



COMMONWEALTH OF KENTUCKY
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23-ORD-022

January 31, 2023

In re: Joshua Orr/Eastern Kentucky Correctional Complex

Summary: The Eastern Kentucky Correctional Complex (“the Complex”) violated the Open Records Act (“the Act”) when it failed to cite an applicable exemption and explain how it applied to a requested record. However, the Complex did not violate the Act when it withheld records pertaining to an investigation because the investigation had not been completed at the time of the request.

Open Records Decision

Joshua Orr (“Appellant”) submitted a request to the Complex for “all documents/attachments concerning Disciplinary Report #EKCC-2022-0002951” and for any “evidence’ being held by Internal Affairs.” The Complex denied his request, stating only that the “Adjusting Committee Chairman has all the evidence pertaining to this disciplinary report” and that the Appellant’s lawyer could request a copy from the Commonwealth’s Attorney when “his case goes to court.” This appeal followed.

Upon receiving a request to inspect records, a public agency must decide within five business days whether to grant or deny the request. KRS 61.880(1). If the agency denies the request, it “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.” *Id.* Here, the Complex did not cite any exemption to the Act or explain how it applied to the records withheld. Accordingly, its initial response violated the Act.

On appeal, the Complex states the responsive records include the disciplinary report itself and “initial investigation records.” The Complex now claims the disciplinary report is a “preliminary record” exempt under KRS 61.878(1)(i) and (j)

and the initial investigation records are “intelligence and investigative reports” exempt under KRS 17.150(2), which is incorporated into the Act by KRS 61.878(1)(l).

KRS 61.878(1)(i) exempts from disclosure “[p]reliminary drafts, notes, [and] correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency.” KRS 61.878(1)(j) exempts from disclosure “[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended.” The Complex asserts the disciplinary investigation “was at the preliminary violation charge stage” when the Appellant made his request.¹ According to the Complex, because the investigation was ongoing, there had been no final decision regarding the Appellant’s charge. As such, it claims the disciplinary report was exempt under KRS 61.878(1)(i) and (j) because it was a preliminary record containing opinions and recommendations at the time the Complex denied the Appellant’s request. This Office agrees that a disciplinary report containing preliminary opinions and recommendations may be withheld during the early stages of an investigation under KRS 61.878(1)(j). *See, e.g.*, 21-ORD-202; 16-ORD-266; 16-ORD-096. Accordingly, the Complex did not violate the Act when it withheld this record.

On appeal, the Complex also argues that records the disciplinary report references, which the Appellant described as “evidence” of the infraction, are exempt from inspection under KRS 17.150(2). That exception exempts from inspection “intelligence and investigative reports” until criminal prosecution is completed or a determination not to prosecute is made. *See id.* If a law enforcement agency denies access to a record under KRS 17.150(2), it must “justify the refusal of inspection with specificity.” KRS 17.150(3).

Here, the Complex explains it denied the Appellant’s request because its investigation was still in the “preliminary violation charge stage” and “the prosecution of the criminal matter has not been completed or declined.” This Office has previously held an agency satisfies the requirements of KRS 17.150(3) by giving specific information that explains a prosecution of the criminal matter to which the records relate has not been completed or declined. *See, e.g.*, 22-ORD-205; 22-ORD-203; 21-ORD-259. Because the Complex has specified that no prosecutorial decision has been made with respect to the subject matter of the investigation, it has met its burden of proof that the withheld record is exempt under KRS 17.150(2). *See* KRS 17.150(3). Thus, the Complex did not violate the Act when it denied inspection of the initial investigation records in this case.²

¹ *See* Dept. of Corrections Policy and Procedure 15.6, available at <https://corrections.ky.gov/About/cpp/Documents/15/PPP%2015.6.pdf> (last accessed Jan. 31, 2023).

² Of course, once the prosecution has concluded, or if a decision not to prosecute is made, the Complex may only continue to rely on this exemption by specifying how one of the four situations described in KRS 17.150(2)(a)–(d) continues to apply.

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.

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s/ Zachary M. Zimmerer
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Distributed to:

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