



COMMONWEALTH OF KENTUCKY
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20-ORD-131

August 20, 2020

In re: Sam Aguiar/Louisville Metro Police Department

Summary: Louisville Metro Police Department (“Department”) violated the Open Records Act (“the Act”) by failing to fully respond to a request to inspect records. However, the Department did not violate the Act by denying requests for certain Risk Assessment Matrix forms, recordings of radio traffic, and Mobile Data Terminal (“MDT”) communications under KRS 17.150(2). The Department substantiated on appeal that disclosure would impede pending investigations by the Federal Bureau of Investigation (“FBI”) and the Office of the Attorney General by revealing information to be used in prospective law enforcement actions.

Open Records Decision

Sam Aguiar (“Appellant”) initiated this appeal from the Department’s denial of his request for certain records. Specifically, Appellant had requested copies of all recordings of radio communications from March 12 and 13, 2020, related to the execution of two search warrants at two locations, including Ms. Breonna Taylor’s home address, and all MDT communications¹ on March 12 and 13. Appellant also requested copies of all Risk Assessment Matrix forms for warrants “executed or scheduled to be executed” between March 8 and March 14, 2020, related to those two addresses or the persons or vehicles associated with them. The Department denied Appellant’s request on the basis of KRS 61.878(1)(h)

¹ A mobile data terminal (“MDT”) is a portable computer device used by officers to send digital communications and for other law enforcement purposes.

and KRS 17.150(2) because the incident was under investigation by the Department's Public Integrity Unit ("PIU"). The Department further stated that the premature release of the records "could result in prejudice to the potential witnesses, adversely color witness recollections, and result in bias to a potential jury pool." This appeal followed.²

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 ruled that recordings of police radio traffic relating to a specific investigation were included in the category of "intelligence and investigative reports" protected by KRS 17.150(2). *See* 16-ORD-240. As for MDT communications, there is no reason to distinguish these types of communications from recordings of police radio traffic for purposes of KRS 17.150(2).

Risk Assessment Matrix forms are used to determine whether the service of a search warrant requires the Department to use a SWAT team. Because serving a search warrant is inherently connected with an ongoing criminal investigation, and the Risk Assessment Matrix form represents intelligence gathered in that investigation, these forms are also "intelligence and investigative reports" subject to 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). The Department asserts that the requested records pertain to the potential prosecution of the officers involved in Ms. Taylor's death and to an ongoing investigation of the incident by the FBI. The Department has provided letters from the FBI and the Office of the Attorney General stating that both agencies are actively investigating the incident in question for potential criminal prosecution.

² Appellant sought other records as part of the same request, but has advised this Office that these three categories of records are the only ones still at issue in this appeal.

In 20-ORD-104, an appeal arising from the execution of the same warrants referenced here, this Office concluded that this substantiating information provided the necessary specificity that a prosecutorial decision had not been made. As a result, the Department's denial of Appellant's request for a Professional Integrity Unit investigative file, relating to the March 13 officer-involved shooting at issue here, was justified under KRS 17.150(2)(d).

The same is true here. In the present appeal, the Department has established conclusively that potential prosecutions, both state and federal, related to the March 13 incident remain entirely possible and that disclosure of the records in dispute would impede the ability of the Attorney General and the FBI to investigate the incident by disclosing information to be used in potential prosecutions. *See also* 20-ORD-106 (holding that radio transmissions relating to execution of the same warrants were properly withheld under KRS 17.150(2)). As in 20-ORD-104, upon completion of the ongoing investigations or a determination not to prosecute, any relevant records that are responsive to Appellant's request may be subject to disclosure unless those records are specifically excluded from application of the Act by another statutory exception. Because KRS 17.150(2) is dispositive of this appeal, this Office declines to make any finding relative to KRS 61.878(1)(h).

The Department did, however, violate the Act in one respect. Although Appellant requested *all* MDT communications for March 12 and 13, 2020, the Department's response addressed only those communications pertaining to the service of the two search warrants and consequent events. The Department did not deny the existence of other MDT communication transmitted by Department officers on March 12 and March 13, or claim that any other exemption applied to deny inspection of MDT communications that were unrelated to the pending investigation. Because the Department failed to produce other MDT communications that were unrelated to a pending investigation, or explain how an exception applied to deny inspection of those other MDT communications, the Department violated the Act. *See* KRS 61.880(1).

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.

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