



COMMONWEALTH OF KENTUCKY  
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**22-ORD-103**

May 19, 2022

In re: Thomas E. Clay/ Commonwealth's Attorney, 21<sup>st</sup> Judicial Circuit

**Summary:** The Commonwealth's Attorney, 21<sup>st</sup> Judicial Circuit ("the Commonwealth's Attorney"), violated the Open Records Act ("the Act") when he failed to cite an exception to the Act in denying a request to inspect records. The Commonwealth's Attorney did not violate the Act when he withheld records pertaining to criminal investigations or criminal litigation under KRS 61.878(1)(h), but did violate the Act when he initially withheld records that were not exempt.

***Open Records Decision***

On March 29, 2022, Thomas E. Clay ("Appellant") requested that the Commonwealth's Attorney provide "any and all communication, including letters and e-mails," between anyone in his office and the office of the Commonwealth's Attorney for the 20<sup>th</sup> Judicial Circuit from January 2017 through January 2019. The Commonwealth's Attorney denied the Appellant's request on the grounds that the requested records were "part of an ongoing criminal investigation/case and therefore [were] exempt from disclosure." However, the Commonwealth's Attorney did not cite an exception to the Act under KRS 61.878(1). This appeal followed.

Under the Act, "[a]n agency response denying, in whole or in part, inspection of any record shall include a statement of the specific exception authorizing the withholding of the record and a brief explanation of how the exception applies to the record withheld." Because the Commonwealth's

Attorney's response did not cite an exception to the Act or explain how it applied, the Commonwealth's Attorney violated the Act.

On appeal, the Commonwealth's Attorney cites KRS 61.878(1)(h) as a basis for denying the Appellant's request for "any communication . . . that was related to any criminal prosecution." However, the Commonwealth's Attorney states that he possesses e-mails from the Commonwealth's Attorney for the 20<sup>th</sup> Judicial Circuit "that are not related to any criminal investigation [but] were directed to a mass e-mail of all Commonwealth's Attorneys," which he "would be happy to provide" to the Appellant.

Under KRS 61.878(1)(h), "records or information compiled and maintained by county attorneys or Commonwealth's attorneys pertaining to criminal investigations or criminal litigation shall be exempted from the provisions of [the Act] and shall remain exempted after enforcement action, including litigation, is completed or a decision is made to take no action." The Appellant argues that his "requests do not involve an open investigation." This statement, even if true, is not relevant to KRS 61.878(1)(h), which applies to criminal investigation and litigation records of a Commonwealth's Attorney regardless of whether an investigation is still ongoing. Accordingly, the Commonwealth's Attorney did not violate the Act when he denied the Appellant's request for such records under KRS 61.878(1)(h). However, on appeal, the Commonwealth's Attorney's concedes that not all of the withheld responsive records pertain to criminal investigations or criminal litigation. By denying the Appellant's request to inspect records that are not exempt from disclosure under KRS 61.878(1)(h), the Commonwealth's Attorney violated the Act.

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court pursuant to KRS 61.880(5) and KRS 61.882 within 30 days from the date of this decision. 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 proceedings. The Attorney General will accept notice of the complaint e-mailed to [OAGAppeals@ky.gov](mailto:OAGAppeals@ky.gov).

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