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25-ORD-043

February 13, 2025

In re: Jeffrey Gegler/Kentucky State Police

Summary: The Kentucky State Police ("KSP") violated the Open Records Act ("the Act") when it failed to properly invoke KRS 61.878(1)(h) to withhold records.

Open Records Decision

Jeffrey Gegler ("Appellant") submitted a request to KSP for "all body worn cameras, dashcams, and interior police vehicle cameras for the traffic stop, arrest, and death of" a specified individual on November 7, 2024. The Appellant also sought "Dispatch communication audio and logs" as well as "Call logs, texts, and any audio recordings" regarding the same incident. In response, KSP denied the request under KRS 61.878(1)(h) because "prosecution has not been declined yet" and "premature disclosure of records generated in the course of this investigation . . . would cause irreparable harm" by "creating bias in the jury pool." This appeal followed.

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).

Recently, in *Shively Police Department v. Courier Journal, Inc.,* 701 S.W.3d 430 (Ky. Sept. 26, 2024), the Supreme Court of Kentucky re-examined KRS 61.878(1)(h) and its proper invocation by law enforcement agencies. That decision reaffirmed the Court's previous decisions requiring agencies to describe a "risk of harm [which] must be concrete, amounting to 'something more than a hypothetical or speculative concern.'" *Shively*, 701 S.W.3d at 438. In *Shively*, the law enforcement agency described two potential risks of harm: "that the requested records could potentially compromise the recollections of some unmade or unknown witnesses and that the release of the records might taint a future grand jury proceeding." *Id.* at 439. The Court held that although those "may, perhaps, be legitimate concerns," the agency had "failed to provide even a 'minimum degree of factual justification,' that would draw a nexus between the *content of the specific records* requested in *this* case and the purported risks of harm associated with their release." *Id.* (quoting *City of Fort Thomas*, 496 S.W.3d at 852) (emphasis added).[1]

Next, the Court acknowledged "the plight of law enforcement agencies attempting to lawfully invoke [KRS 61.878(1)(h)]." *Id.* In describing that "plight," the Court stated that, although the Act "requires some degree of factual justification to prove the agency faces a concrete risk of harm, it is easy to see how a more exacting requirement could quickly subvert the exemption's purpose of shielding sensitive information from public inspection." *Id.*[2] Noting the possibility of subverting the Act, the Court described KRS 61.878(1)(h)'s harm requirements as "a tight rope walk" because "the more factual information the agency offers to support its denial of an open records request, the more information it has revealed about its records and ongoing enforcement action." *Id.* Having so described the "plight of law enforcement agencies," the Court "implore[d] law enforcement agencies to attempt to provide as many facts and details as reasonably possible to support their justification for denial" under KRS 61.878(1)(h). *Id.*[3]

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[1] The Court also noted that these concerns, without additional factual justification, "would seemingly apply universally to any criminal investigation turned felony prosecution." *Shively, supra*, at 439.

[2] Indeed, statutes must be interpreted so that they are not rendered "meaningless or ineffectual." *See Commonwealth v. Shirley*, 653 S.W.3d 571, 577 (Ky. 2022) ("The statute must be read as a whole and in context with other parts of the law. All parts of the statute must be given equal effect so that no part of the statute will become meaningless or ineffectual.").

[3] The Office notes that the Court's interpretation of KRS 17.150(2) is particularly burdensome on law enforcement and could affect the integrity of ongoing investigations and prosecutions. Since 1979, the Office had consistently interpreted KRS 17.150(2) as making intelligence and investigative reports exempt from disclosure before a prosecution is completed or declined. *See, e.g.*, OAG 79-582; OAG 79-387; OAG 83-123; OAG 90-143; 98-ORD-30; 06-ORD-200; 14-ORD-154; 17-ORD-144; 21-ORD-098. In *Shively*, the Court upended law enforcement agencies' decades old reliance on the Office's consistent interpretations by finding that KRS 17.150(2) "govern[s] only the mandatory disclosure of 'intelligence

Now, the Office must determine when a law enforcement agency has "provide[d] as many facts and details as reasonably possible." *Id.* That analysis necessarily requires an analysis regarding the "specific records requested in *this* case." *Id.* (emphasis in original). However, the Court did provide some guidance regarding what a law enforcement agency's burden looks like at different stages of an investigation. Specifically, the Court "posit[ed] that [KRS 61.878(1)(h)'s] 'harm' requirement is perhaps an even greater burden for law enforcement agencies to bear at the outset of a criminal investigation, when the agency has yet to fully determine what facts, evidence, or records are material to its ongoing or impending law enforcement action." *Id.* Thus, it follows that, at the early stage of an investigation when KRS 61.878(1)(h)'s harm requirement imposes "an even greater burden," the degree of "facts and details" that is "reasonably possible" is lesser than it is at later stages of an investigation.

The Office has previously held that a law enforcement investigation being at an early stage is relevant when determining whether the agency has adequately invoked KRS 61.878(1)(h). *See, e.g.*, 18-ORD-047 (holding that the fact that the law enforcement action was "at a very early stage" was relevant when KRS 61.878(1)(h) was invoked to properly deny a request submitted two days after the incident related to the request); 15-ORD-105 (finding relevant "the early stage in the criminal process" when KRS 61.878(1)(h) was invoked to deny a request submitted the day after the incident related to the request); 14-ORD-223 (noting that the "current status of a criminal prosecution could be a factor effecting the threshold for a showing of harm to the agency under KRS 61.878(1)(h)"). As such, the Office's interpretation of *Shively* is aligned with nearly a decade of its prior decisions.

At bottom, although the Court acknowledged that concerns regarding witnesses with untainted recollections or unbiased grand jury pools are legitimate, 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." *Shively*, 701 S.W.3d at 439. Without linking the content of the specific records to the purported risks of harm, the threshold "minimum

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and investigative reports' *after* the related criminal prosecution has been completed or a determination not to prosecute has been made." *Shively, supra*, at 443. Now, the Office's statutory duty is to determine "whether the agency violated provisions of KRS 61.870 to 61.884." KRS 61.880(2)(a). In making that determination, the Office is bound to adhere to the Court's interpretation of KRS 17.150(2) and any other exemption to the Act.

degree of factual justification" is not met. However, when an agency is responding to a request submitted "at the outset of a criminal investigation," the threshold "minimum degree of factual justification" that is "reasonably possible" for the agency is lesser than it is at later stages of the investigation.

Turning now to the merits of this appeal, KSP argues that its response alleged three facts: (1) its investigation had begun the day before it received the Appellant's request; (2) the Commonwealth's Attorney had not yet made a decision regarding prosecution; and (3) if a decision to prosecute was made, "premature disclosure of these records would create a bias in the jury pool from which the Grand Jury would be selected." KSP further explained that the grand jurors could "develop preconceived opinions regarding this incident prior to being presented with all of the relevant evidence in its entirety."

Because KSP's investigation had begun only the day before it received the request, the "minimum degree of factual justification" that was "reasonably possible" for KSP is minimal. However, like the law enforcement agency in *Shively*, KSP alleges harm in the form of a potentially tainted jury pool but has not provided facts sufficient to "draw a nexus between the *content* of the" responsive records "and the purported risk of harm associated with their release." Concern that the release of the responsive records "could potentially create a bias in the jury pool," absent any description of the content of the requested records, is a "hypothetical or speculative concern" that does not satisfy the requirements of KRS 61.878(1)(h). *See City of Fort Thomas*, 496 S.W.3d at 851. Accordingly, KSP failed to properly invoke KRS 61.878(1)(h) to withhold the records, and thus, violated the Act.

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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Assistant Attorney General

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Distributed to:

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