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21-ORD-194

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In re: Sam Aguiar/Louisville Metro Police Department

Summary: Louisville Metro Police Department (the "Department") violated the Open Records Act ("the Act") when it initially denied a request without explaining how exemptions applied to records withheld. However, the Department, both on appeal and immediately prior thereto, corrected its error and properly substantiated its denial.

Open Records Decision

On September 7, 2021, Sam Aguiar ("Appellant") asked the Department to provide copies of "Calls for Service Reports," 911 calls, Emergency Medical Services ("EMS") radio communications, including all dispatch reports, and Computer Aided Dispatch ("CAD") reports related to a specific date and time at a specific address. On September 14, 2021, at 1:55 p.m., the Department responded and stated only that the Appellant's "request is denied. The records [the Appellant] requested are exempt from disclosure per KRS 61.878(1)(h)." Approximately 35 minutes later, the Appellant initiated this appeal.

However, within 90 minutes of the Appellant initiating the appeal, and before this Office issued notice thereof to the Department, the Department sent a supplemental response to the Appellant. In its supplemental response, the Department denied the request under KRS 61.878(1)(h) and KRS 17.150(2) and further explained that the underlying case was the subject of two felony criminal cases currently pending, and that release of the requested records "could jeopardize the pending prosecution by identifying witnesses not otherwise known and tipping them off to the direction of the ongoing criminal case, impact witness recollection of the incident, and taint the jury pool by permitting the case to be tried in the court of public opinion rather than in

court with the benefit of procedural and evidentiary rules." The Appellant acknowledged receipt of this supplemental response, but asserted that "the appeal still stands, however, for the reasons previously asserted."

Under KRS 61.880(1), upon receiving a request to inspect records, a public agency must notify the requester within five business days whether it will comply with or deny the request. Upon receiving the agency's response, the requester may appeal the agency's disposition to this Office by attaching a copy of the request and the agency's response. KRS 61.880(2)(a). Thus, the Appellant's appeal became ripe at 1:55 p.m. on September 14, 2021, when the Department issued a response that notified the Appellant it was denying his request. Under KRS 61.880(2)(a), the Attorney General "shall review the request and denial" and decide whether the agency's response violated the Act. Thus, "the response" that this Office must examine is the Department's initial response at 1:55 p.m.

In addition to issuing a response within five business days, a public agency that denies a request must also cite the exceptions authorizing its denial and briefly explain how the exception applies. KRS 61.880(1). Here, the Department's initial response identified KRS 61.878(1)(h) but failed to provide any explanation as to how that exception applied to the records withheld. Its "limited and perfunctory response" violated the Act. *See Edmondson v. Alig*, 926 S.W.2d 856, 858 (Ky. App. 1996).

However, as explained previously, the Department issued a supplemental response to the Appellant after the appeal had been submitted and before notice of the appeal was issued. Although this Office has discharged its duty under KRS 61.880(2)(a) to consider the Appellant's request and the Department's insufficient denial thereof, it will nevertheless consider the Department's supplemental response and whether it complies with the Act. This Office finds that it does.

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.

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. This Office has previously ruled that CAD reports were included in the category of "intelligence and investigative reports." *See, e.g.,* 17-ORD-144; 11-ORD-171. Police radio traffic relating to a specific investigation has likewise been found to be within the scope of KRS 17.150(2). *See, e.g.*, 16-ORD-240. Finally, this Office has also previously concluded that 911 calls constitute "intelligence and investigative reports" and may be properly withheld under KRS 17.150(2) so long as a prosecution remains pending. *See, e.g.*, 15-ORD-123.

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.

The fact that KRS 17.150(2) 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.

Here, the Department explained that the prosecution remains pending, and specifically identified the case by its felony case designation in Jefferson District Court. The Department further explained that the premature release of the requested records could taint witness memories and the jury pool. The Department also explained that premature release of the information could inform suspects about the ongoing police investigation. In doing so, the Department stated with specificity how KRS 17.150(2) applied to withhold the requested records. *See, e.g.*, 20-ORD-104; 17-ORD-144; 16-ORD-240; 15-ORD-123; 14-ORD-154. Accordingly, the Department did not violate the Act when it denied the Appellant's request under KRS 17.150(2).[1]

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/Marc Manley
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Distributed to:

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[1] Because the Department carried its burden that KRS 17.150(2) applies, this Office will not address its alternative argument that KRS 61.878(1)(h) applies. In 21-ORD-98, this Office comprehensively explained the differences between KRS 17.150(2) and KRS 61.878(1)(h) and declines to do so again here.