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24-ORD-126

May 24, 2024

In re: Michele Cecil/Hancock County Sheriff's Office

Summary: The Hancock County Sheriff's Office ("the Sheriff's Office") violated the Open Records Act ("the Act") when it failed to issue a written response to a request to inspect records within five business days. The Sheriff's Office also failed to meet its burden to support withholding the requested records under KRS 61.878(1)(h).

Open Records Decision

On April 4, 2024, attorney Michele Cecil ("Appellant") submitted a request to the Sheriff's Office seeking "[a]ny and all incident investigation reports, photographs, drawings, diagrams, sketches, surveys, notes, memoranda, correspondence, statements, interviews, other documents, video tapes, transcripts, referrals, and tape recordings of any and all 911 calls generated" regarding an automobile accident involving her client on June 1, 2022, "as well as any witness statements, identities and contact information." After receiving a telephone message from the Sheriff's Office stating there was no report of the accident, the Appellant resubmitted her request on April 5, 2024, with additional information about the driver and location. The Appellant submitted her request a third time on April 10, 2024, and sent a follow-up letter to the Sheriff's Office on April 17, 2024. Having received no written response to her request by April 25, 2024, the Appellant initiated this appeal.

Upon receiving a request to inspect public records, a public agency must determine within five business days whether to grant the request or deny it and must issue a response in writing within that five-day period. KRS 61.880(1). Here, the last day for the Sheriff's Office to respond to the Appellant's request was April 11, 2024. On appeal, the Sheriff's Office admits it did not issue a written response. Accordingly, the Sheriff's Office violated the Act.

After this appeal was initiated, the Commonwealth's Attorney for the 38th Judicial Circuit submitted a letter stating that "the materials of the investigation" by the Sheriff's Office "have been turned over to [his] office for consideration of

presentation to a grand jury.” The Commonwealth’s Attorney further stated, “Pursuant to KRS 61.878, records or information compiled and maintained by [the Commonwealth’s Attorney’s] office pertaining to criminal investigation/litigation are exempted from the [Act] and remain exempt after the action/investigation are [sic] completed. Records of law enforcement agencies . . . are also exempt under 61.878(h) [sic] when compiled [sic] in the process of investigating a crime when disclosure would harm the agency by premature release of information to be used in a prospective law enforcement action.”

Under KRS 61.878(1)(h), “records or information compiled and maintained by county attorneys or Commonwealth’s attorneys pertaining to criminal investigations or criminal litigation shall be exempted from the [Act] and shall remain exempted after enforcement action, including litigation, is completed or a decision is made to take no action.” That clause, however, only applies to records requested from the prosecutor. *See City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 850 n.5 (Ky. 2013).¹ Here, the Appellant requested the records from the Sheriff’s Office.

In its response to this appeal, the Sheriff’s Office claims that “the records are exempt from disclosure pursuant to KRS 61.878(h)” [sic] and “consistent with that same statute and paragraph, the records in possession of the officer shall be open after the criminal action is complete or a decision is made to take no action.” In addition to totally exempting a prosecutor’s criminal litigation file, KRS 61.878(1)(h) also exempts from inspection “[r]ecords of law enforcement agencies or agencies involved in administrative adjudication 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.” This exemption consists of three elements. First, the records must be “records of law enforcement agencies or agencies involved in administrative adjudication.” Second, the agency must show the records were “compiled in the process of detecting and investigating statutory or regulatory violations.” Finally, the agency must show release of the records “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.”

Here, the first two elements of KRS 61.878(1)(h) are clearly satisfied. However, the Sheriff’s Office has not attempted to satisfy the third element, *i.e.*, that disclosing

¹ Some prior decisions of the Office have sustained a law enforcement agency’s denial of a request on the grounds that the records had been turned over to the Commonwealth’s Attorney for prosecution. *See, e.g.*, 13-ORD-016; 93-ORD-97. Those decisions, however, were not based on KRS 61.878(1)(h), but on the fact that the law enforcement agency had given away its only copy of the records and thus no longer had them in its possession. The Sheriff’s Office has confirmed that is not the case here.

the records will harm its investigation. When relying on KRS 61.878(1)(h), a law enforcement agency must establish that, “because of the record’s content, its 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 Fort Thomas*, 406 S.W.3d at 851. Further, the agency must “identify and review its responsive records, release any that are not exempt, and assign the remainder to meaningful categories. A category is meaningful if it allows the court to trace a rational link between the nature of the document and the alleged [harm to the agency].” *Id.* (quotations omitted). “The agency should provide the requesting party . . . with sufficient information about the nature of the withheld record (or the categories of withheld records) and the harm that would result from its release to permit the requester to dispute the claim.” *Id.* at 852. But here, the Sheriff’s Office has made no effort to explain how releasing the records will harm its investigation.

In an appeal under the Act, the public agency bears the burden of proof to sustain its position. KRS 61.880(2)(c). Because the Sheriff’s Office has not proven the necessary elements of the exemption under KRS 61.878(1)(h), the Office finds it violated the Act in denying the Appellant’s request.

A party aggrieved by this decision may appeal it by initiating an action in the appropriate circuit court under KRS 61.880(5) and KRS 61.882 within 30 days from the date of this decision. Under 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.

Russell Coleman
Attorney General

/s/ James M. Herrick
James M. Herrick
Assistant Attorney General

#220

Distributed to:

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