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22-ORD-072

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In re: Jonathan Fannin/Lexington Police Department

Summary: The Lexington Police Department ("the Department") did not violate the Open Records Act ("the Act") when it denied, under KRS 189A.100, a request for video recordings of a field sobriety test intended to be used in a civil trial.

Open Records Decision

Jonathan Fannin ("the Appellant") submitted a request to the Department to inspect all body-worn camera footage taken during the Department's response to a specific incident. The Appellant, an attorney representing a person involved in the incident, notified the Department that he sought these records on behalf of his client for use at a civil trial. In a timely response, the Department denied the Appellant's request for body-worn camera footage under KRS 189A.100 because the footage "references a DUI investigation." Citing 19-ORD-102, the Department explained that video recordings of field-sobriety tests are exempt from inspection even if the intended purpose of the request is to use the footage as evidence in a civil trial. This appeal followed.[1]

KRS 189A.100 establishes the procedure for officers administering sobriety tests during an investigatory stop for a suspect driving under the influence of alcohol. Officers are permitted to record the suspect while

[1] The Appellant also sought several other Department records related to the incident. The Department provided responsive records to some portions of the request, and redacted portions of other records under various exemptions. The Appellant objects only to the Department's denial of the body-worn camera footage.

administering these tests. KRS 189A.100(2)(a). However, such footage "shall be used for official purposes only." KRS 189A.100(2)(b)5. The statute provides only three "official purposes" for which the footage may be used: viewing "in court"; viewing "by the prosecution and defense in preparation for a trial"; and viewing "for purposes of administrative reviews and official administrative proceedings." *Id*. Otherwise, the recordings shall be considered "confidential records." *Id*. The unauthorized release of such confidential footage is a Class A misdemeanor, punishable by fine or a minimum sixth-months imprisonment. KRS 189A.100(2)(b)7 (defining the unauthorized release of footage as official misconduct in the first degree); KRS 522.020(2) (official misconduct in the first degree is a Class A misdemeanor). KRS 189A.100(2)(b)5 is incorporated into the Act under KRS 61.878(1)(l), which exempts from inspection records that have been made confidential by an enactment of the General Assembly.

When interpreting statutes, Kentucky courts "presume that the General Assembly intended for the statute to be construed as a whole, for all of its parts to have meaning, and for it to harmonize with related statutes." *Shawnee Telecom Resources, Inc. v. Brown,* 354 S.W.3d 542, 551 (Ky. 2011) (internal citations omitted). Although KRS 189A.100(b)5 states that viewing the footage "in court" is an official purpose for which the footage may be used, when viewing the statute as a whole, it is clear that viewing "in court" means during a criminal defense proceeding. The statute repeatedly uses the terms "defendant" and "Commonwealth," and specifically states that an official use of such video includes viewing "by *the prosecution and defense* in preparation for a trial." KRS 189A.100(2)(b)5.b. (emphasis added). Thus, only the prosecution and defense may view the footage *outside* of court in preparation for trial.

Other than a criminal defense proceeding, the only permissible use of such footage is "for purposes of administrative reviews and official administrative proceedings." Thus, the General Assembly has considered proceedings other than criminal proceedings, and has permitted the use of such footage during "administrative proceedings." However, the General Assembly did not expressly include civil proceedings among the "official purposes" for which the footage may be used, despite its recognition of both criminal and administrative proceedings.[2] This Office has previously found that the use of

[2] However, this Office notes that the footage shall be destroyed, by order of the sentencing court, upon the "later" of multiple potential events, which includes "the conclusion of any civil case *arising* from events depicted on the videotape." KRS 189A.100(2)(b)6.e (emphasis added). This indicates that perhaps such footage could be used in *some* civil proceeding, otherwise there is no need to preserve the footage until the conclusion of a "civil proceeding." The civil

such footage as evidence in a civil trial is not an "official purpose" under KRS 189A.100(2)(b)5. *See, e.g.*, 19-ORD-102. Accordingly, the Department did not violate the Act when it denied inspection of body-worn camera footage depicting the pursuit, stop, or administration of sobriety tests to a person suspected of driving under the influence.

Finally, the Appellant argues that even if KRS 189A.100(2)(b)5 prevents inspection of footage that depicts the administration of sobriety tests, he did not limit his request to such footage. The Appellant sought "all" body-worn camera footage of the incident "at the intersection" where the Department responded. The Appellant claims that the Department must provide copies of any footage of police interviews of witnesses, general footage of the scene, and footage that captures any injuries. The footage that is exempt from inspection under KRS 189A.100 includes only footage of "the pursuit of a violator or suspected violator," "the traffic stop," or the administration of sobriety tests or the suspect's refusal to participate. KRS 189A.100(2)(a).

The Appellant is correct that footage of witness interviews is not exempt from inspection under KRS 189A.100. Such footage is instead exempt under KRS 61.168(4)(h), which permits a law enforcement agency to deny inspection of footage that would "reveal the identity of witnesses." Because the Appellant is an attorney for an individual involved in the incident, he is only entitled to a copy of the footage if he first executes and provides an affidavit agreeing to abide by certain terms. *See* KRS 61.169. In its response to the Appellant's request, the Department notified the Appellant that he failed to provide the required affidavit. Accordingly, the Department did not violate the Act when it denied the Appellant's request for body-worn camera footage of the incident.

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

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proceeding, however, must "arise" from the "events depicted on the video," thus indicating that such footage could be used in a civil action for false arrest, malicious prosecution, or some other alleged tort committed by the officer against the defendant that is captured on the video. Nevertheless, KRS 189A.100(2)(b)5 only permits the prosecution and defense to view the recording in preparation for a trial. It is unclear how a civil attorney could play the video "in court," KRS 189A.100(2)(b)5.a., without having first viewed the footage in preparation for a civil trial.

Attorney General will accept notice of the complaint e-mailed to OAGAppeals@ky.gov.

Daniel Cameron
Attorney General

/s/Marc Manley
Marc Manley
Assistant Attorney General

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Distributed to:

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