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25-ORD-019

January 27, 2025

In re: Nancy Tucker/Hopkinsville Police Department

Summary: The Hopkinsville Police Department ("the Department") violated the Open Records Act ("the Act") when it withheld medical records, autopsy records, and photos of a deceased individual. The Department also violated the Act when it failed to properly invoke KRS 61.878(1)(h) to withhold records. The Department did not violate the Act when it redacted personal identifying information under KRS 61.878(1)(a).

Open Records Decision

On September 27, 2024, Nancy Tucker ("Appellant") submitted a request to the Department seeking records related to the Department's "collision death investigation" of a specific individual.[1] The Appellant specified that responsive records include "body cam footage, dash cam footage, audio recordings, photos, investigative notes, reports, collision reconstruction, etc." In an initial response on October 4, 2024, the Department stated that it needed "approximately two weeks for the records . . . to be redacted and reproduced." The response further stated that "information and images pertaining to any witnesses or individuals" would be "redacted to protect them from being contacted."[2] On October 18, 2024, the Department produced responsive records but again stated it was withholding "information, images, and video footage" related to witnesses, pursuant to KRS 61.878(1)(h) and KRS 17.150(2), because "the investigation is open and releasing

[1] The Appellant claims to be the mother of the deceased individual.

[2] The October 4 response also stated that medical records and autopsy records would not be provided pursuant to KRS 61.878(1)(a), KRS 61.878(1)(k), and KRS 72.031. It stated that graphic photos of the deceased would not be produced pursuant to KRS 61.878(1)(a). It stated that video of a hospital was being withheld pursuant to KRS 61.168(4). And it stated that NCIC records would not be produced pursuant to KRS 61.878(1)(k). The Department advised that it does not possess "911 or audio recordings" but that those records are in the possession of the Hopkinsville Emergency Communications Center.

certain records could harm the outcome of the ongoing investigation." This appeal followed.

On appeal, the Appellant alleges four violations of the Act by the Department: (1) the Department's October 18, 2024, denial was untimely; (2) the Department failed to "explain how each category is exempted from disclosure"; (3) the Department did not adequately explain how KRS 61.878(1)(h) allowed it to withhold records; and (4) the Department "erroneously relied on KRS 17.150(2)."

First, under KRS 61.880(1), a public agency must decide within five business days whether to grant a request or deny it. This time may be extended under KRS 61.872(5) when records are "in active use, in storage or not otherwise available" if the agency gives "a detailed explanation of the cause . . . for further delay and the place, time, and earliest date on which the public record will be available for inspection." In light of this provision, the Attorney General has recognized that persons requesting large volumes of records should "expect reasonable delays in records production." 12-ORD-228. However, the reasonableness of such a delay "is a fact-intensive inquiry." 21-ORD-045. A vague statement about the volume of a request is not a "detailed explanation" under KRS 61.872(5). *See, e.g.*, 22-ORD-164; 17-ORD-194. Thus, the Department's cursory response referring only to the approximate number of pages of responsive records failed to provide the "detailed explanation" required by KRS 61.872(5). Furthermore, the Department failed to give a date certain by which records would be available for inspection, as required by KRS 61.872(5). Therefore, the Department violated the Act when it did not grant or deny the request within five business days.

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). 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 assertedly exempt category." *Id.* (discussing the "law enforcement exception" under KRS 61.878(1)(h)). Of course, "if 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).

KRS 61.878(1)(a) exempts from disclosure "[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." This exception requires a "comparative weighing of the competitive interests" between personal privacy and the public interest in disclosure. *Ky. Bd. of Exam'rs of Psychologists v. Courier–Journal & Louisville Times Co.*, 826 S.W.2d 324, 327 (Ky. 1992). However, when the public agency fails to articulate a privacy interest, "the balance is decisively in favor of disclosure." 10-ORD-082; *see also* 20-ORD-033; 19-ORD-227.

In its original response and on appeal, the Department states that the information it redacted from the responsive records under KRS 61.878(1)(a) includes Social Security numbers, home addresses, personal telephone numbers, dates of birth, and driver's license numbers. These types of personal information pertaining to private individuals may be categorically redacted from law enforcement records when they provide no insight into how the public agency performed its public duties. *See Ky. New Era*, 415 S.W.3d at 81. Accordingly, the Department did not violate the Act when it redacted these categories of information.

However, the Department also states that it withheld "graphic photos of the deceased," "video images of the deceased," and "medical and autopsy records" under KRS 61.878(1)(a). But the Department has not identified the privacy interest implicated by these records. By merely citing KRS 61.878(1)(a) without articulating a significant personal privacy interest at stake, the Department failed to meet its burden to sustain its denial of these records.[3]

Next, the Department relied on KRS 61.878(1)(k) to withhold "medical records and autopsy records," as well as NCIC records. Under KRS 61.878(1)(k), "[a]ll public records or information the disclosure of which is prohibited by federal law or regulation" are excluded from inspection. Here, the Department did not identify the

[3] The Office notes that, under KRS 61.878(1)(q), "photographs or videos that depict the death . . . of a person" are generally exempt from disclosure except that "such photographs or videos" shall be available for in-person inspection at the request of the victim's "immediate family." The Appellant claims to be the mother of the deceased individual.

federal law or regulation which made these records exempt. Thus, the Department violated the Act when it did not adequately explain its denial of these records.[4]

The Department also withheld medical and autopsy records pursuant to KRS 72.031, incorporated into the Act by KRS 61.878(1)(l). That statute, however, only applies to an "autopsy photograph, other visual image in whatever form, video recording, or audio recording." The Department has not asserted an exception to the Act that applies to written autopsy records. Accordingly, the Department violated the Act when it failed to provide its copies of the written autopsy records to the Appellant, or of it does not possess its own copies, when it failed to affirmatively state as much.

The Department also withheld "videos depicting images inside of a hospital" pursuant to KRS 61.168(4). That statute allows public agencies to "elect not to disclose body-worn camera recordings containing video or audio footage" that depicts 14 categories of information. The Department did not identify which paragraph of KRS 61.168(4) authorized it to withhold the video. Thus, the Department violated the Act when it did not adequately explain its denial of this record.

Turning to KRS 17.150(2), the Department, on appeal, abandons its reliance on that statute but asserts that its denial was authorized by KRS 61.878(1)(h).[5] KRS 61.878(1)(h) exempts "[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 previously held that when a public agency relies on KRS 61.878(1)(h) to deny inspection, it must "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." C*ity of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 851 (Ky. 2013).

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[4] The Office notes that, under KRS 17.150(4), "[c]entralized criminal history records are not subject to public inspection." *See, e.g.*, 24-ORD-151 (affirming the agency's withholding of NCIC records).

[5] On September 26, 2024, the Supreme Court of Kentucky determined that KRS 17.150(2) "govern[s] only the mandatory disclosure of 'intelligence and investigative reports' *after* the related criminal prosecution has been completed or a determination not to prosecute has been made." *Shively Police Dep't v. Courier–Journal, Inc.,* 701 S.W.3d 430, 443 (Ky. 2024). That decision became final on October 17, 2024. *See* RAP 40(G)(1). Thus, by invoking KRS 17.150(2) on October 18, 2024, to withhold records related to an ongoing investigation, the Department violated the Act.

Recently, in *Shively Police Department v. Courier–Journal, Inc.,* 701 S.W.3d 430 (Ky. 2024), the Supreme Court of Kentucky re-examined KRS 61.878(1)(h) and its proper invocation by law enforcement agencies. There, the Court made clear that, to properly invoke KRS 61.878(1)(h), a law enforcement agency must provide a "minimum degree of factual justification" to "draw a nexus between the *content of the specific records*" at issue and the agency's "purported risks of harm associated with their release." *Id.* at 439 (emphasis added). Without linking the content of the specific records to the purported risks of harm, the threshold "minimum degree of factual justification" is not met.

Turning to the Department's invocation of KRS 61.878(1)(h), the Department's original response stated only that it redacted "information, images, and video footage" related to witnesses, and that "the investigation is open and releasing certain records could harm the outcome of the ongoing investigation." On appeal, the Department states only that "disclosure of the witness information would harm the prosecution by prematurely releasing this information" and provides an email from a Commonwealth's Attorney asking that witness information not be provided in response to the Appellant's request. However, the Department has not identified the "purported risks of harm associated with" the release of these records nor have they provided details about how the content of the requested records was linked to those hazards. Indeed, the assertions made by the Department "would seemingly apply universally to any criminal investigation turned felony prosecution." *Shively*, 701 S.W.3d at 439. Thus, the Department's response was insufficiently specific to invoke KRS 61.878(1)(h).

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/ Zachary M. Zimmerer
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#453

Distributed to:

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