



COMMONWEALTH OF KENTUCKY
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25-ORD-384

December 3, 2025

In re: EWU Media/Commonwealth's Attorney, 39th Judicial Circuit

Summary: The Commonwealth's Attorney for the 39th Judicial Circuit ("the Commonwealth's Attorney") violated the Open Records Act ("the Act") when it denied a request for records without explaining how the claimed exemption applied to the records withheld. On appeal, the Commonwealth's Attorney has substantiated her denial of the records under KRS 61.878(1)(h).

Open Records Decision

Erica Edgington, on behalf of EWU Media ("the Appellant"), submitted a request to the Commonwealth's Attorney seeking records relating to a particular criminal offense. In response, the Commonwealth's Attorney stated that its "Office is exempted through KRS 61.878(1)(h)." This appeal followed.

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). However, the exemption does not apply to every public record in the possession of Commonwealth's and county attorneys. *See, e.g.*, 05-ORD-150 n.3 (files associated with a county attorney involved in litigation to obtain child support arrearages were not exempt under KRS 61.878(1)(h) if the files did not pertain to a criminal investigation or prosecution). Nor does the exemption excuse Commonwealth's and county attorneys from complying with KRS 61.880(1). *See, e.g.*, 23-ORD-096 (finding a Commonwealth's attorney violated the Act when it did not respond to a request within five business days of receipt).

If an agency chooses to deny a request, it “shall 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.” KRS 61.880(1). Here, in its initial response, the Commonwealth Attorney stated only that it is “exempted through KRS 61.878(1)(h).” Although that provision exempts the Commonwealth’s Attorney’s case files from inspection, it does not alleviate its duty to explain how the exemption allows the denial in a specific case. *See, e.g.*, 24-ORD-108 (finding a Commonwealth’s attorney violated the Act when he did not explain how KRS 61.878(1)(h) applies to the records withheld). Because the Commonwealth’s Attorney’s initial response did not explain how the requested records are exempted by KRS 61.878(1)(h), its initial response violated the Act.

However, on appeal, the Commonwealth’s Attorney has explained that the requested records are located in its criminal litigation and investigative files and are therefore exempt. For its part, the Appellant argues that the records must be disclosed because the related investigation is complete and because the Commonwealth’s Attorney has not explained how disclosure would harm it. The Appellant is incorrect. KRS 61.878(1)(h) “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”). Thus, a Commonwealth’s Attorney does not need to articulate how disclosure of relevant records would harm it, and those records are permanently exempt from disclosure under the Act. Therefore, the Commonwealth’s Attorney did not violate the Act when it 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.

Russell Coleman
Attorney General

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

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Distributed to:

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