COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

RUSSELL COLEMAN
ATTORNEY GENERAL

1024 CAPITAL CENTER DRIVE
SUITE 200
FRANKFORT, KY 40601
(502) 696-5300

25-ORD-053

February 27, 2025

In re: Holly Harrison-Hawkins/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 under that exemption.

Open Records Decision

Holly Harrison-Hawkins ("Appellant") submitted a request to the Department seeking records related to a special assignment from September 30 to October 2, 2023.[1] In response, the Department advised that did not possess records related to the "Scope and details of the assignment," but that it was "providing the dispatch log, citation, and public copy of the report associated with" the specified event. But the Department stated that "most documentation, including the body-worn camera video" is exempt under KRS 61.878(1)(h), explaining that "[p]rematurely releasing the case report and body worn camera footage associated with this open court matter prior to its closure poses a concrete risk of harm to the prosecution of the case." This appeal followed, and the Appellant challenges the Department's invocation of KRS 61.878(1)(h).[2]

---

[1] Specifically, the Appellant sought records related to the "Scope and details of the assignment"; "Personnel on that assignment": "Documentation related to the active disorder"; "Documentation related to the utilization of OC spray"; "Names or identifiers of individuals involved in the disorder;" "Charges or arrests made as a result of that disorder"; "Copies of any BWC footage during the disorder, utilization of OC spray, through the complete disbursement of involved individuals"; and "Any subsequent documentation related to this occurrence."

[2] On appeal, the Department states it subsequently located and provided records responsive to the Appellant's request related to the "Scope and details of the assignment"; "Personnel on that assignment"; and "Documentation related to the active disorder." Further, the Department states that it possesses no records responsive to the requests for records related to "Documentation related to the utilization of OC spray"; "Names or identifiers of individuals involved in the disorder"; "Charges or

KRS 61.878(1)(h) exempts from disclosure "[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. 2024), the Supreme Court re-examined KRS 61.878(1)(h) and its proper invocation by law enforcement agencies. The Office has addressed the impact of that decision in 25-ORD-043 and 25-ORD-044.

The *Shively* 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 unnamed 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]

The *Shively* decision also "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

---

arrests made as a result of that disorder"; or "subsequent documentation." Thus, the only remaining issue is the Department's withholding of body worn camera video under KRS 61.878(1)(h).

[3] The Court also noted that these concerns, without additional factual justification, "would seemingly apply universally to any criminal investigation turned felony prosecution." *Shively*, 701 S.W.3d at 439.

what facts, evidence, or records are material to its ongoing or impending law enforcement action." *Id.* Thus, when determining whether an agency has as many facts and details as reasonably possible to support their justification for denial" under KRS 61.878(1)(h), the Office notes that "at the early stage of an investigation," the "harm requirement imposes 'an even greater burden,' [and] the degree of 'facts and details' that is 'reasonably possible' is lesser than it is at later stages of an investigation." 25-ORD-044 (citing *Shively*, 701 S.W.3d at 439).

Turning now to the merits of the appeal, the Department's original response stated that premature release of records would harm the "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*, 701 S.W.3d at 439; *see also* 25-ORD-044. 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 it possesses a body worn camera video that is one minute and seventeen seconds long, which was recorded roughly "seven to eight minutes" prior to a shooting in the Lexington area. The video shows "countless citizens" who "could be a yet to be identified witness to the shooting."[4] Moreover, the Department states there were two shooters and one "has yet to be identified and remains at large." Thus, according to the Department, any "one of these citizens could be of great interest to the other shooter, who is still at large and who may wish to eliminate witnesses."

Here, the Department has met its burden by explaining, in detail, how disclosing the body worn camera video would reveal the identities of potential witnesses to a shooting where one shooter remains at large. Such disclosure, where the accused is believed to have participated in a shooting, presents more than a hypothetical risk of intimidation or harm to witnesses. Moreover, the Department

[4] Pursuant to KRS 61.880(2)(c), the Office asked the Department to provide a copy of the withheld video. Of course, the Office cannot disclose the contents of that record. But the Office can confirm the Department's assertion that the video shows the faces of "countless citizens" is accurate.

has stated that it does not oppose "releasing a redacted version of the requested video" with the faces of potential witnesses redacted while leaving unredacted the faces of officers in the responsive video. Such release of redacted video would comply with the Department's obligation under the Act. *See* KRS 61.878(4) ("If any public record contains material which is not excepted under this section, the public agency shall separate the excepted and make the nonexcepted material available for examination.") Accordingly, the Department properly invoked KRS 61.878(1)(h) to withhold and redact the requested video, 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
Zachary M. Zimmerer
Assistant Attorney General

#510

Distributed to:

Holly Harrison-Hawkins
Shannon Penegor, Open Records Supervisor, Open Records Unit, Lexington Police Department
Michael Cravens, Managing Attorney, Department of Law, Lexington-Fayette Urban County Government
Evan P. Thompson, Attorney, Lexington-Fayette Urban County Government

An Equal Opportunity Employer M/F/D