



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

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20-ORD-147

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In re: American Oversight/Office of Attorney General

Summary: The Office of Attorney General (“Office”) did not violate the Open Records Act (“the Act”) in denying a request for records relating to the potential prosecution of election law violations. The Office also did not violate the Act by denying inspection of emails that relate to the Attorney General’s calendar appointments and meeting schedules.

Open Records Decision

American Oversight (“Appellant”), a non-profit organization, submitted two requests to the Office to inspect records. The first sought “[a]ll email communications (including email messages, email attachments, and calendar invitations) sent or received by Attorney General Daniel Cameron, or anyone communicating on his behalf, such as an assistant or scheduler, concerning the activities of Kentucky’s Absentee Ballot Integrity Task Force or any issue within the purview of the task force.” The second sought several categories of records pertaining to meetings of the task force, including by-laws or other entity-formation documents, agendas, minutes, meeting notices, and transcripts or audio recordings of the meetings. With timely written responses, the Office denied inspection of records responsive to the first request as exempt prosecutorial files under KRS 61.878(1)(h), and explained that other responsive records were preliminary scheduling records under KRS 61.878(1)(i) and (j). The Office produced some records responsive to the second request, but denied inspection of other records that were preliminary. The Office further informed Appellant that

the Secretary of State may possess responsive records, and provided Appellant with the contact information for the official records custodian for the Secretary of State.

Appellant initiates this appeal to challenge the Office's reliance upon KRS 61.878(1)(h) as overly broad. Appellant also recognizes that the calendars of public officials may be withheld under KRS 61.878(1)(i), but claims that it requested more than calendar invitations. Appellant claims it also sought other records "such as internal meeting notices." For the following reasons, the Office did not violate the Act.

KRS 61.878(1)(h) is commonly referred to as the "law enforcement exception" because, in part, it exempts from disclosure records of law enforcement agencies compiled in the process of investigating statutory or regulatory violations if premature release would harm the investigation. But KRS 61.878(1)(h) also exempts, in total, "records or information compiled and maintained by county attorneys or Commonwealth's attorneys pertaining to criminal investigations or criminal litigation[.]" The Kentucky Supreme Court has held that, unlike police investigatory records that may only be withheld under KRS 61.878(1)(h) upon a showing of harm to the investigation, records maintained in the criminal files of Commonwealth's attorneys are categorically exempt at all times. *City of Ft. Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 853 (Ky. 2013).

Although the Attorney General does not ordinarily act in the capacity of a Commonwealth's attorney, unless acting as a special prosecutor under KRS 15.210, the Attorney General does have primary jurisdiction over the enforcement of the Commonwealth's election laws, including the power to prosecute violators. KRS 15.243. In this regard, the Attorney General stands in the shoes of the Commonwealth's attorney to prosecute election law crimes, and may deny inspection of records contained within those prosecutorial files. See KRS 15.242 ("The Attorney General shall possess jurisdiction, concurrent with that of county and Commonwealth's attorneys, to investigate and prosecute violations of the election laws."). The courts, and this Office, have found that when the Attorney General acts as a prosecutorial arm of the Commonwealth, the Office may deny inspection of records maintained for that purpose. See *Skaggs v. Redford*, 844 S.W.2d 389, 390 (Ky. 1992) (overruled on other grounds by *City of Ft. Thomas*, 406 S.W.3d 342) (holding that the Attorney General's prosecutorial records were exempt

because both the “Office of the Commonwealth of [sic] Attorney and the Office of Attorney General, together, represent the state’s prosecutorial function in this case[.]”); *Bowling v. Lexington-Fayette Urban Cty. Gov’t.*, 172 S.W.3d 333, 339-40 (Ky. 2005); *see also* 17-ORD-12 (holding that the Office may rely upon KRS 61.878(1)(h) to deny inspection of records contained in the Office’s special prosecution file.).

In its initial response to the request, the Office explained that information contained within the responsive records could identify subjects of election law complaints, as well as attorney mental impressions about legal theories related to the complaints. As noted by the *Bowling* court, KRS 61.878(1)(h) “appl[ies] equally to all records in the litigation files of the Commonwealth’s Attorney, regardless of origin.” 172 S.W.3d at 349. The same is true as it relates to the Attorney General’s litigation files when he acts as the Commonwealth’s chief prosecutor of election law violations. KRS 15.243; *see also* 17-ORD-012 (applying this principle when the Office acts as special prosecutor). And because that information is exempt “regardless of origin,” *Bowling*, 172 S.W.3d at 349, it is immaterial if the origin of this information happened to be the task force. Accordingly, the Office did not violate the Act in denying inspection of records that are part of its litigation files pertaining to investigations of election law violations for potential prosecution.

The Office denied Appellant’s request for other records as preliminary drafts or notes under KRS 61.878(1)(i) and explained that the responsive records pertained to calendars, schedules, or itineraries. In *Courier-Journal v. Jones*, 895 S.W.2d 6, 10 (Ky. App. 1995), the Kentucky Court of Appeals held that the Governor’s appointment schedule was not subject to inspection as it was “nothing more than a draft of what may or may never take place; a notation for inter or intra office use, so the daily affairs of the chief executive can be conducted with some semblance of orderliness[.]” From this reasoning, this Office recognized that emails containing potential itineraries for the Governor’s economic development trip to Japan, as well as emails scheduling potential meetings at that trip, were exempt under KRS 61.878(1)(i). *See* 08-ORD-217.

Appellant agrees that calendar invitations, as well as calendars themselves, may be withheld under KRS 61.878(1)(i). However, Appellant claims that it requested more than calendar invitations, “such as internal meeting notices.” Appellant also sought meeting agendas (one of which was provided), meeting notices, and minutes. Upon reviewing the request, the Office determined that the

only responsive records in its possession were those relating to the scheduling of meetings that the Attorney General may have been invited to attend. Those records are exempt under KRS 61.878(1)(i) as preliminary drafts or notes.

Appellant claims that its request sought more than just calendar invitations. However, that claim essentially disputes the number of potentially responsive records in the Office's possession. This Office routinely declines to resolve disputes involving a perceived disparity between records sought and records produced. *See, e.g.*, 19-ORD-234; 19-ORD-083; 03-ORD-61; OAG 89-81. Moreover, the Office informed Appellant that the Secretary of State might possess additional responsive records, and provided the contact information for that office's official records custodian. *See* KRS 61.872(4). Accordingly, the Office did not violate the Act in denying inspection of the requested records.

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court per KRS 61.880(5) and KRS 61.882. Pursuant to 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 proceeding.

Daniel Cameron
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/s/Marc Manley
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Distributed to:
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