



COMMONWEALTH OF KENTUCKY
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23-ORD-043

February 22, 2023

In re: Andrew Brinegar/Livingston County Clerk's Office

Summary: The Livingston County Clerk's Office ("the Clerk's Office") violated the Open Records Act ("the Act") when it failed to explain its denial of a request for records and made no effort to identify the proper custodian of those records it claimed not to have in its custody or control.

Open Records Decision

On January 24, 2023, Andrew Brinegar ("Appellant") requested to inspect in person, or obtain copies of, certain records from the Clerk's Office. First, the Appellant requested all records pertaining to him, or to a certain property owned by him, between August 1, 2022, and January 24, 2023. He specified that this request included "copies of all emails and text messages from all county employees from all county email accounts, personal email account, county cellphones, private cellphones, and all other forms of communications, including social media, that relate to the county employees [*sic*] public service role and/or in the performance of their government function." Second, the Appellant requested "copies of all county sheriff dispatch logs" from December 9, 2022 at 9:00 p.m. to December 10, 2022 at 3:00 a.m. Finally, he requested "copies of all body camera and dash camera footage from all on duty county sheriff employees" during the same time period.

In a timely response, the Clerk's Office granted inspection of records pertaining to the Appellant "to the extent that such records are recorded in" the Clerk's Office, but denied the remainder of the Appellant's requests. The Clerk's Office stated no basis for denying the request for records pertaining to the Appellant's property. With regard to the Appellant's request for communications from county employees relating to him or his property, the Clerk's Office asserted the Appellant's request sought "public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal

privacy pursuant to KRS 61.878(1)(a), preliminary drafts, notes correspondence [sic] with private individuals, other than correspondence which is intended [sic] to give notice of final action of a public agency pursuant to KRS 61.878(1)(i).”

The response from the Clerk’s Office did not specifically mention the Appellant’s requests for dispatch logs or camera footage. However, the Clerk’s Office denied the request in general “to the extent that the Livingston County Clerk is not the custodian of [the requested] records” and stated the Appellant “may need to seek such other records from other offices within Livingston County government.” Finally, the Clerk’s Office claimed “the scope of [the] request is [sic] places an unreasonable burden in producing public records as contemplated by KRS 61.872(6).” This appeal followed.

When a public agency denies a request under the Act, it must state the exception on which it relies. KRS 61.880(1). Here, the Clerk’s Office stated no specific basis for denying the Appellant’s requests for dispatch logs, camera footage, or records pertaining to the identified property. By failing to give a specific reason for denying those requests, the Clerk’s Office violated the Act.

Furthermore, an agency citing an exception under KRS 61.878(1) must give “a brief explanation of how the exception applies to the record withheld.” KRS 61.880(1). The agency’s explanation must “provide particular and detailed information,” not merely a “limited and perfunctory response.” *Edmondson v. Alig*, 926 S.W.2d 856, 858 (Ky. 1996). “The agency’s explanation must be detailed enough to permit [a reviewing] court to assess its claim and the opposing party to challenge it.” *Ky. New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76, 81 (Ky. 2013); *see also City of Ft. Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 848–49 (Ky. 2013) (noting the agency’s “proof may and often will include an outline, catalogue, or index of responsive records and an affidavit by a qualified person describing the contents of withheld records and explaining why they were withheld”). Here, in denying the Appellant’s requests for employee communications pertaining to him or his property, the Clerk’s Office described no records to which KRS 61.878(1)(a) or (i) purportedly applied. Instead, it merely recited the text of those exceptions without explaining how they applied to any specific records. An agency response that does “little more than recite the language of [the] exception” does not meet the requirements of KRS 61.880(1). 22-ORD-204; 19-ORD-191; 05-ORD-179. Therefore, the Clerk’s Office violated the Act.

Moreover, the Clerk’s Office provides no further explanation of its denial on appeal. A public agency carries the burden of proof at all times in an open records appeal. KRS 61.880(2)(c). Because the Clerk’s Office has not explained how KRS 61.878(1)(a) or (i) applies to any requested records, it has failed to meet its burden of proof to sustain its denial of the Appellant’s request.

Furthermore, “[i]f the application places an unreasonable burden in producing public records[,] the official custodian may refuse to permit inspection of the public records or mail copies thereof. However, refusal under this section *shall be sustained by clear and convincing evidence.*” KRS 61.872(6) (emphasis added). Here, the agency claimed the Appellant’s request was unreasonably burdensome, but has not attempted to support that claim with any evidence or explanation. Therefore, the Clerk’s Office has not established by clear and convincing evidence that the Appellant’s request is unreasonably burdensome, as required by KRS 61.872(6). Accordingly, the Clerk’s Office violated the Act when it denied the Appellant’s request.

Finally, under KRS 61.872(4), “[i]f the person to whom the application is directed does not have custody or control of the public record requested, that person shall notify the applicant and shall furnish the name and location of the official custodian of the agency’s public records.” Here, the Clerk’s Office did not identify the requested records of which it does not have custody or control, or furnish any information regarding the proper custodian to whom the Appellant should direct his request. On appeal, the Clerk’s Office claims it did not do so because the Appellant’s “request was so broad in scope and lacked the requisite specificity to provide all [*sic*] such custodians.” Again, however, the Clerk’s Office fails to identify the types of requested records of which it is not the custodian. At a minimum, the Clerk’s Office should be able to provide the Appellant with information about obtaining records from the county sheriff’s office. Thus, the Clerk’s Office violated the Act when it failed to make any effort to comply with KRS 61.872(4).

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 emailed to OAGAppeals@ky.gov.

Daniel Cameron
Attorney General

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

Distributed to:

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