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**21-ORD-098**

May 27, 2021

In re: Emily Lacey/Nelson County Coroner's Office and Kentucky State Police

**Summary:** The Nelson County Coroner's Office ("Coroner's Office") violated the Open Records Act ("the Act") when it denied a request for copies of death certificates for the victims of an active homicide investigation without explaining how the release of the records would harm the investigation under KRS 61.878(1)(h). The Kentucky State Police, however, did not violate the Act when it denied inspection of the same records under KRS 17.150(2). Regardless, the records are exempt from inspection.

***Open Records Decision***

There are two exemptions to the Act that are commonly referred to as the "law enforcement exemption." One such exemption is KRS 61.878(1)(h), which exempts from inspection "records of law enforcement agencies . . . that were 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." The other is KRS 17.150(2), which states that "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) is incorporated into the Act under KRS 61.78(1)(l), which exempts records that are made confidential by another statute.

This appeal involves both exemptions and a request for the same records made to two public agencies. First, the Coroner's Office relied on KRS 61.878(1)(h) to deny inspection of specific death certificates for the victims of

homicides that remain the subject of an active investigation. Although the Appellant sought the same records from the Kentucky State Police, that agency relied on KRS 17.150(2) to deny inspection. Although one agency violated the Act and the other did not, for the reasons that follow, the records are exempt from inspection from both agencies. Nevertheless, this decision will explain that the two exceptions require public agencies to provide different explanations as for why law enforcement records are exempt from inspection.

Emily Lacey (“Appellant”) asked the Coroner’s Office to provide copies of the death certificates for four individuals who died between 2013 and 2016. In a timely written response, the Coroner’s Office explained that, according to KSP, the deaths were the subject of an ongoing investigation into “statutory violations.” For that reason, the Coroner denied the request under KRS 61.876(1)(h), and stated only that “the release of the requested information would harm [KSP] by the premature release of information to be used in a prospective law enforcement action.”

Upon receiving the response from the Coroner’s Office, the Appellant then sent an identical request to KSP. In a timely response, KSP denied the request under both KRS 17.150(2) and KRS 61.878(1)(h), and stated that “[p]remature release of any records related to an ongoing investigation in a public forum could result in prejudice to the witnesses and may adversely affect their recollection of the events.” The Appellant then sought this Office’s review of both responses.

In 20-ORD-104 and 20-ORD-139, the Office explained the difference between KRS 61.878(1)(h) and KRS 17.150(2). Briefly stated, KRS 17.150(2) applies only to “intelligence and investigative reports” of “criminal justice agencies,” *i.e.*, law enforcement agencies, and only if criminal prosecution has not concluded. If a decision not to prosecute has been made, the records may still be exempt from inspection if one of the conditions of KRS 17.150(2) (a)-(d) applies. For example, even if no prosecution occurs, the law enforcement agency may still redact or withhold information that would reveal the identity of a confidential informant. KRS 17.150(2)(a). If a public agency denies inspection of records under KRS 17.150(2), it must explain its denial “with specificity.” KRS 17.150(3). This “specificity” requirement requires the public agency to explain that a prosecution is ongoing, or a decision declining prosecution has not been made. Or, if prosecution has been declined and one of the conditions in KRS 17.150(2) (a)-(d) applies, the agency must state with specificity how one of those four conditions permits the agency to continue to deny inspection of the records.

KRS 61.878(1)(h), on the other hand, applies to a broader category of law enforcement records. First, it is not limited to “intelligence and investigative reports,” unlike KRS 17.150(2). Second, it also applies to investigations conducted by administrative agencies in connection with investigating the violations of regulatory provisions. To put it another way, all KRS 17.150(2) records are also KRS 61.878(1)(h) records, but not all KRS 61.878(1)(h) records are KRS 17.150(2) records.

If an agency relies only on KRS 61.878(1)(h), it must prove that *that* exception applies. And *that* exception requires the agency to articulate the “harm” that will affect the law enforcement 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 did not address the application of KRS 17.150(2), because the subject of the investigation had already been prosecuted to conviction. *See id.* at 846. Notwithstanding the agency’s claim that the convicted defendant could still seek post-conviction relief, the Court found the agency had not satisfied its burden under KRS 61.878(1)(h). *Id.* at 852.

As set forth above, KRS 17.150(2) provides that “[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.” The fact that KRS 17.150 only applies before a prosecution has concluded, and that it further does not require a “showing of harm,” is a recognition that the premature release of information prior to a criminal trial could damage either the criminal defendant, the Commonwealth, or both. That is because the criminally accused are afforded certain rights that are not available to those facing administrative discipline. For example, the criminally accused have the right to a fair and impartial jury, and the Commonwealth and the defendant both have an interest in witnesses not having access to evidence that could change their testimony.

Under KRS 17.150(2), the question of “harm” is secondary to the question, “Has prosecution been concluded?” If prosecution has not concluded, then it is evident that premature release of records into the public sphere may

affect the impartiality of potential jurors, or provide an opportunity for witnesses to change their testimony. That is why the General Assembly enacted KRS 17.150(2) and limited its application to criminal prosecutions. If the prosecution is over, or a decision not to prosecute has been made, then the concerns about fair and impartial juries, or changes to witness testimony, are no longer relevant. But the records may also be used in other prospective law enforcement actions unrelated to criminal prosecution, such as an administrative investigation into police misconduct. Therefore, the records may still be exempt under KRS 61.878(1)(h), but to properly invoke this exemption, a public agency must articulate a concrete risk of harm to the investigation that will occur if the records are released. *City of Ft. Thomas*, 406 S.W.3d 842.

The Coroner and the KSP are “criminal justice agencies” under KRS 17.150(1). And death certificates are “intelligence reports.” Death certificates can include the time of death, the immediate cause of death, descriptions of injuries causing death, and how those injuries occurred. The premature release of such information could impact witness testimony. For example, it may permit a suspect to create an alibi for the time of death. Or it could prejudice a potential jury pool by allowing members of the community to learn specific facts about the manner and time of death before any such evidence is presented at a trial. To explain how KRS 17.150(2) applies to deny inspection of records, a law enforcement agency must explain that a criminal investigation is ongoing and that prosecution has not been completed or a decision not to prosecute has not yet been made. KSP did that, and therefore it did not violate the Act.

The Coroner’s Office, however, relied only on KRS 61.878(1)(h) to deny inspection of the death certificates. For the reasons previously explained, KRS 61.878(1)(h) specifically requires a law enforcement agency to articulate the harm that will occur to the investigation if the records are prematurely released. The Coroner’s Office failed to articulate the harm necessary to justify its reliance on the exemption. On appeal, however, the Coroner’s Office explains that the death certificates contain the estimated time and cause of death, and the premature release of such information may permit suspects to create alibis for the time of death. At this stage in the investigation, no one has been charged, and the public release of facts related to the time and cause of the victims’ deaths may impede law enforcement’s ability to proceed with the investigation.

At bottom, this Office has long recognized the inherent harm to criminal prosecutions when evidence that may be used at trial is publicly disclosed

prematurely. *See, e.g.*, OAG 83-123. Such inherent harm dissipates after a prosecution has concluded. At that point, KRS 17.150 may only be invoked to deny inspection if one of the conditions enumerated in KRS 17.150(2)(a)-(d) is met and the agency explains with specificity how one of those conditions applies. Or, a public agency may rely on KRS 61.878(1)(h) to deny inspection if it articulates a concrete risk of harm to the agency's investigation. *See City of Ft. Thomas*, 406 S.W. 3d at 846–47. KRS 17.150 applies only in the context of criminal prosecutions, which are proceedings that carry significant constitutional safeguards for the criminally accused.<sup>1</sup> On the other hand, KRS 61.878(1)(h) may be invoked in the context of any law enforcement investigation, whether it is a criminal investigation or administrative investigation. And when a public agency relies solely on KRS 61.878(1)(h) to deny inspection of law enforcement records, it must explain the harm that will occur to the investigation.

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.

**Daniel Cameron**  
Attorney General

/s/Marc Manley  
Marc Manley  
Assistant Attorney General

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<sup>1</sup> Of course, as time progresses and an investigation languishes without any real chance that a prosecution will be forthcoming, a de facto decision not to prosecute may occur. *See Department of Kentucky State Police v. Teague*, Case No. 2018-CA-000186, 2019 WL 856756 (Ky. App. Feb. 22, 2019) (holding that KSP could not rely on KRS 17.150 to deny inspection of records relating to an investigation that had been ongoing for 22 years and there was no evidence that a suspect would be charged in the future). This Office notes that at least one of the decedents died in 2013, or approximately eight years ago. Eventually, the passage of time will by default lead a reasonable person to conclude that no prosecution will be occurring, and that KRS 17.150 should no longer apply to the records.

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Distributed to:

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