



COMMONWEALTH OF KENTUCKY OFFICE OF THE ATTORNEY GENERAL

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25-ORD-083

March 31, 2025

In re: Paula Richardson Barber/Commonwealth Attorney, 21st Judicial
District

Summary: The Commonwealth's Attorney for the 21st Judicial Circuit ("the Commonwealth's Attorney") did not violate the Open Records Act ("the Act") when she denied under KRS 61.878(1)(h) a request for records contained in his criminal investigation or litigation files. The Commonwealth's Attorney violated the Act when she failed to respond to a portion of a request. However, the Commonwealth's Attorney did not violate the Act when she did not provide records she does not possess.

Open Records Decision

Paula Richardson Barber ("Appellant") submitted a request to the Commonwealth's Attorney seeking records related to the forfeiture of certain real property.¹ The Commonwealth's Attorney denied subsection 1 of the request under KRS 61.878(1)(h) as "records or information compiled and maintained by County Attorneys or Commonwealth's Attorneys pertaining to criminal investigations or criminal litigation." Regarding subsections 2, 3, 4, and 5, the Commonwealth's

¹ Specifically, the Appellant sought: (1) "correspondence of any kind" that mentions or is related to civil forfeiture of a specific individual's real property; (2) "All policies and procedures regarding civil forfeiture of real property for the Commonwealth[s] Attorney's Office"; (3) "All bank checks paid and/or received from any criminal and/or civil forfeiture properties" from 2020 to 2024; (4) "All bank records, including but not limited to, checks, bank statements, and deposits for bank accounts [from which] forfeiture funds are held or paid" from 2020 to 2024; (5) "All reports sent to or received from [the] Prosecutor's Advisory Counsel [*sic*] about forfeiture funds and/or property" from 2020 to 2024; and (6) "All annual Asset Forfeiture Reports generated or possessed by the Commonwealth[s] Attorney's Office" for the 2020 to 2024 fiscal years "for Bath, Rowan, Menifee and Montgomery Counties."

Attorney stated she does not possess the requested records but told the Appellant that the Prosecutors Advisory Council does possess them. This appeal followed.²

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 [Act] and shall remain exempted after enforcement action, including litigation, is completed or a decision is made to take no action.” Thus, “a prosecutor’s litigation files are excluded *in toto* from the Act.” *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 853 (Ky. 2013). “[T]his exemption is unique because it categorically exempts county attorneys’ and Commonwealth’s attorneys’ criminal litigation or investigative files.” 23-ORD-106 (emphasis in original); *see also* 02-ORD-112 (finding investigative records in the possession of a county attorney or Commonwealth’s attorney are “permanently shielded from disclosure”).

The Appellant attempts to circumvent this categorical exemption by arguing that the correspondence she seeks is related to the “civil forfeiture of an innocent third party’s real estate” and is therefore not related to any criminal case file. In response, the Commonwealth’s Attorney explains that the lien in question was placed on the real property under KRS 218A.410 and KRS 218A.415 because fentanyl was trafficked at the property. Moreover, the Commonwealth’s Attorney provides case filings in the criminal litigation from which the lien arose. Although the individual identified by the Appellant may not have been directly involved in the criminal litigation, the lien placed on her property was related to the criminal litigation. Thus, the correspondence related to this lien is exempt under KRS 61.878(1)(h), and the Commonwealth’s Attorney did not violate the Act by withholding that correspondence.

Next, the Appellant points out that the Commonwealth’s Attorney did not respond to subsection 6 of her request. Upon receiving a request for records under the Act, a public agency “shall determine within five (5) [business] days . . . after the receipt of any such request whether to comply with the request and shall notify in writing the person making the request, within the five (5) day period, of its decision.”

² The Appellant also asserts that the Commonwealth’s Attorney violated the Act by refusing to accept hand-delivery of her request. In response, the Commonwealth’s Attorney explains that an employee of the Appellant had requested she sign a document but did not allow the Commonwealth’s Attorney to review the document before signing. Therefore, the Commonwealth’s Attorney states that she refused to sign the document and the Appellant’s employee left. Ultimately, the Office is unable to resolve the factual dispute regarding the circumstances of the delivery of the Appellant’s request. *See, e.g.*, 25-ORD-027.

KRS 61.880(1). If an agency denies in whole or in part the inspection of any record, its response must 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.* A public agency may not simply ignore portions of a request. *See, e.g.*, 21-ORD-090. If the requested records exist and a statutory exception applies that allows an agency to deny inspection, the agency must cite the exception and explain how it applies. Conversely, if the records do not exist, then the agency must affirmatively state that the records do not exist. *See Bowling v. Lexington-Fayette Urb. Cnty. Gov’t*, 172 S.W.3d 333, 341 (Ky. 2005). The Commonwealth’s Attorney admits it failed to include subsection 6 in its response due to a typographical error. Thus, the Commonwealth’s Attorney violated the Act when it did not respond to subsection 6 of the Appellant’s request.³

Here, the Commonwealth’s Attorney maintains that it does not possess records responsive to subsections 2 through 6 of the Appellant’s request. Once a public agency states affirmatively that a record does not exist, the burden shifts to the requester to present a *prima facie* case that the requested record does or should exist. *See Bowling*, 172 S.W.3d at 341. If the requester makes a *prima facie* case that the records do or should exist, then the public agency “may also be called upon to prove that its search was adequate.” *City of Fort Thomas*, 406 S.W.3d at 848 n.3 (citing *Bowling*, 172 S.W.3d at 341).

The Appellant asserts that the Commonwealth’s Attorney should possess the bank records relating to forfeitures, and then asks, “If the [Commonwealth’s Attorney] does not possess or maintain their own bank records, who does?” But a requester’s bare assertion that an agency must possess the requested records is insufficient to establish a *prima facie* case that the agency in fact does possess the records. *See, e.g.*, 22-ORD-040. Rather, to present a *prima facie* case that the agency possesses or should possess the requested records, the requester must provide some statute, regulation, or factual support for that contention. *See, e.g.*, 21-ORD-177; 11-ORD-074. Notwithstanding the Appellant’s failure to present a *prima facie* case that the Commonwealth’s Attorney possesses the records, the Commonwealth’s Attorney explains that “[a]ll access and information related to the forfeiture account” is maintained by the Prosecutors Advisory Council. Accordingly, the Commonwealth’s

³ On appeal, the Commonwealth’s Attorney explains that it does not possess the records sought by subsection 6 of the request and they are, instead, in the possession of the Prosecutors Advisory Council.

Attorney did not violate the Act when it could not provide the requested bank records.⁴

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.

Russell Coleman
Attorney General

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

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Distributed to:

Paula Richardson Barber, Esq.
Ashton McKenzie, Commonwealth's Attorney

⁴ The Appellant does not contest the Commonwealth's Attorney's assertion that it does not possess any other requested records.