



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-198

September 29, 2022

In re: Rusty Weddle/Kentucky State Penitentiary

Summary: The Kentucky State Penitentiary (“the Penitentiary”) did not violate the Open Records Act (“the Act”) when it denied a request for records the release of which could constitute a security threat, KRS 197.025(1), or when it denied a request for pending grievances that retain preliminary status under KRS 61.878(1)(j).

Open Records Decision

On August 2, 2022, inmate Rusty Weddle (“Appellant”) submitted a seven-part request for records to the Penitentiary. The Appellant appeals the Penitentiary’s responses to two portions of this request. The first is the Penitentiary’s denial of his request for copies of incident and occurrence reports from July 2, 2022, when the Appellant “was pepper sprayed twice, put in [a] restraint chair and” placed under increased monitoring. The Penitentiary denied this request under KRS 61.878(1)(l), 197.025(1), and 197.025(6),¹ stating that “[r]elease of restraint, extraction, or use-of-force records for an adult correctional institution is a security risk . . . because of disclosure of use-of-force practices and training from secured policies and procedures and the risk of retaliation to staff.”

On appeal, the Appellant states that he wants the names of all officers involved in the incident and “the documented amount of pepper spray used as well as all reports related to the incident,” but “[a]nything [that] is a security threat may be blacked out.” 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,

¹ The Penitentiary does not continue to invoke KRS 197.025(6) on appeal. However, KRS 197.025(1) is dispositive of the issue.

the institution, or any other person.” The exemption under KRS 197.025(1) is incorporated into the Act under KRS 61.878(1)(l), which exempts from inspection records made confidential by any enactment of the General Assembly. Here, the Penitentiary asserts that releasing the names of the responding officers could subject them to retaliation from the Appellant or other inmates. Additionally, the Penitentiary states that releasing the reports would “create a security risk by revealing too much detail about staff response” to similar incidents.

This Office has historically deferred to the judgment of correctional facilities in determining whether the release of certain records would constitute a security threat under KRS 197.025(1). In particular, this Office has recognized that incident reports are exempt from inspection when they contain detailed information about response tactics that could put employees at risk in the future. *See, e.g.,* 22-ORD-090; 19-ORD-149; 17-ORD-097; 16-ORD-071; 07-ORD-039. Furthermore, this Office has recognized that KRS 197.025(1) permits the withholding of records that could lead to retaliation against correctional staff. *See, e.g.,* 21-ORD-225; 17-ORD-229; 17-ORD-097; 16-ORD-247; 03-ORD-190. Accordingly, the Penitentiary did not violate the Act when it withheld the requested reports under KRS 197.025(1).²

The Appellant also challenges the Penitentiary’s denial of his request for copies of all grievances he filed that had not “been answered” at the time of the request. In its response to the request, the Penitentiary identified two grievances that had “not been answered in some way” [*sic*] and therefore were “still in a pending phase.”³ The Penitentiary denied the request for those records under KRS 61.878(1)(i) and (j), stating that they were “notes, preliminary drafts, correspondence with private individuals, or preliminary documents containing opinions, observations, and recommendations that are not incorporated into or do not reflect final agency action.”

The Act allows public agencies to deny a request for records that are “preliminary drafts, notes, and correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency.” KRS 61.878(1)(i). Under KRS 61.878(1)(j), an exemption that is separate and distinct from KRS 61.878(1)(i), records that are “preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies are formulated or recommended” are also exempt from inspection.

² While this appeal was pending, the Penitentiary disclosed two of the disputed reports to the Appellant on the grounds that he already knew the identity of the responding officer. Thus, any dispute regarding those records is now moot. 40 KAR 1:030 § 6.

³ The Appellant alleges that he has “almost 20 pending grievances,” whereas the Penitentiary states that there are only two. However, the Appellant has presented no evidence of additional grievances. This Office is unable to resolve factual disputes between a requester and a public agency. *See, e.g.,* 21-ORD-163.

Records containing preliminary recommendations or opinions can lose their exempt status once they are adopted by a public agency as part of its final action. *See Ky. State Bd. of Med. Licensure v. Courier-Journal & Louisville Times Co.*, 663 S.W.2d 953, 956 (Ky. App. 1983) (holding that complaints against licensees, and “internal preliminary investigative materials” regarding those complaints, were exempt from inspection under KRS 61.878(1)(j)⁴ but “once such notes or recommendations are adopted by the Board as part of its action, the preliminary characterization is lost, as is the exempt status”). The Supreme Court later affirmed this rationale when it held that the University of Kentucky took final action when it adopted its final response to an investigation conducted by the NCAA. *University of Kentucky v. Courier-Journal & Louisville Times Company*, 830 S.W.2d 373, 378 (Ky. 1992). As such, the University’s final response was no longer preliminary, and KRS 61.878(1)(j) no longer applied to deny inspection of the record. *Id.*

In 21-ORD-088, this Office found that the Penitentiary properly denied an inmate’s request to inspect “every pending grievance” under KRS 61.878(1)(j). Specifically, this Office stated that “[t]he grievances, and the records from the relevant investigations, are exempt from disclosure until the Penitentiary takes final action on the grievances,” at which time “the Penitentiary will be required to assess the records to determine which records will have forfeited their preliminary status, which records are subject to inspection, and whether an exception permits the Penitentiary to withhold the documents.” The Appellant’s request for copies of all of his pending grievances is essentially identical to the request in 21-ORD-088. Accordingly, the Penitentiary did not violate the Act when it denied this request under KRS 61.878(1)(j).

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.

Daniel Cameron
Attorney General

s/James M. Herrick
James M. Herrick

⁴ At the time this decision was rendered in 1983, the “preliminary recommendations” exception was codified at KRS 61.878(1)(h). Although this exception is now codified at KRS 61.878(1)(j), the text of the exception has not changed.

Assistant Attorney General

#323

Distributed to:

Rusty Weddle, #182312

Mark F. Bizzell, Esq.

Ms. Courtney Martin