



COMMONWEALTH OF KENTUCKY
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23-ORD-106

May 8, 2023

In re: Pam McKinney/Livingston County Attorney

Summary: The Livingston County Attorney (“the County Attorney”) did not violate the Open Records Act (“the Act”) when he denied under KRS 61.878(1)(h) a request for records contained in his criminal litigation file.

Open Records Decision

Pam McKinney (“Appellant”) submitted a request to the County Attorney to inspect a “narrative” that was created by a named Kentucky Department of Fish and Wildlife Resources Conservation Officer about a specific individual and sent to the County Attorney. The County Attorney denied the request “pursuant to KRS 61.878(1)(h) as such records constitutes [sic] ‘records or information compiled and maintained by county attorneys or Commonwealth’s attorneys pertaining to criminal investigations or criminal litigation.’” This appeal followed.

The Appellant argues the County Attorney failed to explain how the cited exception applied to the requested record, and that he improperly issued a “blanket denial.” An agency citing an exception under KRS 61.878(1) must give “a brief explanation of how the exception applies to the record withheld.” KRS 61.880(1). The agency’s explanation must “provide particular and detailed information,” not merely a “limited and perfunctory response.” *Edmondson v. Alig*, 926 S.W.2d 856, 858 (Ky. 1996). “The agency’s explanation must be detailed enough to permit [a reviewing] court to assess its claim and the opposing party to challenge it.” *Ky. New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76, 81 (Ky. 2013); *see also City of Ft. Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 848–49 (Ky. 2013) (noting the agency’s “proof may and often will include an outline, catalogue, or index of responsive records and an affidavit by a qualified person describing the contents of withheld records and explaining why they were withheld”).

In most cases, it is not self-evident from the text of most exemptions how they apply to records a public agency withholds from inspection. For example, records may be exempt if they implicate a personal privacy interest that is outweighed by the public interest in the record. KRS 61.878(1)(a). A public agency invoking this exception must explain what the personal privacy interest at stake *is*, so that it can be weighed against the public interest in the record. *See, e.g.*, 22-ORD-040. Other exceptions involve multiple types of records, such as “drafts, notes, or correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency.” KRS 61.878(1)(i). Thus, when a public agency relies on an exemption that can apply to various types of records, the public agency must describe what record it is withholding, *i.e.*, whether the record is a “draft,” a “note,” or “correspondence with a private individual.” Still other exemptions require a public agency to provide specific information to justify their use. For example, KRS 61.878(1)(h), the exemption on which the County Attorney relied, can also be invoked by a law enforcement agency investigating violations of criminal statutes, but only if the law enforcement agency explains how “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.”

But KRS 61.878(1)(h) also applies to “records or information compiled and maintained by county attorneys or Commonwealth’s attorneys pertaining to criminal investigations or criminal litigation.” KRS 61.878(1)(h) further provides that those prosecutors’ criminal litigation files “shall remain exempted after enforcement action, including litigation, is completed or a decision is made to take no action.” Thus, this exemption is unique because it *categorically* exempts county attorneys’ and Commonwealth’s attorneys’ criminal litigation or investigative files. Here, the Appellant asked for a “narrative,” created by a law enforcement agency and given to a County Attorney, which the County Attorney keeps in his criminal litigation file. It is not clear how much more information the County Attorney could have provided to explain how the exemption applies to the record withheld. The Appellant indicates the County Attorney was not the Livingston County Attorney at the time the narrative was created, but that is irrelevant because the exemption applies to the office of the Livingston County Attorney’s criminal litigation and investigative files, regardless of who specifically served in that office at the time the record was created. Simply put, prosecutorial files are categorically exempt under KRS 61.878(1)(h), and therefore, the County Attorney’s explanation for why he denied the request was adequate. Accordingly, the County Attorney did not violate 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 emailed to OAGAppeals@ky.gov.

Daniel Cameron
Attorney General

s/ Zachary M. Zimmerer
Zachary M. Zimmerer
Assistant Attorney General

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Distributed to:

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