



COMMONWEALTH OF KENTUCKY
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23-ORD-297

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In re: James Harrison/Eastern Kentucky Correctional Complex

Summary: The Eastern Kentucky Correctional Complex (“the Complex”) violated the Open Records Act (“the Act”) when it initially denied a request to inspect records under KRS 61.878(1)(h) but failed to explain how that exception applied to the record withheld. However, the Complex has substantiated on appeal that the records pertaining to an ongoing investigation are exempt under KRS 61.878(1)(j) .

Open Records Decision

Inmate James Harrison (“Appellant”) submitted a request to the Complex seeking “the report” created by a Complex employee on September 20, 2023, “relating to an alleged incident” involving the Appellant that day. The Complex denied the request under KRS 61.878(1)(h) because the disciplinary report concerns actions “currently under investigation and are not a complete record at the present time.” The Complex also stated the Appellant could resubmit his request when the investigation was complete and “adopted into the agency’s actions.” This appeal followed.

KRS 61.878(1)(h) exempts “[r]ecords of law enforcement agencies . . . 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.” When relying on KRS 61.878(1)(h), the Complex must establish that, “because of the record’s content, its release poses a concrete risk of harm to the agency in the prospective action. A concrete risk, by definition, must be something more than a hypothetical or speculative concern.” *City*

of *Ft. Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 851 (Ky. 2013). However, the Complex's initial response did not articulate how release of the information contained in the disciplinary report would pose a concrete risk of harm to the agency, and therefore, its response to the Appellant's request violated KRS 61.880(1).

On appeal, the Complex abandons its reliance on KRS 61.878(1)(h), and now asserts the disciplinary report is exempt under KRS 61.878(1)(i) and (j). 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 ongoing at the time of the request and still is yet to be finalized.

As such, the Complex 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 has previously found that the disciplinary reports generated by correctional facilities in the course of investigating infractions committed by inmates may be withheld during the early stages of an investigation under KRS 61.878(1)(j) because they contain preliminary opinions and recommendations. *See, e.g.*, 23-ORD-022; 21-ORD-202; 16-ORD-266; 16-ORD-096. If, however, any of the preliminary opinions are adopted in a final correctional facility action after the investigation concludes, then those preliminary opinions will lose their preliminary status and be subject to inspection, unless another exemption applies to allow the record to be withheld. Accordingly, the Complex did not violate the Act when it withheld this record.

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.

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