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25-ORD-044

February 13, 2025

In re: Jeffrey Gegler/Lexington Police Department

Summary: The Lexington Police Department ("the Department") violated the Open Records Act ("the Act") when its initial response failed to properly invoke KRS 61.878(1)(h) to withhold records. However, on appeal, the Department has demonstrated that it properly withheld records pursuant to that exemption.

Open Records Decision

Jeffrey Gegler ("Appellant") submitted a request to the Department seeking the arrest report, Use of force reports, Body worn camera footage, Dashcam footage, and CAD logs related to a November 29, 2024, incident at a specified address. In response, the Department denied the request under KRS 61.878(1)(h) because "[p]rematurely releasing the case report and body worn camera footage association with this open court matter prior to its closure poses a concrete risk of harm to the prosecution of the case."[1] 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

[1] The Department provided the Appellant with the CAD logs, redacting personal information under KRS 61.878(1)(a) and "case sensitive information" under KRS 61.878(1)(h). The Department also informed the Appellant that it did not possess a "use of force report" related to the specified incident. The Appellant has not challenged the Department's redactions.

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.[2] 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).[3]

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.*[4] 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

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[2] The Court also 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, supra*, at 443.

[3] 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.

[4] 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.").

many facts and details as reasonably possible to support their justification for denial" under KRS 61.878(1)(h). *Id.* [5]

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.

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[5] 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 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.

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 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 the appeal, the Department's original response stated that premature release of records would harm "prosecution of the case" by revealing "sensitive and/or intimate details . . . prior to the court having the opportunity to fully, diligently, and discreetly investigate those details." The Department further explained that release of those details would result in "hazards" such as: "release of case details known only to those directly involved"; "tainting witness testimony and jury pools"; privacy concerns of "cooperating parties"; "difficulty in assessing the validity of new information"; and "fear of witness retaliation." However, because the Department provided no details about how the content of the requested records was linked to those hazards, the assertions "would seemingly apply universally to any criminal investigation turned felony prosecution." *Shively, supra*, at 439. Thus, the Department's initial response was insufficiently specific to invoke KRS 61.878(1)(h).

However, on appeal, the Department has supplemented its original response. It now explains that the Appellant seeks records related to a carjacking. The accused is alleged to have taken "the victim's vehicle without permission by threatening them [*sic*] with a knife" and then attempting twice to hit the victim with the stolen vehicle. The Department explains that the location of the victim's home is "identifiable in the unredacted records" and the release of unredacted record would "increase[e] the risk of retaliation and intimidation."[6] The Department further explains that it received the Appellant's request the same day the accused was arrested. As a result, the Department "had to coordinate its response simultaneously with the outset of the criminal investigation while the facts, evidence, and charges were still being determined."

[6] Also relevant here are the constitutional rights of crime victims. *See* Ky. Const. § 26A (providing crime victims with a constitutional right to "reasonable protection from the accused").

Here, because the request was submitted simultaneously with the beginning of the Department's investigation, the "minimum degree of factual justification" that was "reasonably possible" for the Department was minimal. Regardless, although the Department's burden was minimal, it has easily met that burden by explaining, in detail, how disclosing the contents of the withheld and redacted records would reveal where the victim, a key witness in the case, lived. Such disclosure, in a case where the accused had been accused of "use of a deadly weapon and wanton endangerment," presents more than a hypothetical risk of retaliation and intimidation to the victim. Accordingly, the Department properly invoked KRS 61.878(1)(h) to withhold and redact the requested records, and thus, did not violate 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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Distributed to:

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