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

21-ORD-198

October 19, 2021

In re: Terrance Miles/Southeast State Correctional Complex

Summary: The Southeast State Correctional Complex ("the Complex") violated the Open Records Act ("the Act") when it failed to cite an exception to the Act or to explain how the exception applied to the record withheld. However, the Complex carried its burden on appeal that KRS 197.025(1) authorized it to deny inspection of the requested records.

Open Records Decision

On July 21, 2021, inmate Terrance Miles ("Appellant") requested a copy of a "PREA [Prison Rape Elimination Act] investigation and audio" pertaining to him. The Complex denied the request under Corrections Policy and Procedure ("CPP") 14.7(II)(J), which provides that "all investigative reports, incident reports, KOMS created incident reports (IRT), sexual abuse incident reviews, and investigative notes and documents on sexual offense incidents shall remain confidential and shall not be subject to open records." This appeal followed.

When a public agency denies a request under the Act, it must cite the applicable exception to the Act and give "a brief explanation of how the exception applies to the record withheld." KRS 61.880(1). The agency's explanation must "provide particular and detailed information," not merely a "limited and perfunctory response." *Edmondson v. Alig,* 926 S.W.2d 856, 858 (Ky. 1996). Here, the Complex merely quoted CPP 14.7(II)(J), but neither cited an exception to the Act nor explained how the exception applied to the requested records. Thus, the Complex violated the Act. *See, e.g.,* 21-ORD-099.

On appeal, the Complex explains that the incident to which the requested records pertain was "investigated as a non-PREA complaint," but nevertheless as a "potential sexual offense." Thus, 42 U.S.C. ch. 147 § 15601, *et seq*., does not apply. Instead, the Complex argues that CPP 14.7(II)(J) applies to the investigation regardless of whether the complaint is being investigated under the federal law. Under CPP 14.7(II)(J), "[a]ll information in an intake screening, incident report or investigation of a sexual offense shall be kept confidential except to the extent necessary to report to an appropriate supervisor, adequately investigate, provide treatment, or make security or management decisions." However, the Complex fails to cite any statutory authority that permits it to rely on solely the existence of a Department of Corrections policy to deny inspection of the record. Instead, in the form of an alternative argument, the Complex claims that the records are exempt under KRS 197.025(1).

KRS 61.878(1)(l) incorporates KRS 197.025(1) by reference, as it is an "enactment of the General Assembly." Under KRS 197.025(1), "no person shall have access to any records if the disclosure is deemed by the commissioner of the department or his designee to constitute a threat to the security of the inmate, any other inmate, correctional staff, the institution, or any other person." This Office has historically given correctional facilities such as the Complex wide latitude in determining what records constitute a security threat. *See, e.g.*, 18-ORD-220; 17-ORD-060; 15-ORD-101; 07-ORD-182. The report at issue may contain sensitive topics relating to other inmates and staff that could cause security concerns, and thus, the Complex did not violate the Act when it denied the Appellant's request under KRS 197.025(1).

In an attempt to rebut the Complex's arguments, the Appellant argues that he is nonetheless entitled to the records because they contain a "specific reference" to him. In support, he relies on KRS 197.025(2), which states:

> KRS 61.870 to 61.884 to the contrary notwithstanding, the [D]epartment [of Corrections] *shall not be required to comply* with a request for any record from any inmate confined in a jail or any facility or any individual on active supervision under the jurisdiction of the department, *unless* the request is for a record which contains a specific reference to that individual.

(emphasis added). In numerous decisions, more than can be cited here, this Office has held that KRS 197.025(2) applies to *deny* inmates access to records

that do not contain "specific references" to them. *See, e.g.*, 08-ORD-008; 11-ORD-120; 14-ORD-016; 17-ORD-015; 19-ORD-068; 21-ORD-084.

However, in an anomalous decision, 19-ORD-100, this Office held the opposite to be true; *i.e.,* that an inmate *is entitled* to any record that contains a specific reference to him "notwithstanding" any exceptions to the Act under KRS 61.878(1). In doing so, the decision ignored the actual text of KRS 197.025, which states that its provisions apply "KRS 61.870 to 61.884 to the contrary notwithstanding[.]" In other words, KRS 197.025(2) applies to requests made by inmates notwithstanding *any provision* of the Open Records Act to the contrary. And the central provision of the Act is KRS 61.872, which *grants* Kentucky residents the right to inspect public records.[1] Thus, a proper reading of KRS 197.025 is that, notwithstanding whatever rights a person may have under the Act, an inmate's right to inspect records is specifically controlled by the provisions of KRS 197.025. And under that statute, the Department and other correctional facilities "*shall not be required to comply* with a request for any record from any inmate confined in a jail or any facility . . . *unless* the request is for a record which contains a specific reference to that individual." KRS 197.025(2) (emphasis added).

"The cardinal rule of statutory construction is that the intention of the legislature should be ascertained and given effect." *MPM Financial Group, Inc. v. Morton*, 289 S.W.3d 193, 197 (Ky. 2009). To ascertain legislative intent, courts "presume that the General Assembly intended for the statute to be construed as a whole, for all of its parts to have meaning, and for it to harmonize with related statutes." *Shawnee Telecom Res., Inc. v. Brown*, 354 S.W. 542, 551 (Ky. 2011). Courts "also presume that the General Assembly did not intend an absurd statute[.]" *Id.* Under the anomalous interpretation in 19-ORD-100, however, KRS 197.025(2) would entitle an inmate to obtain all records excluded from the Act under any provision of KRS 61.878(1), as long as the records contain a specific reference to the inmate. This would, in effect, grant inmates a far more expansive right of access to records than the legislature has granted to the general public. *Cf.* KRS 61.884 ("Any person shall have access to any public record relating to him or in which he is mentioned by name, upon presentation of appropriate identification, *subject to the provisions of KRS 61.878*.") (emphasis added). Such a result would be clearly antithetical to the intention of the General Assembly in enacting KRS 197.025, which, when read in its entirety, is to provide fewer rights of

[1] *See also* KRS 61.871 (affirming that "the basic policy of KRS 61.870 to 61.884 is that free and open examination of public records is in the public interest").

inspection to inmates than to the general public. Accordingly, this Office rejects the analysis in 19-ORD-100, the only decision of this Office inconsistent with this approach, and finds that the Complex did not violate the Act when it denied the Appellant access to the records pursuant to an applicable exception, even though the records contain a specific reference to the Appellant.

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 proceeding.

Daniel Cameron
Attorney General

/s/ James M. Herrick

James M. Herrick
Assistant Attorney General

#255

Distributed to:

Terrance Miles, #151766
Jesse L. Robbins, Esq.
Ms. Rebecca Day