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24-ORD-247

November 22, 2024

In re: Christopher Hunt/Commonwealth's Attorney, 34th Judicial Circuit

Summary: The Commonwealth's Attorney for the 34th Judicial Circuit ("the Commonwealth's Attorney") did not violate the Open Records Act ("the Act") when he denied under KRS 61.878(1)(h) a request for records contained in his criminal investigation or litigation files.

Open Records Decision

On October 24, 2024, attorney Christopher Hunt ("the Appellant") submitted a request to the Commonwealth's Attorney seeking "[a]ll records related to any criminal cases against or involving" four named individuals. The Commonwealth's Attorney denied the request under KRS 61.878(1)(h) because all responsive records were "records or information compiled and maintained by County Attorneys or Commonwealth's Attorneys pertaining to criminal investigations or criminal litigation." This appeal followed.

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 [Act] and shall remain exempted after enforcement action, including litigation, is completed or a decision is made to take no action." Thus, "a prosecutor's litigation files are excluded *in toto* from the Act." *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 853 (Ky. 2013). "[T]his exemption is unique because it *categorically* exempts county attorneys' and Commonwealth's attorneys' criminal litigation or investigative files." 23-ORD-106 (emphasis in original); *see also* 02-ORD-112 (finding investigative records in the possession of a county attorney or Commonwealth's attorney are "permanently shielded from disclosure").

The Appellant attempts to circumvent this categorical exemption by citing other language from KRS 61.878(1)(h). Thus, it is appropriate to provide context here by quoting that subsection in full. The provision exempts from disclosure:

Records of law enforcement agencies or agencies involved in administrative adjudication that were compiled in the process of detecting and investigating statutory or regulatory violations if the disclosure of the information would harm the agency by revealing the identity of informants not otherwise known or by premature release of information to be used in a prospective law enforcement action or administrative adjudication. Unless exempted by other provisions of [the Act], public records exempted under this provision shall be open after enforcement action is completed or a decision is made to take no action; *however*, 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. The exemptions provided by this subsection shall not be used by the custodian of the records to delay or impede the exercise of rights granted by [the Act].

KRS 61.878(1)(h) (emphasis added).

First, the Appellant quotes the language immediately preceding the “however” clause in the second sentence of the statute, arguing the Commonwealth’s Attorney’s file should “be open after enforcement action is completed or a decision is made to take no action.” But a clause beginning with “however” introduces an exception to, or a superseding negation of, the language that precedes it. Here, the “however” clause after the semicolon in KRS 61.878(1)(h) negates, as to county attorneys and Commonwealth’s attorneys, the immediately preceding language, which provides that records “shall be open.” Thus, that language applies only to the other agencies covered by the provision and not the Commonwealth’s Attorney.

Next, the Appellant quotes the final sentence of KRS 61.878(1)(h) to suggest the Commonwealth’s Attorney is using the exemption “to delay or impede the exercise of rights granted by” the Act. But because the investigative and litigation files of a Commonwealth’s attorney are permanently and categorically exempt from disclosure, the Appellant has no “rights granted by” the Act to inspect those records. Accordingly, the Commonwealth’s Attorney did not “delay or impede the exercise of” the Appellant’s rights.

Finally, the Appellant claims the Commonwealth’s Attorney may not rely on the exemption unless “the disclosure of the information would harm the agency by revealing the identity of informants not otherwise known or by premature release of information to be used in a prospective law enforcement action.” But this portion of KRS 61.878(1)(h), likewise, does not apply to the Commonwealth’s Attorney. By

“according blanket protection to the investigatory and prosecutorial files of county and Commonwealth’s attorneys, [the General Assembly] relieved those agencies of the need to justify non-disclosure by a showing, otherwise required, that disclosure would harm the agency by revealing an informant or by compromising in some way a prospective enforcement action.” *Lawson v. Ofc. of Atty. Gen.*, 415 S.W.3d 59, 66 (Ky. 2013). Therefore, the Commonwealth’s Attorney did not violate the Act when he denied the Appellant’s request for records pertaining to criminal investigations or criminal litigation.

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

Russell Coleman
Attorney General

/s/ James M. Herrick
James M. Herrick
Assistant Attorney General

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Distributed to:

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