



## COMMONWEALTH OF KENTUCKY OFFICE OF THE ATTORNEY GENERAL

RUSSELL COLEMAN  
ATTORNEY GENERAL

1024 CAPITAL CENTER DRIVE  
SUITE 200  
FRANKFORT, KY 40601  
(502) 696-5300

25-ORD-131

May 22, 2025

In re: Merissa Henderson/Rowan County Attorney

**Summary:** The Rowan County Attorney (“the County Attorney”) did not violate the Open Records Act (“the Act”) when he denied a request for records contained in his criminal investigation or litigation files.

### *Open Records Decision*

Merissa Henderson (“Appellant”) submitted a request to the County 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 “communications” between the County Attorney and law enforcement agencies. In response, the County 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 County Attorney’s invocation of KRS 61.878(1)(h) by asserting that the requested records relate to “custody matters,” “inter-agency communications, [and] administrative decision-making,” which she asserts make 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”).

On appeal, the County Attorney explains that all records in his possession are exempt under KRS 61.878(1)(h).<sup>1</sup> He explains that the records in his possession do not relate to a custody matter. Rather, the records relate to “an abuse case in juvenile court and a criminal case” alleging criminal abuse in the second degree.<sup>2</sup> Such records are permanently exempt under KRS 61.878(1)(h). Thus, the County Attorney did not violate the Act when he denied the Appellant’s request.<sup>3</sup>

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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<sup>1</sup> The County Attorney also states that he does not have access to email communications sent by a former assistant county attorney and that those emails may be in the possession of the Prosecutor’s Advisory Council. The County Attorney states also that those records would be exempt under KRS 61.878(1)(h).

<sup>2</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 County Attorney possesses responsive records that are not parts of his criminal litigation files.

<sup>3</sup> After this appeal was initiated, the County Attorney opted to release one email to the Appellant, which he maintained could be withheld under KRS 61.878(1)(h). Accordingly, any dispute as to that email is moot. *See* 40 KAR 1:030 § 6.

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Distributed to:

Merissa Henderson

Cecil Watkins, Rowan County Attorney