is a condition precedent to public inspection” of records within the scope of KRS 17.150(2). This Office has previously found that CAD reports were included in the category of “intelligence and investigative reports.” *See, e.g.,* 17-ORD-144; 11-ORD-171. Therefore, the CAD report is within the scope of KRS 17.150(2).

When an agency relies upon KRS 17.150(2) to deny a request to inspect records, “the burden shall be on the custodian to justify the refusal of inspection with specificity.” KRS 17.150(3). KSP met this burden because it is undisputed that the criminal case in question is still pending trial before the district court. Upon completion of the ongoing prosecution or a determination not to prosecute, the CAD report will be subject to disclosure unless that record is specifically excluded from application of the Act by another statutory exception. Because KRS 17.150(2) is dispositive of this appeal as to the CAD report, this Office declines to make any finding relative to KRS 61.878(1)(h).<sup>1</sup>

The incident report, however, is another matter. This Office has consistently held that police incident reports are not intelligence or investigative reports, as they merely contain data documenting the report of a crime and the police’s response, and therefore are not exempt from disclosure under KRS 17.150(2). *See, e.g.,* 09-ORD-205; 17-ORD-121; 19-ORD-124; *see also Cape Publications v. City of Louisville*, 147 S.W.3d 731, 733 (Ky. App. 2003) (quoting circuit court opinion, stating that because “police incident reports are matters of public interest and are public records[,] the public should be allowed to scrutinize the police to ensure they are complying with their statutory duties”).

Nor are police incident reports generally exempt from disclosure under KRS 61.878(1)(h), which excludes from the Act “[r]ecords of law enforcement agencies . . . compiled in the process of detecting and investigating statutory or regulatory violations if the disclosure of the information would harm the agency by revealing the identity of informants not otherwise known or by premature release of information to be used in a prospective law enforcement action[.]” *See, e.g.,* 09-ORD-205 (holding that the agency had not met its burden of proof to show

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<sup>1</sup> This Office’s decision is limited to the application of the Act. Because Appellant represents the defendant in the criminal case, he can seek the records through the criminal discovery process.

harm arising from the disclosure of information appearing on the first page of a Uniform Offense Report).

Under KRS 61.880(2)(c), the public agency carries the burden of proof at all times. And to carry its burden in relying upon KRS 61.878(1)(h), KSP must establish that “*because of the record’s content*, its release poses a concrete risk of harm to the agency in the prospective action. A concrete risk, by definition, must be something more than a hypothetical or speculative concern.” *City of Ft. Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 851 (Ky. 2013) (emphasis added). KSP has not articulated how release of the information contained in this police incident report may affect the witnesses’ memories of the event. Accordingly, KSP has not met its burden and violated the Act by withholding the incident report.

Moreover, KSP rephrased Appellant’s request as one for CAD or incident reports, notwithstanding the fact that Appellant specifically requested “a complete copy of Case #33-19-0315[.]” KSP failed to indicate whether CAD or incident reports were the only documents contained within case file #33-19-0315. “An agency 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.” KRS 61.880(1). If no other records exist in case file #33-19-0315, KSP failed to state as much. For that reason, KSP failed to meet its burden that either all requested records were produced or an exemption applied to withhold additional records contained within the case file.

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/ James M. Herrick

James M. Herrick  
Assistant Attorney General

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Distribution:

Edward L. Metzger III, Esq.

Shan Dutta, Esq.

Ms. Wilda Willis Caudle