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-139

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In re: The New York Times/Louisville Metro Government Agencies

Summary: Louisville Metro Government agencies ("Metro") did not violate the Open Records Act ("the Act") in denying a request to inspect records related to an ongoing and active police investigation. However, the Louisville Metro Police Department and Louisville Metro Department of Corrections violated the Act in failing to issue timely responses to requests to inspect records.

Open Records Decision

Through a series of open record requests submitted between June and July, the New York Times ("Appellant") sought several records related to the investigation of the death of Ms. Breonna Taylor. Although Appellant requested thirteen different categories of records, the requests can be summarized as: 1) seeking from Louisville Metro Emergency Services all Computer Aided Dispatch ("CAD") reports, and audio recordings of radio transmissions, generated in connection with the execution of multiple search warrants on March 12 and 13; 2) seeking from Louisville Metro Police Department all video footage, either body-camera[1] or other surveillance video, recorded during the execution of those search warrants; 3) seeking from the Jefferson County Attorney's Office a copy of the autopsy report reflecting the cause of Ms. Taylor's death; and 4) seeking from

[1] The majority of the thirteen requests identified different officers believed to be present during the execution of the search warrants and sought body-camera footage recorded by those specific officers. Eventually, Appellant requested all body-camera footage from every officer at each of the locations where search warrants were executed.

Louisville Metro Department of Corrections copies of any audio recordings of telephone calls made by two identified inmates to any person outside the facility between December 2019 and March 2020.

Each of the public agencies independently responded to Appellant's requests. And each of them denied the requests under KRS 61.878(1)(h) and KRS 17.150(2). However, both the Louisville Metro Police Department and the Louisville Metro Department of Corrections failed to respond to the requests directed to them within ten days. In response to the public health emergency caused by the novel coronavirus, the General Assembly passed Senate Bill 150 ("SB 150"). Among other things, SB 150 extends the time for a public agency to respond to a request to inspect records to ten days. SB 150 § 1(8)(a). Containing an emergency clause, SB 150 became law on March 30, 2020, upon the Governor's signature. Therefore, each Metro agency was required to respond to the requested records within ten days of receiving the request. Having failed to do so, both the Louisville Metro Police Department and Louisville Metro Department of Corrections violated the Act.

Following all of the agencies' denials, Appellant initiated this appeal. Appellant recognizes that this Office recently decided that intelligence and investigative reports relating to the investigation of Ms. Taylor's death are temporarily exempt under KRS 17.150(2). *See e.g.,* 20-ORD-104 (holding that the "full investigative file" pertaining to Kenneth Walker is temporarily exempt); 20-ORD-105 (holding that the requested autopsy report is temporarily exempt); 20-ORD-106 (holding that the requested CAD reports and recordings of radio transmissions are temporarily exempt); 20-ORD-107 (holding that video footage is temporarily exempt). Appellant argues that this Office erred in those decisions. This Office disagrees, and reaffirms those decisions.

KRS 61.878(1)(h) permits a law enforcement agency to deny a request for investigative records obtained by a law enforcement agency during a criminal investigation if premature disclosure of those records will cause harm to the investigation. In *City of Ft. Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842 (Ky. 2013), the Supreme Court of Kentucky held that investigative files of law enforcement agencies are not categorically exempt from disclosure under KRS 61.878(1)(h). Rather, when a record pertains to a prospective law enforcement action, KRS 61.878(1)(h) "is appropriately invoked only when the agency can articulate a

factual basis for applying it, only, that is, when because of the record's content, its release poses a concrete risk of harm to the agency in the prospective action." *Id*. at 851. The Court in that case did not address the application of KRS 17.150(2), because the subject of the investigation 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 that the agency had not satisfied its burden under KRS 61.878(1)(h). *Id*. at 852.

However, the holding in *Ft. Thomas* is inapplicable to KRS 17.150 because in that case prosecution had already been completed at the time of the request. "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). Therefore, a condition precedent to the public's right to inspect "intelligence and investigative reports" is the conclusion of the Commonwealth's prosecution, or a decision not to prosecute. This Office has explained that a criminal justice agency need only identify the existence of potential prosecution with specificity to temporarily deny inspection of "intelligence and investigative reports." KRS 17.150(3); *see also* 20-ORD-104 (holding that a police department is not required to articulate a concrete risk of harm when relying on KRS 17.150 and collecting prior decisions that so held).

Appellant relies on an unpublished decision by the Kentucky Court of Appeals, *Department of Kentucky State Police v. Teague*, 2019 WL 856756 (Ky. App. Feb. 22, 2019), to assert that this Office's longstanding interpretation of KRS 17.150 is erroneous. However, the facts in *Teague* were unique and are easily distinguishable. [2] In that case, the underlying investigation had been open for twenty-two years at the time of the request. *Id*. at *2. Over the course of many years, the police allowed the requester "to see the chain of custody of the reel-to-reel recording, discussed with her where the recording had been stored, and even played the 911 tape for her on two different occasions." *Id*. at *3. Nevertheless, the police continuously denied repeated requests and always provided the same "vague, speculative, and, given the twenty-two years expended in investigation .

[2] Perhaps the unique circumstances of that case explain why the decision was ordered not to be published. Regardless, under CR 76.28(4)(c), unpublished decisions are not binding authority on any court in Kentucky.

. . extremely remote *possibilities*" for why release would harm the investigation. *Id*. at *2 (emphasis original).

The investigation in *Teague* was considered "open" for twenty-two years—so long that a reasonable person might conclude that a decision not to prosecute had been made as there were no suspects to prosecute. Moreover, once an investigation has been open that long, one could argue public dissemination of records would actually help the investigation because it had clearly reached an insurmountable roadblock. Unlike the facts in *Teague*, here, Ms. Taylor's death occurred on March 13, 2020. The investigation has been ongoing for less than six months and, at this time, neither the federal authorities nor the Attorney General have made a decision whether to prosecute anyone. Thus, the Metro agencies properly relied upon KRS 17.150(2) to temporarily deny Appellant's requests.

All of the records Appellant has requested are "intelligence [or] investigative reports" under KRS 17.150(2). The Metro agencies have further stated that premature release of these records could prejudice witnesses and affect their memories of the events, and could prejudice potential jury pools. Both the Attorney General and the FBI continue to assert that their respective investigations are ongoing at this time. For these reasons, and for the reasons explained in 20-ORD-104, 20-ORD-105, 20-ORD-106, and 20-ORD-107, the Metro agencies did not violate the Act in temporarily denying inspection of the requested CAD reports, recordings of radio transmissions, video footage, and the autopsy report.

The only remaining records at issue are the requested audio recordings of inmate phone calls. This Office has not yet previously addressed whether these records are subject to inspection. Metro claims these audio recordings relate to the ongoing investigations and their premature release would harm the investigations. Metro has already explained how release of other records with potential evidentiary value could harm the investigation and notes that these recordings also pertain to investigations of other suspects who have been arrested but have yet to be prosecuted. Metro has stated with specificity that the audio recordings are investigative reports that relate to an ongoing investigation where a prosecutorial decision has not been made. Accordingly, KRS 17.150(2) authorizes the temporary withholding of these records and the Louisville Metro Department of Corrections did not violate the Act in temporarily denying inspection of the requested recordings of telephone calls.

This Office recognizes that "the basic policy of [the Act] is that free and open examination of public records is in the public interest and the exceptions provided for by KRS 61.878 or otherwise provided by law shall be strictly construed, even though such examination may cause inconvenience or embarrassment to public officials or others." KRS 61.871. This Office also recognizes the significant public interest in these particular records. But the purpose of KRS 17.150(2) is to protect the integrity of law enforcement investigations so that the truth can be discovered and justice can be served without fear or favor. As in *Teague*, law enforcement agencies cannot rely upon KRS 17.150(2) to delay access to these records indefinitely. However, at this stage in the investigation, the Metro agencies properly relied upon KRS 17.150(2) to deny inspection.

A party aggrieved by this decision may appeal it 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.

Daniel Cameron
Attorney General

/s/Marc Manley
Marc Manley
Assistant Attorney General

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Distributed to:

Al-Amyn Sumar, Counsel for the New York Times
Mark Jeziorski, Records Custodian, Louisville Metro Emergency Services
Alicia Smiley, Records Custodian, Louisville Metro Government
Jacinta Scruggs, Records Custodian, Louisville Metro Government
Alice Lyon, Assistant Jefferson County Attorney
Paul Guagliardo, Assistant Jefferson County Attorney