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24-ORD-131

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In re: Jacob Ryan/Louisville Metro Police Department

Summary: The Louisville Metro Police Department (the "Department") violated the Open Records Act ("the Act") when it issued responses that failed to explain how the cited exemption applied to the records withheld and when it failed to properly invoke KRS 61.878(1)(h) to withhold records. The Department also violated the Act when it denied a request for records as unreasonably burdensome. However, the Department did not violate the Act when it could not provide copies of records that do not exist within its possession.

Open Records Decision

Jacob Ryan ("Appellant") submitted two requests for records to the Department for records related to the search of cell phone devices. First, the Appellant requested any "database, spreadsheet, or other record detailing any/all cell data extraction using" a specific mobile device forensic tool. Second, the Appellant requested all search warrants executed by the Digital Forensic Unit "related to any request for data extraction from a cellular device" for a specific time period. The Department denied both requests, contending that "the records [he] requested are exempt from disclosure under KRS 61.878(1)(h)." This appeal followed.

First, when a public agency denies a request under the Act, it must give "a brief explanation of how the exception applies to the record withheld." KRS 61.880(1). The agency's explanation must "provide particular and detailed information," not merely a "limited and perfunctory response." *Edmondson v. Alig*, 926 S.W.2d 856, 858 (Ky. 1996). "The agency's explanation must be detailed enough to permit [a reviewing] court to assess its claim and the opposing party to challenge it." *Ky. New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76, 81 (Ky. 2013).[1]

[1] An agency is not "obliged in all cases to justify non-disclosure on a line-by-line or document-by-document basis." *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 851 (Ky. 2013). Rather, "with respect to voluminous [open records] requests . . . it is enough if the agency identifies the particular kinds of records it holds and explains how [an exemption applies to] the release of each

On appeal, the Department admits "that both of the responses initially supplied to [the Appellant] violated KRS 61.880(1) by not explaining how the cited exemptions applied to the records withheld." As a result, the Appellant could not assess the propriety of the Department's invocation of KRS 61.878(1)(h). Thus, the Department violated the Act.

The Department, on appeal, continues to deny the Appellant's requests but abandons its reliance on KRS 61.878(1)(h) as to the first request. Instead, the Department now denies the first request, stating that "no responsive records exist." Once a public agency states affirmatively that a record does not exist, the burden shifts to the requester to present a *prima facie* case that the requested record does or should exist. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov't*, 172 S.W.3d 333, 341 (Ky. 2005). If the requester makes a *prima facie* case that the records do or should exist, then the public agency "may also be called upon to prove that its search was adequate." *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 848 n.3 (Ky. 2013) (citing *Bowling*, 172 S.W.3d at 341).

Here, because the Department did not make this claim until after the appeal was initiated, the Appellant did not have an opportunity to present a *prima facie* case that the records do or should exist within the Department's possession. Nevertheless, even if the Appellant had made a *prima facie* case, the Department sufficiently explains why it does not possess responsive records. The first request sought any "database, spreadsheet, or other record detailing [any] cell data extraction using" a specific mobile device forensic tool. The Department has explained that it "does not track which software programs were used to extract data from cellular devices, and there are multiple programs available." Thus, the Department has sufficiently explained on appeal why it does not possess any records responsive to the Appellant's first request.

Turning now to the Department's invocation of KRS 61.878(1)(h), it states that "[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." KRS 61.878(1)(h). The Supreme Court of Kentucky has held that when a public agency relies on KRS 61.878(1)(h) to deny inspection, it must

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assertedly [sic] exempt category." *Id.* (discussing the "law enforcement exception" under KRS 61.878(1)(h)). "[I]f the agency adopts this generic approach it must itself 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" exemption. *Id.* (quotation omitted).

"articulate a factual basis for applying it, only, that is, when, because of the record's content, its release poses a concrete risk of harm to the agency in the prospective action." *City of Fort Thomas*, 406 S.W.3d at 851.

Here, the Department initially claimed that "the records [he] requested are exempt from disclosure under KRS 61.878(1)(h)." On appeal, the Department explains that "[t]he release of all search warrants submitted to DFU would inevitably mean the release of active and/or sealed search warrants, which would compromise the integrity of an ongoing investigation by identifying witnesses, and by allowing witnesses and suspects to destroy any additional types of evidence sought."

The Department's initial responses and its response on appeal do not "articulate a factual basis" for a "concrete risk of harm" to it. Instead, the Department describes vague hypothetical scenarios that might result if it released "all search warrants." The Department does not describe the actual content of the records or how that content, if released, would cause an actual harm. There is no evidence, based on the Department's statements, that it ever reviewed the records responsive to the Appellant's request to determine whether their release would pose a concrete risk of harm to any of its investigations. Furthermore, because KRS 61.878(1)(h) only applies to "a prospective law enforcement action" the Department also failed to explain that any of the withheld records contain any "information to be used in a prospective law enforcement action or administrative adjudication." Instead, it issued "limited and perfunctory" responses both initially and on appeal. *Edmondson*, 926 S.W.2d at 858. Accordingly, the Department failed to properly invoke KRS 61.878(1)(h) to withhold records, and thus, violated the Act.

Finally, on appeal, the Department also relies on KRS 61.872(6) to deny the second request. KRS 61.872(6) contains two separate but interrelated grounds to deny a request. The more common of the two applies when "the application places an unreasonable burden in producing records." *Id*. This portion of KRS 61.872(6) is specific to the request, or "application," if it alone places an unreasonable burden on the agency. In making such a determination, the Office considers the number of records the request implicates, whether the records are in a physical or electronic format, and whether the records contain exempt material requiring redaction. *See, e.g.,* 97-ORD-088 (a request implicating thousands of physical files stored in several locations throughout the state and each file needed to be reviewed for redactions pursuant to state and federal law was unreasonably burdensome). An agency can also establish an unreasonable burden if it does not catalog its records in such a manner that they can be searched using a keyword. *See, e.g.,* 96-ORD-042 (unreasonable burden found where the agency's thousands of files needed to be reviewed to determine if the records were responsive to the keywords in the request).

In support of its claimed exemption, the Department claims it "would have to individually contact detectives for each case to determine[ ] whether the warrants were sealed; whether the associated cases were still open; and whether any warrants required redaction to avoid compromising an ongoing enforcement action." The Department further states that, during the time period specified in the second request, it "has examined more than 1800 devices, and most of those involved search warrants." Although the number of records at issue is not the only factor the Office considers, it is the most important one. *See e.g.,* 22-ORD-182. The Office has previously found that searching and sorting through 5,000 emails to separate exempt emails from nonexempt emails was not an unreasonable burden, when it was not clear the emails contained information that was required to remain confidential by law. *See, e.g.,* 22-ORD-255; 24-ORD-008 (finding the agency had "not sustained by clear and convincing evidence that" reviewing 2,607 emails for exempt material placed "an unreasonable burden on the agency"). While the Department may have been able to sustain the need to delay access to those records under KRS 61.872(5), it certainly has not sustained by clear and convincing evidence that the task places such an unreasonable burden on the agency that the request could be fully denied under KRS 61.872(6). Moreover, the Department has not estimated how many of the "more than 1800 devices" examinations it conducted involved search warrants. Accordingly, the Department has not sustained by clear and convincing evidence that the Appellant's request places an unreasonable burden on it.

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
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/s/ Matthew Ray
Matthew Ray
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Distributed to:

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