



COMMONWEALTH OF KENTUCKY  
OFFICE OF THE ATTORNEY GENERAL

DANIEL CAMERON  
ATTORNEY GENERAL

CAPITOL BUILDING, SUITE 118  
700 CAPITAL AVENUE  
FRANKFORT, KENTUCKY 40601  
(502) 696-5300  
FAX: (502) 564-2894

**21-ORD-259**

December 21, 2021

In re: Ashley Gruner/Kentucky State Police

**Summary:** The Kentucky State Police (“KSP”) did not violate the Open Records Act (“the Act”) when it met its burden of proof that KRS 17.150(2) authorized it to deny inspection of investigative records contained in a 42-year-old homicide case.

***Open Records Decision***

On November 15, 2021, Ashley Gruner (“Appellant”) requested a copy of the records pertaining to KSP’s investigation of an unsolved homicide case that occurred in Eastern Kentucky approximately 42 years ago. KSP denied the request under KRS 17.150(2) and KRS 61.878(1)(h), explaining that the detective assigned to the case needed to interview one individual and 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.” KSP directed the Appellant to “contact the Post 13 Records Clerk . . . to determine if the case has been closed” prior to submitting another request. This appeal followed.

Under KRS 61.880(2)(c), a public agency that denies a request to inspect records carries the burden of proving that the claimed exemption applies to withhold the requested record. KSP relies on both KRS 61.878(1)(h) and KRS 17.150(2) to deny inspection of the records. In 21-ORD-098, this Office explained the difference between these two exemptions. Under KRS 61.878(1)(h), “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” are exempt

from inspection. Under KRS 17.150(2), however, “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.” If a law enforcement agency denies access to a record under KRS 17.150(2), it must explain “with specificity” if a prosecution is ongoing or if a decision not to prosecute has been made. KRS 17.150(3). If prosecution has concluded, or a decision not to prosecute has been made, then the agency must specify how one of the four conditions under KRS 17.150(2)(a)-(d) apply to allow it to continue to deny inspection. *See* 21-ORD-098.

Although a law enforcement agency may invoke KRS 17.150(2) to deny inspection of intelligence and investigative reports related to a case in which prosecution has not concluded, the exemption cannot apply indefinitely. *See* KRS 17.150(3) (“Exemptions provided by this section shall not be used by the custodian of the records to delay or impede the exercise of rights granted by this section.”). As explained in 21-ORD-098, the purpose of this exemption is to protect the rights of the criminally accused to a fair and impartial trial. But as time progresses, and it eventually becomes apparent that no prosecution will be forthcoming, then a *de facto* decision not to prosecute may have been made. *See Dept. of Kentucky State Police v. Teague*, Case No. 2018-CA-000186, 2019 WL 856756 (Ky. App. Feb. 22, 2019) (unpublished decision) (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).

Thus, for KSP to carry its burden under KRS 17.150(2), it must show that it is a law enforcement agency, the records are intelligence or investigative reports, and that there has been no determination not to prosecute. Here, it is undisputed that KSP is a law enforcement agency and that the records are intelligence or investigative reports. The question is whether KSP has explained with specificity that no determination has been made regarding prosecution. On appeal, KSP explains that the detective assigned to the case is actively seeking a suspect whose name was “referenced in a prior interview” and “anticipates being able to locate this individual and interview him during the next couple of weeks.” KSP asserts that “disclosure of any investigative records could assist [the suspect] in creating an alibi or evading arrest.”

This Office has previously declined to “decid[e] the maximum amount of time that a case can remain open” under KRS 17.150(2). *See* 21-ORD-128 n.2. Although 42 years have passed since the crime occurred, the facts in the record on appeal support KSP’s claim that investigation of this case has not

concluded. KSP is pursuing an identified suspect whom it expects to locate and interview in a matter of weeks. Thus, this is not a case in which “a *de facto* decision not to prosecute has been made by the passage of time.” See 21-ORD-128. Because prosecution has been neither completed nor declined, KRS 17.150(3) merely requires a law enforcement agency to give specific information to “explain that a criminal investigation is ongoing.” See 21-ORD-098. KSP has provided such information. Accordingly, KSP did not violate the Act when it withheld the investigative records in this case.<sup>1</sup>

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 e-mailed to OAGAppeals@ky.gov.

**Daniel Cameron**  
**Attorney General**

/s/ James M. Herrick

James M. Herrick  
Assistant Attorney General

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Distributed to:

Ms. Ashley Gruner  
Michelle D. Harrison, Esq.  
Ms. Robin C. Wells

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<sup>1</sup> Because KRS 17.150(2) is dispositive of the issues on appeal, it is unnecessary to determine whether the investigative records are exempt under KRS 61.878(1)(h). However, this Office has noted that information might be withheld under KRS 61.878(1)(h) if it would “permit a suspect to create an alibi for the time of death.” See 21-ORD-098.