



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

**22-ORD-079**

April 28, 2022

In re: Marvin Pennington/Kentucky State Reformatory

**Summary:** The Kentucky State Reformatory (the “Reformatory”) violated the Open Records Act (“the Act”) when it initially failed to explain how certain exemptions applied to records it withheld, and when it failed to separate exempt material from nonexempt material under KRS 61.878(4). The Reformatory did not violate the Act when it denied inspection of material that is prohibited from disclosure under KRS 439.510, KRS 61.878(1)(l), KRS 61.878(1)(k), and 17 U.S.C. §106.

***Open Records Decision***

Inmate Marvin Pennington (“Appellant”) submitted a request to the Reformatory for “a copy of [his] KyRAS/CMP (risk [a]ssessment) [f]rom [his] KOMS [f]ile.” In a timely response, the Reformatory denied his request and cited KRS 439.510, KRS 61.878(1)(l), KRS 61.878(1)(k), and 17 U.S.C. §106. This appeal followed.

As an initial matter, when a public agency denies a request to inspect records, it must provide “a brief explanation of how the exception applies to the record withheld.” KRS 61.880(1). Here, the Reformatory cited KRS 439.510, KRS 61.878(1)(l), KRS 61.878(1)(k), and 17 U.S.C. §106 in its initial response, but the Reformatory did not explain how these exceptions applied to the records withheld. Thus, the Reformatory violated the Act.

Although the Reformatory's initial response was deficient, the Reformatory is correct that portions of the risk assessment are exempt from inspection. Under KRS 439.510, "[a]ll information obtained in the discharge of official duty by any probation or parole officer shall be privileged and . . . [s]uch information shall not be disclosed directly or indirectly to any person . . . unless" under court order.<sup>1</sup> In its initial response, the Reformatory claimed that the requested risk assessment forms "contain information collected by probation and parole officers in the course of their duties and are exempt pursuant to KRS 439.510 and KRS 61.878(1)(l)." This Office has found that portions of these types of risk assessments that contain information gathered by parole officers are exempt from inspection under KRS 439.150. *See, e.g.*, 20-ORD-198; 19-ORD-144; 17-ORD-022; 05-ORD-265; 01-ORD-120.

Moreover, on appeal, the Reformatory explains that "[p]ortions of the [requested risk assessment] were derived from a prior risk assessment tool," known as the Ohio Risk Assessment System, which the Reformatory uses pursuant to a contract with the University of Cincinnati. This Office has previously found that the University of Cincinnati owns a copyright for this risk assessment system, and correctional facilities in the Commonwealth are prohibited from providing "the assessment tools, questions, responses, and scoring" of that system under "the copyright provisions of 17 U.S.C. § 106, which is incorporated into the Act by KRS 61.878(1)(k)." 20-ORD-198.

Here, like in 20-ORD-198, the "the assessment tools, questions, responses, and scoring" portions of the risk assessment are protected copyright material exempt from inspection under 17 U.S.C. § 106 and KRS 61.878(1)(k). And the portions of the risk assessment containing information obtained from parole officers are exempt from inspection under KRS 439.510 and KRS 61.878(1)(l).

However, in 20-ORD-198 this Office did not find that the entire risk assessment was exempt. In fact, the correctional facility in 20-ORD-198 had redacted these exempt portions of the record, and provided the rest of the record for inspection. That is because "[i]f any public record contains material

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<sup>1</sup> KRS 439.510 is incorporated into the Act under KRS 61.878(1)(l), which exempts from inspection "[p]ublic records or information the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly."

which is not excepted under this section, the public agency shall separate the excepted and make the nonexcepted material available for examination.” KRS 61.878(4). Here, in contrast, the Reformatory denied the Appellant’s entire request and did not separate the exempt portions of the record from the nonexempt portions. The Reformatory has stated that the risk assessment “contain[s] information” from parole officers, but has never claimed that the entire risk assessment is comprised of such information. Nor has the Reformatory claimed that the remainder of the risk assessment, apart from the information obtained by parole officers, is protected by copyright. The Reformatory has not explained why it is unable to redact exempt portions of the risk assessment like the correctional facility in 20-ORD-198. And under KRS 61.880(2)(c), the Reformatory carries “the burden of proof in sustaining the action.” The Reformatory has failed to carry its burden that the entire risk assessment is exempt, and therefore it violated the Act when it failed to separate exempt information from nonexempt information, and provide the latter to the Appellant.

A party aggrieved by this decision may appeal it by initiating 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.

**Daniel Cameron**  
**Attorney General**

/s/Matthew Ray  
Matthew Ray  
Assistant Attorney General

#113

Distributed to:

Marvin Pennington, #119935  
Amy V. Barker