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23-ORD-210

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In re: Teresa Gilbert/Pulaski County Clerk

Summary: The Pulaski County Clerk (the “Clerk”) violated the Open Records Act (“the Act”) when he failed to respond to a request to inspect records within five business days. However, because one of the requested records was “in active use” at the time of the request and the other requested record did not exist at the time of the request, the Clerk did not violate the act by not providing the records to the Appellant.

Open Records Decision

On May 24, 2023, Teresa Gilbert (“Appellant”) emailed two requests to the Clerk to inspect various records relating to the May 2023 primary elections.¹ Having received no response to her requests by June 2, 2023, the Appellant initiated this appeal.

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.” After the appeal was initiated, the Clerk admitted he failed to respond to the Appellant’s requests within five business days. Accordingly, the Clerk violated the Act.

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 primary elections.

Although a public agency must respond to a request to inspect records and notify the requester whether it will grant the request within five business days, the public agency may be unable to provide the records within that brief timeframe. Under KRS 61.872(5), if a requested record is “in active use, storage, or not otherwise available,” a public agency may delay inspection if it states the earliest date on which the record will be available and provides a detailed explanation for the cause of delay.

On appeal, the Clerk explains the requested surveillance video was not available at the time of the request because it was in active use under KRS 117.295(1). That statute requires, “For a period of thirty (30) days following any election, the voting equipment shall remain locked against voting, the ballot boxes containing all paper ballots shall remain locked, and the voting equipment and ballot boxes shall be under video surveillance. The system used to conduct the video surveillance shall have enough storage capacity to retain sixty (60) consecutive days of continuous recording data.” Because the primary elections were held on May 16, 2023, the video surveillance equipment remained in active use until June 16, 2023.² In his response in this appeal on June 15, the Clerk explained that, for this reason, “the footage will not become available until June 16, 2023.” The Clerk thus satisfied the requirements of KRS 61.872(5) by stating the earliest date on which the record would be available.

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 primary elections. However, before turning to this part of the Appellant’s request, it is important to briefly discuss recent changes to the Commonwealth’s election systems. Prior to 2022, Kentucky’s poll books, which

² Because the video surveillance equipment must be in continuous use for a minimum of 24 hours per day for 30 days, and it must contain sufficient storage to store 60 days of continuous video, only certain video surveillance systems are capable of the task. As has become apparent in the multiple simultaneous appeals involving requests for similar surveillance videos of voting machines used in the May 2023 primary elections, the clerks have each contracted separately with various vendors to operate these video surveillance systems. Some systems may have the ability to retrieve a day’s worth of video without interrupting the continuous recording, and some may not. Moreover, it appears most of the clerks are unable to retrieve the video without the assistance of their vendors. Thus, while the video may cease recording 30 days after the election, not all clerks have been able to retrieve the video on that day without the assistance of a vendor. Further still, many of these vendors charge the clerks a processing fee to obtain the video, with various fees having been charged across the state for the same videos. While the Act permits a public agency to recover “the actual cost of reproduc[ing]” a record, KRS 61.874(3), clerks should be mindful of these reproduction costs when they consider competing contracts for services. Although exorbitant vendor costs might call into question the reasonableness of a contract, especially in the face of other contracts that have not resulted in as high of fees, the reasonableness of any contract is beyond the scope of this Office’s review under the Act.

document whether a registered voter cast a ballot in a particular election, were kept in paper format. When a voter went to the polls to cast a ballot, he or she would present valid photo identification and physically sign next to his or her name where it appeared in the paper poll book. However, during the 2022 Regular Session, the General Assembly passed House Bill 618 to reform Kentucky's election systems.³ See 2022 Ky. Acts ch. 172. One new addition was the use of "e-poll books," which are "electronic device[s] capable of holding a file of voter data and related information for use in identifying registered voters prior to a voter's receiving or casting a ballot, and allowing a voter to electronically sign in on an electronic registered voter roster in lieu of signing a paper registered voter roster." KRS 17.001(8). Upon receiving an appropriate application, the State Board of Elections ("SBE") is required to examine and certify for use any e-poll book that meets all legal qualifications. KRS 117.379(2)(c).

Although the poll books have changed from paper to electronic format, ownership of the voter registration data has not changed. Specifically, SBE is the owner and official custodian of the Commonwealth's voter registration database, not the county clerks. See KRS 117.025(3)(a).⁴ Prior to each primary election, the SBE is responsible for transmitting to each county clerk "a master list of all registered voters in the county, together with three (3) signature rosters of all registered voters in each precinct of the county according to party affiliation, and two (2) lists of all registered voters in each precinct of the county at least eighteen (18) days prior to each primary." KRS 117.025(3)(b). Similarly, prior to each regular election, the SBE must transmit to each county clerk "a master list of all registered voters in the county, together with one (1) signature roster of all registered voters in each precinct of the county on which each voter's party affiliation is identified, and two (2) lists of all registered voters in each precinct of the county at least eighteen (18) days prior to each regular election." KRS 117.025(3)(c). Relevant here, the SBE must also "[s]elect the required *format* for any voter registration list provided to a county clerk *including those intended for use in an e-poll book product.*" KRS 117.025(3)(d) (emphasis added).

Here, the Appellant sought the e-poll book signature logs in a specific electronic format: either ".csv" or ".xlsx." However, on appeal, the Clerk explains the record "was

³ One of the new requirements imposed by House Bill 618 is for county clerks to store election equipment in a locked room under video surveillance for 30 days, as has been discussed above. See KRS 117.295(1). Prior to this amendment, the equipment was stored in a locked room without video surveillance for a shorter time period.

⁴ Although not relevant here, another indicium of the SBE's ownership of this data is its power to sell it to the state central executive committees of each political party, to candidates, and to other persons. See KRS 117.025(3)(f) and (i).

not available” at the time of the request because he had not yet received the completed report from the vendor. In support, he provided emails from the vendor, in which the vendor gave various status updates between May 31 and June 14 regarding its progress in creating the “custom reports,” with the final email on June 14 stating the report was ready “for download.”

In 23-ORD-211, this same Appellant sought a similar record from the Casey County Clerk. That Clerk similarly claimed to have not possessed a copy of the e-poll book signature logs at the time of the request because he was waiting for the vendor to provide him a copy. In response, the Appellant claimed the “ePulse” system was capable of generating various reports automatically, and therefore, the Clerk should already possess a copy of the requested record. Given the similarities of this “report” and the one at issue in 23-ORD-211, the Office sought in both cases additional information regarding the “reports” available to the county clerks through “ePulse.”⁵

In response to the Office’s inquiries, the Clerk provided another email from the vendor explaining that “ePulse is a Poll Pad dashboard that counties can use to manage [and] monitor the status of their Poll Pads [and] check-ins during an election. County admin users have the ability to create custom reports in ePulse using various data points captured by the Poll Pads, but they do not automatically exist nor does [the vendor] automatically create various reports.” With respect to the e-poll book signatures for the May 2023 primary election, the vendor stated it “create[s] two reports for the County that are made available to download from ePulse[.] [T]his is required for a vendor to be certified in Kentucky. The reports are provided in .PDF format only and are specific post-election reports that meet the requirements set by the State Board of Elections[.] [T]hese are the ‘Ky Final Roster’ [and] the ‘Supplemental Roster’.”⁶

Based on the foregoing, the Office finds the Clerk has carried his burden of proof that he did not possess a record responsive to the Appellant’s request at the time it was submitted. Thus, unlike the surveillance video that existed but was “in active use,” here, KRS 61.872(5) could not have applied to the e-poll book signature records at the time of the request because the records did not yet exist. Rather, the record did not exist and come into the Clerk’s possession until the vendor created the

⁵ After the Office requested additional information from the Clerk, the Appellant also raised in this appeal the same argument that the Clerk has access to various reports from “ePulse.” Thus, in both 23-ORD-211 and here, the Appellant disputes the Clerk’s claim that he did not possess the record at the time of the request.

⁶ The vendor also provided a 120-page handbook detailing the capabilities of the ePulse software.

record subject to the format required by the SBE under KRS 117.025(3)(d). Accordingly, a more appropriate response for the Clerk would have been to state the record did not exist at the time of the request, rather than to state the record was unavailable at the time of the request. Because KRS 61.872(5) cannot apply to a record that does not exist, the Clerk did not violate that provision of the Act by failing to state the earliest date on which it would be available.

Moreover, the Clerk did not, and still does not, possess the record in the .cvs or .xlsx format the Appellant has requested. The Clerk possesses the record in PDF format only, which is the format the SBE has instructed the vendors to use to maintain their certification for use. KRS 117.025(3)(d). “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.” KRS 61.874(3) (emphasis added). The Appellant is asking the Clerk to tailor the format of an electronic record into her preferred format. Even if the Clerk is capable, the Act leaves it to his discretion whether to do so. Accordingly, the Clerk did not violate the Act when he provided the Appellant the e-poll book signature logs for the May 2023 primary election in PDF format.

In sum, the Clerk violated the Act when he failed to respond to the Appellant’s request within five business days. However, the Clerk has adequately explained why the e-poll book signature record did not exist, and why the video surveillance record was not available, at the time of the Appellant’s request.

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.

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Distributed to:

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