



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

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21-ORD-101

June 1, 2021

In re: Stephen McBride/Montgomery County Clerk

Summary: The Montgomery County Clerk (the “Clerk”) violated the Open Records Act (“the Act”) when it did not respond to an open records request. However, it did not violate the Act when it required a request submitted by email to be resubmitted in person or by mail.

Open Records Decision

On April 15, 2021, Stephen McBride (“Appellant”) sent an email to the Clerk in which he requested to inspect any public records concerning the ownership, possession, carrying, storage, transportation, manufacture, sale, purchase, taxation, or transfer of firearms. Having received no response by April 26, 2021, the Appellant appealed to this Office.

The Act provides that “[e]ach public agency, upon any request for records made under [the Act], shall determine within three (3) [business] days . . . after the receipt of any such request whether to comply with the request and shall notify in writing the person making the request, within the three (3) day period, of its decision” KRS 61.880.¹ On appeal, the Clerk explains that he had overlooked the Appellant’s request because it is his policy not to accept such requests by email. After receiving notice of this appeal, the Clerk emailed

¹ In response to the public health emergency caused by the Coronavirus, however, the General Assembly extended the time for a public agency to respond when it enacted Senate Bill (“SB 150”), which became law on March 30, 2020. SB 150 provides, notwithstanding the provisions of the Act, that “a public agency shall respond to the request to inspect or receive copies of public records within 10 days of its receipt.” SB 150 § 1(8)(a). However, the Clerk did not respond to the request until well beyond the ten day period, so SB 150 is not relevant to this analysis.

the Appellant, explained the policy, and invited him to resubmit his request by delivering it to the Clerk's office by hand or mail.

As explained below, the Clerk was permitted to deny the request because it was not submitted in conformity with the policy. However, KRS 61.880(1) requires a public agency to notify the requester within the prescribed time period whether it will comply with the request. Here, the Clerk did not respond within the prescribed period to inform the Appellant that he does not accept requests via email. Therefore, the Clerk violated the Act.

Although the Clerk violated the Act when he failed to respond to the Appellant, he was not required to accept the Appellant's emailed request at the time the request was made.² Until June 29, 2021, a public agency's records custodian has discretion under KRS 61.872(2)(a) on whether to accept a request by email. Such discretion is not unlimited. To exercise its discretion, a public agency must state the acceptable means of transmission in its policies and procedures under KRS 61.876. *See, e.g.*, 20-ORD-055 (finding that a public agency violated the Act when it denied a request submitted via email when its policy permitted such transmission). Here, the Clerk has a policy to not accept requests via email. At the time the Appellant's request was made, that policy did not violate the Act.

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 proceedings.

² The 2021 General Assembly enacted House Bill 312 ("HB 312") which makes several changes to the Act. HB 312 becomes effective June 29, 2021. *See* OAG 21-02. HB 312 amends KRS 61.876 to require all public agencies to update their policies and procedures to include both the mailing address and the email address of the records custodian. HB 312 further amends KRS 61.872(2) to require a records custodian to accept requests submitted by email to the record custodian's email address stated in the policy. Therefore, effective June 29, 2021, a public agency may not reject a request to inspect records submitted via email to the records custodian.

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