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**21-ORD-043**

March 9, 2021

In re: WAVE 3 News/Louisville Metro Department of Corrections

**Summary:** Louisville Metro Department of Corrections (Department) did not violate the Open Records Act (“the Act”) when it denied a request for records under KRS 17.150(2).

***Open Records Decision***

WAVE 3 News (“Appellant”) requested from the Department a copy of a surveillance video that purportedly depicts a physical altercation between an inmate and a Department employee. The Appellant also sought copies of the incident reports created by the Department when it investigated the altercation. In a timely response, the Department denied the requests, in part, under KRS 17.150(2) because the altercation is the basis of a criminal investigation in which a decision to prosecute has not yet been made.<sup>1</sup> This appeal followed.

Under KRS 17.150, “[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.” KRS 17.150(2)

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<sup>1</sup> The Department also denied the request for the surveillance video under KRS 197.025(1), which permits the Commissioner of the Department of Corrections, or his or her designee, to deny inspection of records that are deemed “to constitute a threat to the security of the inmate, any other inmate, correctional staff, the institution, or any other person.” The Department also relied on KRS 61.878(1)(h) to deny inspection of both the surveillance video and incident reports. However, because this Office affirms the Department’s denial based upon KRS 17.150(2), we do not address the Department’s other claimed exceptions.

(emphasis added). This Office has observed that “[i]nvestigative reports are nearly always withheld from public inspection to protect sources of information and techniques of investigations and also to prevent premature disclosure of the contents to the targets of investigation, which could thwart law enforcement efforts.” OAG 83- 123, p. 2 (citations omitted). In other words, the right of public inspection set forth in KRS 17.150(2) is contingent upon the completion of the investigation and prosecution, or a determination having been made not to prosecute. *See* OAG 90-143; *see also* 20-ORD-090. This Office has previously stated that “KRS 17.150 does not require the agency to demonstrate a showing of harm. It merely requires the agency to provide a specific reason for withholding the records.” 14-ORD-154, pp. 4-5; *see also* 20-ORD-104 (explaining the difference between KRS 61.878(1)(h) and KRS 17.150(2)). That “specificity” requirement is stated in KRS 17.150(3), which provides that “[w]hen a demand for the inspection of the records is refused by the custodian of the records, the burden shall be upon the custodian to justify the refusal of inspection with specificity.”

As for the types of records that are encompassed by KRS 17.150(2), this Office has determined that the term “investigative reports” is broad enough encompass audio and video recordings. *See, e.g.,* 07-ORD-095. And “incident reports” are clearly “investigative or intelligence reports.” *See, e.g.,* 20-ORD-156; 20-ORD-107. Therefore, KRS 17.150(2) permits the Department to deny inspection of these records if a decision to prosecute has not yet been made.

On appeal, the Department claims that the altercation is the basis of both an administrative investigation and a criminal investigation. The Department claims that the criminal investigation is still ongoing and there still exists a potential for prosecution in connection with the altercation. Because the Department has specified that a prosecutorial decision has not yet been made, it did not violate the Act in denying inspection of the records.<sup>2</sup>

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

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<sup>2</sup> The Appellant also sought a photograph of a Department employee. Although the Department first denied the request, it provided the photograph to the Appellant on appeal. Therefore, any dispute regarding the employee’s photograph is moot. 40 KAR 1:030 § 6.

in circuit court, but shall not be named as a party in that action or in any subsequent proceedings.

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#47

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