



COMMONWEALTH OF KENTUCKY
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20-ORD-138

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In re: *The State Journal*/Kentucky State Police

Summary: The Kentucky State Police (“KSP”) violated the Open Records Act (“Act”) by denying a request for a specified incident report merely because it related to an ongoing investigation.

Open Records Decision

On June 1, 2020, *State Journal* reporter Fred Petke (“Appellant”) requested from KSP a copy of the incident report generated by or for KSP following an officer-involved shooting on Hiawatha Trail in Frankfort, Kentucky.¹ In a timely response, KSP denied Appellant’s request under KSR 17.150(2)(d), and 61.878(1)(h) and (l). KSP stated the report “is part of an investigation that is still open” and that “[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.” Thereafter, Appellant initiated this appeal challenging KSP’s denial of his request.

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.” Accordingly, the public’s right to inspect “intelligence and investigative reports” hinges on whether

¹ The Frankfort Police Department (“FPD”) employed the officer involved in the incident. Appellant first requested the incident report from the FPD on May 8, 2020. On May 12, 2020, the Frankfort City Clerk notified Appellant that KSP is currently handling the related investigation and referred him to KSP for “any additional records.”

a prosecutorial decision has been made. However, not every document in a police investigation file is an “intelligence [or] investigative report” under KRS 17.150(2). This Office has previously held that a police “incident report,” like the one requested here, is not an investigative or an intelligence report. *See, e.g.,* 15-ORD-038; 19-ORD-124.

On appeal, KSP asserted that “premature 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.” In support of this position, KSP cited a recent decision of this Office, 20-ORD-065. However, in that case, this Office did not address whether an “incident report” was exempt under KRS 17.150 because KSP provided the requester a copy of it. That decision held that the agency was justified in withholding other documents contained within the investigative file under KRS 17.150(2).

Because incident reports are not “intelligence [or] investigative reports” under KRS 17.150(2), this Office must determine whether KSP can withhold this particular incident report under KRS 61.878(1)(h). *See, e.g.,* 20-ORD-122 (finding that incident reports cannot be withheld under KRS 17.150(2)). To deny inspection of a law enforcement record under KRS 61.878(1)(h), the burden is on the law enforcement agency to articulate a concrete showing of harm to the investigation. *See City of Ft. Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 851 (Ky. 2013). The determination of whether disclosure of a police incident report will cause harm to a particular investigation is fact-intensive and must be analyzed on a case-by-case basis. But in general, police incident reports or initial offense reports that do not include sensitive information that “would reveal the identities of informants not otherwise known, or compromise the investigation or prosecution of a case, [by revealing] the ‘Synopsis,’ ‘Modus Operandi,’ ‘Accused,’ ‘Suspects,’ ‘Witnesses,’ ‘Evidence and How Marked,’ ‘Investigation,’ and ‘Attachments’” are not exempt under KRS 61.878(1)(h). *See* 09-ORD-205, p. 7; 19-ORD-124, p. 4.

On appeal, KSP did not articulate how the release of this incident report would harm the investigation. Therefore, to ascertain whether this incident report contained the identities of informants, or any other information, the release of which could harm the investigation, this Office asked KSP to provide a copy of the requested incident report for confidential review. *See* KRS 61.880(2)(c); 40 KAR 1:030 § 3. Following this confidential review, this Office is satisfied that the

incident report in dispute is similar to those incident reports that this Office has routinely held are subject to inspection. *See e.g.*, 09-ORD-205. That is, there is nothing on the face of the record that appears could harm the investigation if KSP disclosed it. Without any further explanation from KSP as to how the release of this incident report could harm the investigation, KSP failed to meet its burden of establishing that KRS 61.878(1)(h) applied to withhold the incident report and, therefore, violated the Act by denying the request.

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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/s/ Michelle D. Harrison

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Distributed to:

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