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**20-ORD-168**

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In re: *WKMS*/Murray Police Department

***Summary:*** The Murray Police Department ("Department") violated the Open Records Act ("Act") when it denied a request to inspect records pertaining to a specific investigation. In particular, the Department failed to explain the harm that would result from premature disclosure of the records.

***Open Records Decision***

On September 16, 2020, *WKMS* News Director Rachel Collins ("Appellant") requested to inspect "[a]ny and all documents pertaining to the thefts and subsequent return (both incidents) of the FOP Lodge 23 light display from Murray's Central Park" in November 2019. In particular, Appellant sought incident reports, citations, and criminal summonses. In a timely response, the Department claimed that it was "unable to release these records at this time due to the investigation still being open." Appellant requested verification of the status because she was "told both cases were officially closed." However, the Department provided no additional information, and this appeal followed.

On appeal, the Department reiterated its original position. The Department further explained, however, that it had previously issued summonses in the criminal matters but the summonses had not yet been served. The Department therefore maintained that Appellant was incorrect regarding the status of the pending criminal investigations. Accordingly, the Department asserted that the premature release of this information would harm its law enforcement action.

Despite its assertions on appeal, the Department violated the Act because it failed to justify its denial as required by KRS 61.878(1)(h). Pursuant to KRS 61.880(2)(c), "[t]he burden of proof in sustaining the action shall rest with the agency[.]" KRS 61.880(1) also requires that a "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." "[T]he custodian of records [is required] to provide *particular and detailed information* in response to a request for documents. . . . [A] limited and perfunctory response [does not] even remotely compl[y] with the requirements of the Act-much less [amount] to substantial compliance." *Edmondson v. Alig*, 926 S.W.2d 856, 858 (Ky. App. 1996).

A law enforcement agency's duty to provide a detailed explanation for the basis of its denial is heightened when it relies upon KRS 61.878(1)(h), because the law enforcement agency must specifically explain how premature disclosure of the records would harm its investigation. In *City of Ft. Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 851 (Ky. 2013), the Kentucky Supreme Court held that a law enforcement agency's investigative files 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." 406 S.W.3d at 851. A concrete risk of harm "by definition, must be something more than a hypothetical or speculative concern." *Id.* at 851. "[T]he mere fact that an enforcement action remains prospective is [not] enough to establish that disclosure of anything from a law enforcement file constitutes 'harm' under the exemption." *Id.* at 852 (overruling, in part, *Skaggs v. Redford,* 844 S.W.2d 389 (Ky. 1992)).

A public agency should provide the requester and the court "with sufficient information about the nature of the withheld record (or the categories of withheld records) and the harm that would result from its release to permit the requester to dispute the claim and the court to assess it." *Id*. In other words, the public agency must identify specific records or categories of records "the *particular nature* of which renders them exempt. [T]he law enforcement exemption cannot be invoked without at least that minimum degree of factual justification[.]" *Id.* (emphasis added).

Here, the Department has not explained how release of the requested records would harm its investigation. For example, the Department stated on appeal that criminal summonses have been issued, but did not explain how releasing copies of the summonses would pose any risk to the pending criminal investigations. In the Department's initial response, it did not mention any risk of harm, stating merely that it was "unable to release these records at this time due to the investigation still being open." On appeal, the Department simply repeated the language in KRS 61.878(1)(h). The Department did not, however, describe the records or provide any concrete examples of harm to the investigation that would result from disclosure. In essence, the Department's response is the exact type of response rejected by the *City of Ft. Thomas* court. Accordingly, the Department failed to carry its burden to demonstrate that KRS 61.878(1)(h) permits it to deny inspection of the requested records.

Either party may appeal this decision may appeal 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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