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21-ORD-102

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In re: Hayden Hodges/Graves County Sheriff's Office

Summary: The Graves County Sheriff's Office ("Sheriff's Office") violated the Open Records Act ("the Act") when it failed to explain how an exception to the Act applied to a record it withheld from inspection. The Sheriff's Office did not violate the Act when it denied a request, under KRS 189A.100(2), for a video containing field sobriety testing.

Open Records Decision

On April 13, 2021, Hayden Hodges ("Appellant") requested a copy of "all body-worn camera videos of" an incident on March 20, 2021, in which a named individual was charged with driving under the influence. In a timely response, the Sheriff's Office denied that request under KRS 189A.100(2) and KRS 61.878(1)(h). But the Sheriff's Office did not explain its denial other than to state that the recording is "part of an open criminal investigation and the body camera video is exempt from open records request at this time." This appeal followed.

When a public agency denies a request under the Act, it must give "a brief explanation of how the exception applies to the record withheld." KRS 61.880(1). The agency's explanation must "provide particular and detailed information," not merely a "limited and perfunctory response." *Edmondson v. Alig*, 926 S.W.2d 856, 858 (Ky. 1996). Moreover, when a law enforcement agency claims that records are exempt under KRS 61.878(1)(h), it must articulate how release of the records will pose "a concrete risk of harm to the agency in the prospective action." *City of Ft. Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 851 (Ky. 2013); *see also* 21-ORD-098.

Here, the Sheriff's Office merely stated that the video was "part of an open criminal investigation." Rather than explain how KRS 189A.100(2) authorized the Sheriff's Office to withhold the video, the Sheriff's Office merely provided the Appellant a copy of the statute. And although the Sheriff's Office stated that the records were part of an ongoing criminal investigation, it did not explain how premature release of the video would harm its investigation. Thus, the Sheriff's Office violated the Act when it failed to explain how KRS 189A.100(2) or KRS 61.878(1)(h) applied to deny inspection of the records. KRS 61.880(1).

Although the Sheriff's Office's initial response violated the Act, it properly denied the request under KRS 189A.100(2). Law enforcement agencies may make audiovisual recordings of a field sobriety test of a person suspect suspected of driving under the influence. KRS 189A.100(2)(a). But under KRS 189.100(2)(b)5, such recordings "shall be used for official purposes only," which are limited to "[v]iewing in court," "[v]iewing by the prosecution and defense in preparation for a trial," and "[v]iewing for purposes of administrative reviews and official administrative proceedings." Such recordings must "otherwise be considered as confidential records." KRS 189A.100(2)(b)5.c. And KRS 61.878(1)(l) excludes from the Act "[p]ublic records or information the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly[.]"

The General Assembly was clear that KRS 189A.100, including its confidentiality provisions, applies to the "entire recording." *See* KRS 189A.100(2)(b)2 (requiring the "entire recording" to be played in court "unless the defendant waives the showing of any portions not offered by the prosecution"); KRS 189A.100(2)(b)3 (requiring the "entire recording" to be available for use by the defense at trial); KRS 189A.100(2)(b)4 (requiring that the defense be given an opportunity to view the "entire recording" prior to trial). This Office has previously held that such recordings are entirely confidential, and that a law enforcement agency is not authorized to release any portion of such videos. *See, e.g.,* 93-ORD-133; 10-ORD-088; 19-ORD-102. And to ensure that no public official inappropriately releases such recordings, the General Assembly has declared that using or showing the recordings to an unauthorized person constitutes official misconduct in the first degree – a Class A misdemeanor. KRS 189A.100(2)(b)7.

Here, the Sheriff's Office explains that the video is about two hours long and contains "the DUI arrests of two individuals . . . and [the recording] starts when the deputy arrives on the scene." The Appellant does not dispute that the

video shows field sobriety testing. Nor does he claim that he is requesting the video for “official purposes,” as defined in KRS 189.100(2)(b)5. Instead, he claims that KRS 189.100(2) only applies to the specific moments of the video where the field sobriety testing occurs. Therefore, he argues, the Sheriff’s Office must redact those portions of the video and provide the remainder to him. But, as explained above, the Sheriff’s Office cannot release any portion of the recording under KRS 189A.100(2). Thus, the Sheriff’s Office did not violate the Act when it denied the Appellant’s request under KRS 189A.100(2).

In sum, the Sheriff’s Office violated the Act when it failed to explain how the cited exceptions to the Act authorized it to withhold the video requested. On appeal, however, the Sheriff’s Office has met its burden to show that the video is confidential under KRS 189A.100(2)(b) and that it is exempt from inspection under the Act. Because KRS 189A.100(2)(b) is dispositive, it is unnecessary to consider whether the video is exempt under KRS 61.878(1)(h).

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
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/s/ James M. Herrick

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#133

Distributed to:

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