



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-156

September 28, 2020

In re: WDRB News/Louisville Metro Police Department

Summary: Louisville Metro Police Department (“Department”) failed to respond to an open records request within the statutory time period for doing so. On appeal, however, the Department met its burden to show that Incident Action Plans were “antiterrorism protective measures and plans” under KRS 61.878(1)(m)1.c and that their disclosure would have a reasonable likelihood of threatening public safety by exposing vulnerabilities in the Department’s potential response to protests that may turn violent. The Department properly withheld administrative incident reports from inspection under KRS 17.150(2) during an active police investigation prior to the completion of prosecution or a decision not to prosecute. The Department did not violate the Open Records Act (“the Act”) by failing to provide records that did not exist.

Open Records Decision

On June 5, 2020, WDRB News (“Appellant”) requested After-Action Reports, administrative incident reports, rules of conduct including use of force options, and an Incident Action Plan, all relating to the actions the Department took at a specified location in Louisville around midnight on May 31-June 1, 2020. The Department did not respond to Appellant’s request until June 30, 2020.

Normally, a public agency must respond to an open records request within three business days. KRS 61.880(1). In response to the public health emergency

caused by the novel coronavirus, however, the General Assembly modified that requirement when it enacted Senate Bill 150 ("SB 150"), which became law on March 30, 2020, following the Governor's signature. SB 150 provides, notwithstanding the provisions of the Act, that "a public agency shall respond to the request to inspect or receive copies of public records within 10 days of its receipt." SB 150 § 1(8)(a). The Department violated the Act by failing to respond to Appellant's request within ten days.

On June 30, 2020, the Department denied Appellant's request under KRS 61.878(1)(m), and explained that the requested records "contain LMPD strategies, proposed medical routes, gathering places for LMPD and other tactical and operational information that, if released, could place LMPD personnel and civilians at greater risk of being harmed." On appeal, Appellant claims that the denial was overly broad and that the Department failed to explain which part of KRS 61.878(1)(m) it was citing or how it applied to the records that the Department withheld.

The Department issued a supplemental response on July 22, 2020, and further explained that it denied the request for Incident Action Plans under KRS 61.878(1)(m)1.c and KRS 61.878(1)(m)1.d. The Department stated that those records "contain strategic and tactical information such as roll call locations/staging areas, hospital routes and radio channels," the release of which would "directly affect the vulnerability" of the Department's "counterterrorism/antiterrorism protective measures and plans." The Department asserted that disclosure of the records would endanger the safety of both the public and its officers because "officers have been directly targeted" during such protests. Specifically, the Department explained that it had intercepted communications between "violent demonstrators," which suggested plans to "ambush[] law enforcement officers at staging locations and known response routes." Additionally, the Department stated that the release of designated hospital routes poses a risk to public safety because persons planning criminal acts could use this information "to block those routes and prevent needed medical care." Finally, the Department asserted that the identity of its radio communication channels is sensitive information because "violent demonstrators" have accessed those channels "so that they may evade and attack officers as they move in real time," thus preventing the officers from effectively responding as needed to protect public safety.

In 20-ORD-142 (copy attached for reference), this Office determined that the Department had met its burden to show that the same Incident Action Plans currently at issue were exempt from disclosure as “antiterrorism protective measures and plans” under KRS 61.878(1)(m)1.c. Because the Department has made an identical showing here, it has met its burden of proof as to the Incident Action Plans, in accordance with the reasoning of 20-ORD-142.¹

In support of its denial of the administrative incident reports, the Department cited KRS 61.878(1)(h) and KRS 17.150(2). The Department stated that the records are “intelligence and investigative reports” that are “part of an ongoing criminal investigation” by the Department’s Public Integrity Unit, the Kentucky State Police (“KSP”), and the FBI, in which “no prosecutorial decision has been made.” The Department further asserted that disclosure of the records “would harm the ongoing investigation and potential prosecution by identifying witnesses not otherwise known and tipping them off to the direction of the ongoing investigation, impacting witness recollection of the incident, and tainting the jury pool[.]”

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.” This Office has previously found that administrative incident reports were “intelligence and investigative reports” under this provision. *See, e.g.*, 20-ORD-107. In 20-ORD-128, this Office explained that “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.” In that decision, this Office found that the Kentucky State Police properly denied inspection of several intelligence reports under KRS 17.150(2) because the police investigation was ongoing and no prosecutorial decision had been made. Accordingly, in this case, the Department’s supplemental response denying Appellant’s request for the administrative incident reports complied with the provisions of the Act.²

¹ Because the Incident Action Plans are “antiterrorism protective measures and plans” under KRS 61.878(1)(m)1.c, this Office need not consider whether they are “counterterrorism measures and plans” under KRS 61.878(1)(m)1.d.

² Because KRS 17.150(2) is dispositive here, this Office need not consider the Department’s argument under KRS 61.878(1)(h).

In its supplemental response, the Department agreed to provide Appellant the requested “rules of conduct,” which consisted of the Department’s “Emergency Response Plan” and standard operating procedures for use of force and “Civil Disturbances/Disorderly Crowds.” This appeal is therefore moot as to that portion of the request. 40 KAR 1:030 § 6.

The Department further stated that it “did not locate any ‘After Action Reports.’” Once a public agency states affirmatively that it does not possess any responsive records, the burden shifts to the requester to present a *prima facie* case that the requested records do exist. *Bowling v. Lexington-Fayette Urban Cty. Gov’t*, 172 S.W.3d 333, 341 (Ky. 2005). If the requester establishes a *prima facie* case that records do or should exist, “then the agency may also be called upon to prove that its search was adequate.” *City of Ft. Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 848 n.3 (Ky. 2013) (citing *Bowling*, 172 S.W.3d at 341). In this case, Appellant has not established a *prima facie* case that an “After Action Report” exists or should exist. Therefore, this Office is unable to find that the Department violated the Act as to that portion of the request.

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 proceeding.

Daniel Cameron
Attorney General

/s/ James M. Herrick

James M. Herrick
Assistant Attorney General

#224

Enclosure

20-ORD-156

Page 5

Distributed to:

Mr. Marcus Green

Alice Lyon, Esq.

Ms. Alicia Smiley