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26-ORD-439

October 1, 2026

In re: Patty Basham/Commonwealth's Attorney's Office for the 38th Judicial Circuit

Summary: The Commonwealth's Attorney's Office for the 38th Judicial Circuit ("the Commonwealth's Attorney's Office") violated the Open Records Act ("the Act") when it denied a request for records without identifying the specific exemption which authorized its denial. On appeal, the Commonwealth's Attorney's Office has substantiated its denial of the records under KRS 61.878(1)(h).

Open Records Decision

On August 31, 2026, Patty Basham ("the Appellant") submitted a request to the Commonwealth's Attorney's Office seeking records related to the "case file" associated with the investigation and presentation of charges to the grand jury related to a particular individual. In response, the Commonwealth's Attorney's Office denied the request, stating that "[p]ursuant to KRS 61.878, records or information compiled and maintained by this office pertaining to criminal investigations/litigation are exempted from the [Act] and remain exempt after the action/investigation are completed." 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 excuse Commonwealth's and county attorneys from complying with KRS 61.880(1). *See, e.g.*, 23-ORD-096 (finding a Commonwealth's attorney's office 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). Although the Commonwealth's Attorney's Office explained why the requested records are exempt, it did not identify the "specific exception" that authorized its denial. Thus, the Commonwealth's Attorney's Office violated the Act when its initial response did not comply with KRS 61.880(1).

However, on appeal, the Commonwealth's Attorney's Office explains that it withheld the requested litigation records under KRS 61.878(1)(h) and that those records remain exempt even after the related investigation has ended. The Commonwealth's Attorney's Office is correct. 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's records are permanently exempt from disclosure under the Act. Therefore, the Commonwealth's Attorney's Office 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 pursuant to KRS 61.880(5) and KRS 61.882 within 30 days from the date of this decision. Pursuant to 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:

Patty Clark, Appellant
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