COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

DANIEL CAMERON
ATTORNEY GENERAL

CAPITOL BUILDING, SUITE 118
700 CAPITAL AVENUE
FRANKFORT, KENTUCKY 40601
(502) 696-5300
FAX: (502) 564-2894

20-ORD-110

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In re: Sarah Farley/Lexington Police Department

Summary: Lexington Police Department ("Department") violated the Open Records Act ("the Act") by failing to explain the application of claimed exemptions, as required by KRS 61.880(1), and by withholding a complaint and attachment to the complaint.

Open Records Decision

In a request to the Department, Sarah Farley ("Appellant") initially requested a case report, certain text messages, and an e-mail containing an informal complaint. For different reasons, each request was denied, and this appeal followed. For the reasons that follow, this Office finds that the Department violated the Act.

The dispute here concerns two records, which the Department describes as "[o]ne email and its corresponding attachment . . . in regards to an informal complaint concerning Ofc. Weslee Farley[.]" The Department asserted that the "email and the attachment [are] exempt from public inspection pursuant to KRS 61.878(1)(i)." The Department vaguely describes the attachment to the e-mail as being "in regards to" the complaint, but Appellant asserts that it "contain[s]" the complaint. Although the Department has provided the e-mail to Appellant, it still insists that the attachment to that e-mail is preliminary.

KRS 61.878(1)(i) exempts from the Act "[p]reliminary drafts, notes, correspondence with private individuals, other than correspondence which is

intended to give notice of final action of a public agency[.]" Complaints against police officers are not exempt from inspection under KRS 61.878(1)(i) "once final action is taken." *City of Louisville v. Courier-Journal & Louisville Times Co.,* 637 S.W.2d 658, 659 (Ky. App. 1982). "Inasmuch as whatever final actions are taken necessarily stem from them, [complaints] must be deemed incorporated as a part of those final determinations." *Id.* at 659-60; *see also Palmer v. Driggers,* 60 S.W.3d 591, 600 (Ky. App. 2001) (holding that "once there has been a 'final action' to a disciplinary proceeding taken by an agency, the complaint that initially spawned that proceeding is subject to public scrutiny"). At all times, the agency carries the burden of proof in sustaining its action. KRS 61.880(2)(c).

Here, the Department violated the Act because it failed to meet its burden and to explain how the exemption applies to the attachment it withheld. KRS 61.880(1). The Department admits that it has taken final action on the complaint at issue. The Department found the complaint unsubstantiated and closed the matter. However, the Department has failed to give any meaningful description of the attachment, the record at issue in this appeal. There is even some suggestion that the attachment is the complaint. The Department's description of the attachment simply fails to meaningfully distinguish the e-mail, which was released, from the attachment to it. That distinction is important because the complaint is "subject to public scrutiny" now that the Department has taken final action. *City of Louisville,* 637 S.W.2d at 659. Without more, this Office is unable to determine that the disputed record, *i.e.,* the e-mail attachment, is exempt under KRS 61.878(1)(i).

The Department also claimed that KRS 61.878(1)(a), the personal privacy exemption, applies because the complaint was unsubstantiated and that releasing the attachment would only hurt the officer's reputation. However, the Department's failure to provide any meaningful description of the attachment makes it impossible for this Office to weigh the competing interests in privacy versus public disclosure necessary to reach a determination under the personal privacy exemption. *See Zink v. Commonwealth,* 902 S.W.2d 825, 828 (Ky. App. 1994).

The remaining portions of this appeal are moot under 40 KAR 1:030 § 6. The Appellant had requested a case report that was subsequently provided to her subject to certain redactions consistent with *Kentucky New Era, Inc. v. City of Hopkinsville,* 415 S.W.3d 76 (Ky. 2013). Appellant had also sought certain text

messages between any Department personal or responding officers relating to "[a]n EPO case between Weslee Farley [and] Sarah Farley," or a wanton endangerment case between the same parties, both of which were "filed on 3/24/20." The Department provided the requested text messages on appeal. Thus, these issues are moot.

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court pursuant to KRS 61.880(5) and KRS 61.882. 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.

Daniel Cameron
Attorney General

/s/ James M. Herrick

James M. Herrick
Assistant Attorney General

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Distribution:

Ms. Sarah Farley
Michael R. Sanner, Esq.
Ofc. John Linton