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**21-ORD-052**

March 25, 2021

In re: Jonathan Fannin/Louisville Metro Police Department

**Summary:** The Louisville Metro Police Department (“Department”) did not violate the Open Records Act (“the Act”) when it denied a request for the investigative file related to a disciplinary investigation that is ongoing. The Department violated the Act by withholding other public records.

***Open Records Decision***

On February 22, 2021, Jonathan Fannin (“Appellant”) asked the Department for “copies of the police report, full investigative file and reports including the 911 dispatch audio recordings, body worn camera footage, transcripts [and] CAD incident reports pertaining to any calls made” regarding a specific incident on May 29, 2020. In a timely response, the Department denied the request under KRS 61.878(1)(h), (i), and (j). The Department explained that the Professional Standards Unit was investigating the incident and that the administrative investigation was ongoing. The Department also stated that the premature release of the investigative file would “harm the investigation by tainting witness recollection of events as they may have to be re-interviewed for further investigation.” This appeal followed.

On appeal, the Department reiterates its claim that the requested records are “preliminary” because the investigation is ongoing. “Preliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency” may be exempt from inspection under KRS 61.878(1)(i). And “[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended” may be exempt from inspection under KRS

61.878(1)(j). Kentucky courts have held that public records that are adopted as part of a public agency's final action may lose their preliminary status and become subject to inspection. See *University of Kentucky v. Courier-Journal & Louisville Times Co.*, 830 S.W.2d 373, 378 (Ky. 1992). Drafts, notes, and preliminary recommendations that are part of an internal affairs investigation into alleged police misconduct may be exempt from disclosure until the public agency has taken final action concerning officer discipline. *City of Louisville v. Courier-Journal and Louisville Time Co.*, 637 S.W.2d 658, 660 (Ky. App. 1982). But the preliminary exemption "does not extend to the complaints which initially spawned the investigations. The public upon request has a right to know what complaints have been made and the final action taken by the Chief thereupon." *Id.*

To the extent that the investigation file contains drafts, notes, private correspondence with individuals, and preliminary recommendations, the Department was justified in withholding those records under KRS 61.878(1)(i) and (j).<sup>1</sup> The Department has not yet taken final action in the disciplinary proceeding, so these materials remain preliminary and are exempt from disclosure under the Act.

The Appellant also asked for the police report from that evening, copies of any computer aided dispatch (CAD) reports, and 911 calls and police video footage from that evening. These documents are not drafts, or memorandums recommending a policy or course of action. This is evidence of a past event and it is not subject to change. And if the complaints which "spawn[] the investigation" are not preliminary records exempt from disclosure, *City of Louisville*, 637 S.W.2d at 660, then neither are the 911 calls and police video that do the same thing. See, e.g., 06-ORD-230 (finding that 911 calls are not exempt under KRS 61.878(i) or (j)).

The Department also argues that all of the records are exempt under KRS 61.878(1)(h). They are not. That provision protects law enforcement records that are "compiled in the process of detecting and investigating statutory or regulatory violations if the disclosure of the information would harm the agency by revealing the identity of informants not otherwise known or by premature release of information to be used in a prospective law enforcement action or administrative adjudication." KRS 61.878(1)(h). In *City of Ft. Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842 (Ky. 2013), the Supreme Court of Kentucky

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<sup>1</sup> Such records would be documents drafted by the investigators in which the available evidence is analyzed and conclusions are drawn. Such records do not include the actual evidence from the night in question.

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. “A concrete risk, by definition, must be something more than a hypothetical or speculative concern.” *Id.*

Here, the Department claims that the premature release of the 911 calls, police video footage, and dispatch reports will “harm the investigation by tainting witness recollection of events as they may have to be re-interviewed for further investigation.”<sup>2</sup> But the Department admits that the witnesses to the incident have already been interviewed. It is purely speculative whether the witnesses will have to be “re-interviewed.” And if their memories change, those witnesses will have to explain why their previous statements contradict their new statements. Under these facts, the Department has not carried its burden, because it offers only a speculative and hypothetical harm that is not likely to occur in this case.

Because the 911 calls, police video footage, and CAD reports are not drafts, notes, correspondence with private individuals, or policy recommendations, those records are not exempt under KRS 61.878(1)(i) and (j). *See, e.g.*, 06-ORD-230. The Department has failed to carry its burden that KRS 61.878(1)(h) applies to these records under these facts. Accordingly, the Department violated the Act in withholding those records. However, the Department was justified in withholding any records in the investigative file that would be considered a draft or a preliminary recommendation.

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 proceedings.

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<sup>2</sup> This “investigation” is an administrative investigation, not a criminal one. The Department has not claimed that there is an ongoing criminal investigation into this incident such that KRS 17.150 may apply. In 20-ORD-104, this Office explained the difference between KRS 61.878(1)(h) and KRS 17.150. *See also* 14-ORD-154.

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