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25-ORD-079

March 24, 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 related to a particular Officer-involved shooting involving a sheriff’s office. The request sought the “Names of all responding officers”; “Body cam and dash cam footage”; “Use of force reports”; “Incident reports”; “Arrest reports”; “911 call audio”; and “Dispatch audio.” In response, KSP denied a portion of the request under KRS 61.878(1)(h) because the identified incident “occurred 12 days prior to [the Appellant’s] request,” “prosecution has not yet been declined,” and “premature disclosure of these records, which are generated during an ongoing investigation . . . could cause irreparable harm” by “influencing the jury pool for the Grand Jury.” KSP further denied the request for “Names of all responding officers” because the Act “does not require an agency to gather information” and advised that it does not possess any additional responsive records because “the investigation is in its early stages and several records have not been created.”¹ This appeal followed.

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

¹ After the appeal was initiated, the Appellant stated that he “agree[s] with KSP to the extent that they do not have to provide [him] with unfinished documents nor provide [him] a ‘list’ of the officers involved.” Thus, only KSP’s denial under KRS 61.878(1)(h) is at issue in this appeal.

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.” *City 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 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).²

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 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).

² 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.

Turning now to the merits of this appeal, KSP argues that release of responsive videos and reports “would have posed a significant risk of causing the grand jurors to develop pre-conceived opinions regarding this incident prior to being presented with all of the relevant evidence in its entirety,” especially “[a]t such an ‘early stage in the criminal process.’”

Because KSP’s investigation had begun just twelve days before it received the Appellant’s request, the “minimum degree of factual justification” that was “reasonably possible” for KSP is lesser. However, the Office has previously found, post-*Shively*, that “[c]oncern 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). 25-ORD-043 (quoting *City of Fort Thomas*, 496 S.W.3d at 851). Here, because KSP has not described the content of the requested records, it failed to justify its decision to withhold records under KRS 61.878(1)(h), 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
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/s/ Zachary M. Zimmerer
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Distributed to:

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