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21-ORD-231

November 24, 2021

In re: Gia Wright/Kentucky Department of Fish and Wildlife Resources

Summary: The Kentucky Department of Fish and Wildlife Resources (the “Department”) did not carry its burden to show that KRS 61.878(1)(h) allowed it to deny a request for records. However, the Department did not violate the Open Records Act (“the Act”) when it denied inspection of the records under KRS 61.878(1)(i).

Open Records Decision

On October 12, 2021, Gia Wright (“Appellant”) submitted a request to the Department for eight categories of records related to the investigation into a specific person’s disappearance. The person was last seen on February 14, 2020, when she was “reportedly swept away by a current while wading in the Tennessee River[.]” On October 26, 2021, the Department responded and denied the request pursuant to KRS 61.878(1)(h) and (i) because “the report is not final and is part of an ongoing law enforcement investigation.” This appeal followed.

KRS 61.878(1)(h), exempts from inspection “[r]ecords 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 or administrative adjudication.” The Department is a “law enforcement agenc[y]” under KRS 61.878(1)(h). *See* KRS 150.090(2) (vesting Department conservation officers with the full power of peace officers). However, to deny a request for records pursuant to KRS 61.878(1)(h), the

Department must also demonstrate how it would be harmed by the “premature release of information to be used in a prospective law enforcement action[.]” KRS 61.878(1)(h); *see also* 21-ORD-098 (explaining that the two law enforcement exceptions, KRS 61.878(1)(h) and KRS 17.150(2), carry different burdens of proof). To carry its burden of proof under KRS 61.878(1)(h), the Department must show that the records “release poses a concrete risk of harm to the agency in the prospective action. A concrete risk, by definition, must be something more than a hypothetical or speculative concern.” *City of Ft. Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 851 (Ky. 2013).

On appeal, the Department states that “[t]he premature release of the investigative documents *could* harm or impede the ongoing investigation as it *could* prevent witnesses from coming forward with information, adversely impact witness recollection of events, or *potentially* alert a wrongdoer to the status of the investigation and guide them as to how to cover up any such wrongdoing.” These claims are speculative and do not demonstrate a “concrete risk of harm to the agency in the prospective action.” *Id.* Thus, the Department has failed to identify a specific concrete risk of harm to its investigation and failed to carry its burden that KRS 61.878(1)(h) allows it to deny a request for records.

The Department also claimed the records are preliminary drafts. KRS 61.878(1)(i) exempts from the Act “[p]reliminary drafts, notes, [and] correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency[.]” This Office has described a preliminary draft as “a tentative version, sketch, or outline of a formal and final written product.” *See* 21-ORD-180. On appeal, the Department explains that the records withheld are “investigative documents” that are “preliminary, incomplete, and in draft form at the time they were withheld.” Furthermore, “[t]he investigation remains open as efforts to locate [the specific person] are continuing.” Accordingly, the Department did not violate the Act when it withheld from inspection preliminary records that are not yet incorporated into a final action.

Although the Department’s initial response only relied on KRS 61.878(1)(h) and (i) to deny inspection of the records, the Department now claims on appeal that KRS 17.150(2) also allows it to deny the request. Under KRS 17.150(2), “[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.” However, agencies cannot rely on this exemption in perpetuity. In cases where there is a

significant passage of time a *de facto* determination not to prosecute may occur. See, e.g., 21-ORD-128; see also *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).

Although the Appellant claims that “[t]he [d]etective in charge at the [Department] told [her] that they did not have any additional information to further investigate this case and believe that this was accidental,” the Department explains that “no determination has been made as to whether to prosecute anyone for a crime related to [the specific person’s] disappearance.” Furthermore, the Department states that “[u]ntil such time she is located, there remain many questions regarding the circumstances of her disappearance.” Thus, the Department has not completed prosecution, nor has it declined prosecution in this case. Moreover, a sufficient enough amount of time has not passed such that a *de facto* determination not to prosecute could have been made since this specific person was last seen less than two years ago. Accordingly, the Department did not violate the Act when it relied on KRS 17.150(2) to deny a request for investigative records where prosecution has not yet completed nor has a decision not to prosecute been made.

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 within 30 days from the date of this decision. 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. The Attorney General will accept notice of the complaint emailed to OAGAppeals@ky.gov.

Daniel Cameron
Attorney General

/s/Matthew Ray
Matthew Ray
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Distributed to:

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