



## COMMONWEALTH OF KENTUCKY OFFICE OF THE ATTORNEY GENERAL

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**25-ORD-130**

May 22, 2025

In re: Merissa Henderson/Commonwealth Attorney, 21st Judicial Circuit

**Summary:** The Commonwealth Attorney for the 21st Judicial Circuit (“the Commonwealth’s Attorney”) did not violate the Open Records Act (“the Act”) when she denied a request for records contained in her criminal investigation or litigation files.

### ***Open Records Decision***

Merissa Henderson (“Appellant”) submitted a request to the Commonwealth’s Attorney for all records related to any legal proceeding involving her or her children from January 1, 2017, to the date of her request. She further specified that the requested records included “inter-agency communications” between the Commonwealth’s Attorney and law enforcement agencies. In response, the Commonwealth’s Attorney denied the request under KRS 61.878(1)(h) as seeking “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 challenges the Commonwealth’s Attorney’s invocation of KRS 61.878(1)(h) on two grounds. First, she asserts that the criminal litigation is no longer active, meaning the records are not categorically exempt. Second, she asserts that the requested records relate to “inter-agency communications, administrative decision-making, and potential misconduct,” which she asserts makes KRS 61.878(1)(h) inapplicable.

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”).

Therefore, even if the prosecution has concluded, the Commonwealth’s Attorney can still rely on KRS 61.878(1)(h) to deny inspection of its criminal prosecution file. Further, the Commonwealth’s Attorney explains that “[a]ny and all items requested” by the Appellant are “related to [her] criminal prosecution.”<sup>1</sup> Such records are permanently exempt under KRS 61.878(1)(h). Thus, the Commonwealth’s Attorney did not violate the Act when she denied the Appellant’s request.

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](mailto:OAGAppeals@ky.gov).

**Russell Coleman**  
**Attorney General**

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

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<sup>1</sup> Once a public agency states affirmatively that a record does not exist, the burden shifts to the requester to make a *prima facie* case that the requested record does or should exist. *See Bowling v. Lexington-Fayette Urb. Cnty. Gov’t*, 172 S.W.3d 333, 341 (Ky. 2005). To make a *prima facie* case that the agency possesses or should possess the requested record, the requester must point to some statute, regulation, or factual support for this contention. *See, e.g.*, 21-ORD-177; 11-ORD-074. The Appellant has not presented a *prima facie* case that the Commonwealth’s Attorney possesses responsive records that are not parts of her criminal litigation files.

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Distributed to:

Merissa Henderson

Ashton McKenzie, Commonwealth's Attorney