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23-ORD-178

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In re: Jason Potts/Ohio County Clerk

Summary: The Ohio County Clerk (the “Clerk”) violated the Open Records Act (“the Act”) when she imposed an excessive fee for electronic records that required redaction. The Clerk did not impose an excessive fee for the actual cost of reproducing requested surveillance videos. The Clerk also did not violate the Act when she invoked KRS 61.872(5) to delay access to records in active use and provided the record prior to the estimated date of availability.

Open Records Decision

On May 24, 2023, Jason Potts (“Appellant”) emailed two requests to the Clerk to inspect various records relating to the May 2023 primary elections.¹ In a timely response, the Clerk invoked KRS 61.872(5) because the requested video was in active use and the requested electronic signature rolls did not yet exist. The Clerk was unable to estimate when the electronic signature rolls would be available, but notified the Appellant the video would be available on June 16. The Clerk also advised the Appellant to be prepared to pay a copying fee of 10 cents per page for the electronic signature rolls.

On June 5, the Clerk issued a supplemental response and advised the Appellant that the video would be available on June 17, but the vendor would charge \$500.00 to retrieve it. She asked the Appellant to confirm whether he would pay the fee before she scheduled the vendor to perform the service. Additional correspondence

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.”

between the parties ensued. Then, on June 14, the Clerk sent another supplemental response to inform the Appellant the electronic signature rolls were available. However, because the Clerk needed to redact the dates of birth from the records under KRS 61.878(1)(a), she printed the electronic database and manually redacted them. As a result, the Clerk sought reimbursement of \$34.20 for 342 pages at 10 cents per page, plus additional mailing costs. The Clerk also reiterated that after speaking to the vendor regarding retrieval of the video surveillance, the vendor anticipated charging \$500.00 to obtain the video. The Clerk again requested confirmation from the Appellant that he would pay the fee before committing to have the vendor retrieve the video. This appeal followed.

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).

With respect to the request for video, the Clerk properly invoked KRS 61.872(5) and notified the Appellant the earliest date on which the video would be available was June 16, 2023. This was so, according to the Clerk, because under KRS 117.295, the video surveillance had to run continuously for 30 days and could not be interrupted. Ultimately, the Clerk stated the video could be made available earlier than originally estimated, if the Appellant agreed to pay the fee imposed by the vendor to retrieve the video. The fact that records become available earlier than the estimated date provided does not mean the agency’s delay was excessive.

With respect to the request for electronic signature rolls, the Clerk attempted to invoke KRS 61.872(5) but was unable to provide the earliest date on which the records would be available because the records did not yet exist. Thus, KRS 61.872(5) did not actually apply to these records because they were not “in active use, storage, or not otherwise available” because they did not exist. A more appropriate response would have been to inform the Appellant the records did not exist and would not exist until they were delivered by the vendor. Regardless, there is no basis to conclude that the Clerk inappropriately delayed access to records when they were not in her possession.

With respect to the fee for electronic signature rolls, KRS 61.880(4) states, “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 the electronic signature rolls 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.” In other words, while an agency may not include the cost of “staff” required to reproduce the record, it may charge the cost incurred by entities other than staff. Moreover, 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 claims to have incurred actual costs because she had to print the electronic signature rolls to redact dates of birth under KRS 61.878(1)(a). While it was proper for the Clerk to redact from the records dates of birth,² the Court of

² The Office has routinely upheld the redaction of dates of birth from public records under KRS 61.878(1)(a). *See, e.g.*, 23-ORD-052; 19-ORD-204; 08-ORD-025; 07-ORD-141. The Appellant, however, relies on 22-ORD-037 to claim that the public interest in dates of birth on the voter rolls outweighs the privacy interest at stake. In 22-ORD-037, the Office found that a county clerk could not redact the *addresses* of *candidates* from candidate filings. There, the Office concluded the public had an interest in confirming a candidate for office met the residency requirement. There is a noticeable distinction between the dates of birth of voters, who have not placed themselves in public view by running for office, and the address of candidates who have intentionally placed themselves in public

Appeals has held that an agency may not pass on the costs of redaction when reproducing records for a noncommercial purpose. *See 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). Accordingly, the Clerk violated the Act by imposing an excessive fee that did not reflect the "actual cost" of reproducing the electronic signature rolls because the only cost incurred was to redact the record.

In contrast to the electronic signature rolls, the Clerk *will* incur "actual costs" distinct from redactions in reproducing the requested video surveillance. That "actual cost" is imposed by a third party, not staff, because the third party is the only entity capable of 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. While the estimated \$500.00 far exceeds similar estimates from other vendors to retrieve surveillance video for other county clerks, which have ranged between \$75.00 and \$156.00,³ KRS 61.874(3) permits recovery of the "actual cost or reproduction," not a "reasonable cost." It is questionable whether \$500.00 is in fact reasonable, given other vendors are capable of reproducing surveillance video more cheaply. If, however, there is no way for the Clerk to reproduce the video without incurring an "actual cost" of \$500.00, she may recover that fee from the Appellant under KRS 61.874(3).

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.

view. Moreover, while there is an age restriction to register to vote, there is no maximum age at which the right to vote ceases. Thus, whatever minor public interest might exist in the age of voters, it is outweighed by the privacy interest at stake in those voters' dates of birth (especially when coupled with their names and addresses), which can be used to facilitate identity theft.

³ *See, e.g.*, 23-ORD-152 n.3; 23-ORD-158 n.2; 23-ORD-172.

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