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25-ORD-094

April 3, 2025

In re: Nicholas Horne/Kentucky State Police

Summary: The Kentucky State Police (“KSP”) 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, KSP has demonstrated that it properly withheld the records under that exemption.

Open Records Decision

Nicholas Horne (“Appellant”) submitted a request to KSP seeking records related to a shooting that took place on December 23, 2024.¹ In response, KSP produced the computer-aided dispatch reports with personal information redacted under KRS 61.878(1)(a) and stated that it does not possess responsive body-worn camera or dash-camera video. KSP denied the remaining parts of the request under KRS 61.878(1)(h) because the responsive records are contained in “the investigative file concerning this incident”; “disclosure of these records at this early stage of the investigation and prosecution, would irreparably harm the subject investigation by compromising the recollections of those witnesses that investigators have not interviewed”; and disclosure “would also pose a significant risk of causing the grand jurors to develop preconceived opinions regarding this incident prior to being presented with all the relevant evidence.” This appeal followed, and the Appellant challenges the KSP’s invocation of KRS 61.878(1)(h).²

¹ Specifically, the Appellant sought “The investigative file for the incident . . . and evidence contained within that file”; “The video footage of the incident”; “The Computer-Aided Dispatch” report from the incident and “audio of those calls”; “911 calls related to the incident”; “Recorded audio communications involving officers at the scene”; “Dashcam and bodycam footage”; “Incident and accident reports”; “Photographs of the scene”; “The autopsy and related reports and photographs”; “The search warrant being executed for the incident above”; “The investigative file for the” related criminal action; and “The interviews conducted related to this incident.”

² The Appellant does not challenge either the redactions KSP made under KRS 61.878(1)(a) or the assertions KSP made that it does not possess any relevant body-worn camera or dash-camera video.

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 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 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 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

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.

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 KSP’s original response stated that premature “disclosure of these records at this early stage of the investigation and prosecution, would irreparably harm the subject investigation by compromising the recollections of those witnesses that investigators have not interviewed” and “would also pose a significant risk of causing the grand jurors to develop preconceived opinions regarding this incident prior to being presented with all the relevant evidence.” However, because KSP 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 KSP’s initial response was insufficiently specific to justify withholding the records under KRS 61.878(1)(h).

However, on appeal, the KSP has supplemented its original response. First, because the incident that is the target of the Appellant’s request took place only 22 days prior to submission of the request, the “degree of factual justification” that was “reasonably possible” for KSP is minimal. It now explains that, because of the early stage of the investigation, the reports included in the investigative file “have not yet been reviewed for completeness or accuracy.”⁴ Further, KSP explains that it is “still in the process of sending evidence for forensic testing, [the] laboratory reports are still pending[,]” and “the Medical examiner’s Office has not finalized its autopsy report.” KSP also explains that the remaining records in the investigative file “identif[y] witnesses and details not known to the public” or “include specific facts, observations, or evidence to justify the searches.” According to KSP, “dissemination of these records would hinder the willingness of cooperating witnesses to continue cooperating if their cooperation was made public and resulted in unwarranted attention and invasions of their privacy.”

Here, KSP has met its burden by explaining, in detail, how disclosing the records contained in its investigative file would harm its investigation. KSP has described the records that, due to the early stage of the investigation, may not be complete or accurate. Moreover, KSP has explained how release of the remaining

⁴ Although not the basis of this decision, the Office notes that the incomplete nature of the identified records implicates KRS 61.878(1)(j).

records in the investigative file would lead to witnesses not being willing to cooperate in the ongoing investigation. The Office does not doubt that disseminating incomplete or inaccurate information and dissuading witness cooperation in an ongoing investigation are legitimate harms. Thus, at this early stage of the investigation, “when the agency has yet to fully determine what facts, evidence, or records are material to its ongoing or impending law enforcement action,” KSP has met its burden under KRS 61.8781(h) by explaining how disclosure of the requested records would lead to the described harms. Accordingly, KSP properly invoked KRS 61.878(1)(h) to withhold 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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