



COMMONWEALTH OF KENTUCKY
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23-ORD-173

July 18, 2023

In re: Bobbie Coleman/Breathitt County Clerk

Summary: The Breathitt County Clerk (the “Clerk”) violated the Open Records Act (“the Act”) when she failed to timely respond to requests to inspect records and when she charged a fee for electronic records without substantiating the actual cost of reproducing those records.

Open Records Decision

On May 22, 2023, Bobbie Coleman (“Appellant”) emailed two requests to the Clerk to inspect various records relating to the May 2023 primary elections.¹ Having received no response by June 1, 2023, the Appellant initiated her first appeal.

Shortly after the Appellant initiated her first appeal on June 1, the Clerk responded to the requests and stated only that the County Judge/Executive had access to the requested surveillance video, but he was “out of town this week.” The Clerk advised she would attempt to retrieve the video when he returned. As for the Appellant’s request for the electronic signature rosters, the Clerk advised that her vendor was “working on” creating the electronic signature rolls and she would provide those records to the Appellant upon receiving them from the vendor.

While the Appellant’s first appeal was pending, she submitted another request to the Clerk on May 30, 2023. This time the Appellant asked for a copy of the Clerk’s most recent contract with the vendor providing video surveillance services of the

¹ Specifically, the Appellant sought video surveillance tapes of the election machines from 6:00 p.m. on May 16, 2023, to 6:00 p.m. on May 17, 2023. The Appellant also sought, “in spreadsheet format (.csv or .xlsx) [the Clerk’s] complete voter sign-in rosters for every precinct, absentee, early, and election day voters from the May 2023.”

election equipment. On June 9, 2023, the Clerk notified the Appellant the “documents” were ready, and she would mail them to the Appellant after prepayment of a \$69.40 fee. The Appellant asked the Clerk to substantiate the basis of the fee because she had asked for electronic copies of records, not hard copies. The Clerk responded that the documents included the complete electronic signature rolls and a copy of the requested contract. The Clerk reiterated that prepayment of the fee would be required before releasing them to the Appellant. The Appellant then initiated her second appeal to challenge the Clerk’s imposition of the fee.

Under KRS 61.880(1), upon receiving a request for records under the Act, a public agency “shall determine within five (5) [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 five (5) day period, of its decision.” Or, if responsive records are “in active use, in storage or not otherwise available,” a public agency may delay access to them by stating the earliest date on which they will be available and a detailed explanation of the cause of the delay. KRS 61.872(5). Here, the Clerk violated the Act twice because neither of her responses to the Appellant’s requests were timely. The Clerk did not respond to the Appellant’s May 22 requests until June 1, or seven business days later. She also did not respond to the Appellant’s May 30 request until June 9, or eight business days later.

With respect to the fee, the Clerk has not substantiated whether the requested records existed in hard copy or electronic format. Under KRS 61.880(4), “If a person feels the intent of KRS 61.870 to 61.884 is being subverted by an agency short of denial of inspection, including but not limited to the imposition of excessive fees . . . the person may complain in writing to the Attorney General, and the complaint shall be subject to the same adjudicatory process as if the record had been denied.” The Office notes that, with respect to the electronic signature rolls, these records have been provided to the county clerks in electronic PDF format by the various vendors. *See, e.g.*, 23-ORD-158 n.2.

Under KRS 61.874(3), “The public agency may prescribe a reasonable fee for making copies of nonexempt public records requested for use for noncommercial purposes which shall not exceed the actual cost of reproduction, including the costs of the media and any mechanical processing cost incurred by the public agency, but not including the cost of staff required.” However, if “a public agency is asked to produce a record in a nonstandardized format, or to tailor the format to meet the request of an individual or a group, the public agency may at its discretion provide the requested format and recover staff costs as well as any actual costs incurred.” *Id.*

Thus, whether an agency may charge an increased fee for electronic records turns on whether the records exist in standardized or nonstandardized format.

Under KRS 61.874(2)(b), the standardized format for electronic records is a record that is “in a flat file electronic American Standard Code for Information Interchange (ASCII) format.” This Office has previously found that PDF format is a “standard format” under KRS 61.874(2)(b). *See, e.g.*, 11-ORD-085. As such, the Clerk may only recover the “actual cost” of reproducing the PDF file for the Appellant’s inspection. The Clerk has not explained whether she incurred any “actual costs” in reproducing the electronic signature rolls the vendor provided her pursuant to contract.² To the extent the Clerk printed the electronic signature rolls for purposes of redaction, the Court of Appeals has held that an agency may not pass on the costs of redaction when reproducing records for a noncommercial purpose. *See Commonwealth, Dep’t of Ky. State Police v. Courier Journal*, 601 S.W.3d 501, 508 (Ky. App. 2020) (the agency’s inability to redact records in its database other than by manual redaction did not permit it to pass on the reproduction costs to the requester).

The Clerk carries the burden of substantiating her actual cost of reproducing the electronic signature rolls and the requested contract. *See* KRS 61.880(2)(c). It is not clear from this record whether the contract exists in electronic format or hard copy format only. But the electronic signature rolls do exist in electronic format as a PDF. While the Clerk should make redactions to that PDF file under KRS 61.878(1)(a) to remove dates of birth, she cannot pass on to the Appellant the cost of printing the records and manually redacting them. *Ky. State Police*, 601 S.W.3d at 508. Accordingly, the Clerk violated the Act by imposing an excessive fee. *See* KRS 61.880(4)

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.

² This is in contrast to additional costs some county clerks have incurred from their vendors in accessing the requested video surveillance records. In those cases, the county clerks faced additional third-party costs, beyond those part of the original contract, in reproducing the records. This situation is similar to agencies that incur third-party bank charges for reproducing copies of canceled checks that had been requested. *See, e.g.*, 23-ORD-152 n.3; 16-ORD-239; 14-ORD-177; 10-ORD-140.

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