



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

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21-ORD-248

December 13, 2021

In re: Harry Crouch/Office of the Attorney General

Summary: The Office of the Attorney General (“the Office”) violated the Open Records Act (“the Act”) when it invoked KRS 61.872(5) but failed to dispense with the request on the date by which it had said records would be available for inspection. The Office did not violate the Act when it withheld records that were correspondence with private individuals under KRS 61.878(1)(i) or records pertaining to criminal litigation under KRS 61.878(1)(h).

Open Records Decision

On October 1, 2021, Harry Crouch (“Appellant”) requested copies of all communications between any employee or agent of the Office and two named individuals.¹ The Office received the request on October 5, 2021, and replied on October 12, 2021, that because the request “covers a large number of records[,] additional time is necessary to compile and review the requested records and identify any exempt records or records that otherwise require redaction.” Pursuant to KRS 61.872(5), the Office stated that it would issue its final disposition of the request by 4:30 p.m. on October 22, 2021. On October 25, 2021, the Office denied the Appellant’s request on the grounds that all responsive records were either correspondence between private individuals

¹ The Appellant tendered a copy of a separate open records request dated September 27, 2021, but did not include the Office’s response to that request. Insofar as the Appellant may have intended to initiate an appeal regarding that request, the appeal is unperfected. See KRS 61.880(2)(a) (requiring a complaining party to “forward to the Attorney General a copy of the written request and a copy of the written response denying inspection”); 40 KAR 1:030 (providing that “[t]he Attorney General shall not consider a complaint that fails to conform to . . . KRS 61.880(2)”).

and the Office of Victims Advocacy, which are exempt from disclosure under KRS 61.878(1)(i), or prosecutorial records of the Office of Special Prosecutions, which are exempt under KRS 61.878(1)(h). This appeal followed.

On appeal, the Appellant claims that the Office's response was untimely because it was issued more than three business days after receipt of the request. But KRS 61.880(1) allows five business days for a public agency to fulfill or deny a request for public records. This period may be extended if the records are "in active use, in storage or not otherwise available," but the agency must give "a detailed explanation of the cause . . . for further delay and the place, time, and earliest date on which the public record[s] will be available for inspection." KRS 61.872(5). Here, the Office responded within five business days. It did not grant or deny the request at that time, but it offered a future date by which it would be able to make records available for inspection.² However, the Office's final response was not issued by that date. This Office has found that a public agency violates KRS 61.872(5) when it provides the earliest date certain on which records would be available yet the agency misses its self-imposed deadline. *See, e.g.*, 21-ORD-011. Therefore, the Office violated the Act when it did not make a final disposition of the Appellant's request on the date determined by the agency when it invoked KRS 61.872(5).

The Appellant also claims that the Office wrongfully denied him access to the requested records. In its response to the request, the Office explained that the Office of Victims Advocacy "provides direct and indirect services to crime victims, which includes members of a crime victim's family." In that capacity, Office of Victims Advocacy personnel engaged in correspondence with the private individuals named in the Appellant's request. KRS 61.878(1)(i) exempts from disclosure "correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency." The Office asserts that none of the communications here were intended to give notice of a final agency action. Because the Appellant has not provided evidence that either of the named individuals was "anything more than a private citizen," those communications are exempt under KRS 61.878(1)(i). *See* 20-ORD-095.

² Although not clearly raised by the Appellant, this Office takes the opportunity to note that the Office's invocation of KRS 61.872(5) to delay its substantive response to the Appellant's request because it "covers a large number of records; therefore, additional time is necessary to compile and review the requested records and identify any exempt records or records that otherwise require redaction," was not sufficient. This Office has previously found that such an explanation is not sufficiently detailed to comply with KRS 61.872(5). *See, e.g.*, 21-ORD-011.

The remaining communications are part of the prosecutorial files of the Office of Special Prosecutions. 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 provisions of [the Act] and shall remain exempted after enforcement action, including litigation, is completed or a decision is made to take no action.” In criminal litigation, “[t]he Office of the Commonwealth[’s] Attorney and the Office of Attorney General, together, represent the state’s prosecutorial function[.]” *Bowling v. Lexington-Fayette Urb. Cnty. Gov.*, 172 S.W.3d 333, 339 (Ky. 2005) (quoting *Skaggs v. Redford*, 844 S.W.2d 389, 390 (Ky. 1992), *overruled in part on other grounds by City of Ft. Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842 (Ky. 2013)). Accordingly, when the Office of Special Prosecutions acts in place of the Commonwealth’s Attorney, “KRS 61.878(1)(h) applies to exclude [the Office’s] litigation files *in toto* from the Open Records Act.” See 17-ORD-012 (citing *City of Ft. Thomas*, 406 S.W.3d at 853). Here, the Office of Special Prosecutions acted on behalf of the Christian County Commonwealth’s Attorney. Therefore, the records are exempt under KRS 61.878(1)(h).

The Appellant makes numerous arguments as to why the records should not be exempt, all of which amount to the assertion that there is a “significant public interest” in disclosure. When a personal privacy interest under KRS 61.878(1)(a) is at issue, the Act requires a “comparative weighing of the antagonistic interests” between privacy and the public interest in disclosure. *Kentucky Bd. of Examiners of Psychologists v. Courier-Journal & Louisville Times Co.*, 826 S.W.2d 324, 327 (Ky. 1992). This is because the application of KRS 61.878(1)(a) depends upon whether an invasion of personal privacy is “clearly unwarranted.” However, in evaluating other exemptions such as KRS 61.878(1)(h) and 61.878(1)(i), no weighing of antagonistic interests is necessary, because the General Assembly has provided that those categories of records are exempt *per se*. Thus, the Office did not violate the Act when it denied the Appellant’s request.

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 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 e-mailed to OAGAppeals@ky.gov.

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