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23-ORD-211

August 11, 2023

In re: Teresa Gilbert/Casey County Clerk

Summary: The Casey 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, the Clerk did not violate the Act by not producing a record that did not exist at the time of the request.

Open Records Decision

On May 23, 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 by June 1, 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 this appeal was initiated, the Clerk responded to the Appellant’s requests, but did not explain why he failed to do so within five business days of receiving the request. Accordingly, the Clerk violated the Act.

In his belated response to the Appellant’s requests, the Clerk provided a memorandum issued by the State Board of Elections (“SBE”) to all County Clerks on

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 primary” election.

May 22, 2023, advising them about the same open record request submitted to county clerks across the Commonwealth. *See, e.g.*, 23-ORD-145; 23-ORD-147; 23-ORD-148. The SBE advised that the county clerks “are not in possession of any digital record of voter rosters.” Rather, the “Final Completed County Roster Output File” would be made provided to the clerks by their respective vendors. The Appellant contests that claim and argues the Clerk can retrieve the electronic voter-signature rolls through ePulse, which is the electronic election management system used by the county clerks. In support of her claim, the Appellant provides an email from the vendor advising the clerks not to pull “reports” from ePulse. Moreover, the vendor advertises ePulse as “an all-inclusive election management suite designed to give administrators real-time access to monitor their election as a whole.” More specifically, ePulse “allows for administrators to oversee the operation of individual precincts and Poll Pads [*i.e.*, the tablets voters use to sign] including battery life of the device, average check-in times, number of ballots issued or spoiled; all the while ensuring the election authority can directly contact poll workers via video or text message for speedy trouble resolution.” Finally, the advertisement concludes, “ePulse aims to be as intuitive and user-friendly as the Poll Pads themselves. The simple-to-view dashboards give the user an overview of election data essentials which can be easily digested and exported into customizable reports.”

Following the Appellant’s reply² on appeal, the Office sought additional information from the Clerk regarding the “Final Completed County Roster Output File” and the reports available to the county clerks through “ePulse.” But before addressing the Clerk’s response to that inquiry, the Office notes its decision in 23-ORD-210, which is being released simultaneously with this decision.

In 23-ORD-210, this Appellant sought a similar record from a different county clerk. In that decision, the Office explained recent changes to the Commonwealth’s elections laws that led to the certification and use of “e-poll books,” or more specifically, “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) (defining “e-poll book”). Upon receiving an appropriate application, the

² On June 13, 2023, the Appellant attempted to file a new appeal alleging subversion of the Act under KRS 61.880(4) based on the Clerk’s assertions in his belated response. However, the Appellant’s subsequent correspondence only contests the Clerk’s response to the request for the electronic voter signature rolls, not the video surveillance. Rather than processing the Appellant’s subsequent correspondence as a new appeal, the Office considers it to be a reply in support of this appeal.

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). In 23-ORD-210, the Office further explained that “SBE is the owner and official custodian of the Commonwealth’s voter registration database, not the county clerks. See KRS 117.025(3)(a).” Moreover, 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).

In 23-ORD-210, the Clerk provided evidence from the vendor supporting his claim that the e-poll book signature logs did not exist at the time of the request because the vendor had not yet provided them in the format required by SBE. Here, the Clerk provides similar evidence, but from SBE. Specifically, in a memo by SBE to the Clerk, SBE acknowledged it had provided the Clerk’s vendor with “voter roster data” for Casey County. SBE further stated the vendor uses that voter roster data and “the ePulse interface to populate [Casey County’s] e-Poll Books with the necessary roster data for the election. The e-Poll Books are then deployed for use throughout the various days of voting. When the election is over, [the] vendor sends the roster data back to the State Board of Elections along with any additional information regarding voter check-ins that has been recorded during voting.”

SBE further contrasted the reports available in ePulse from the official e-poll book signature logs documenting those who cast a ballot at the May 2023 primary election, stating:

The reports available to [the Clerk] from the ePulse interface for an election are custom reports that authorized users in [the Clerk’s] office may create that allow[s him] to glean information relevant to election administration in [his] specific locale. They are not automatically created reports from ePulse, KNOWiNK, or Harp Enterprises; they do not exist until a county election administrator, such as [the Clerk], chooses to create them. Alternatively, the “Final Roster” and “Supplemental” report provided to [Casey County] by Harp Enterprises for download are the specific post-election reports required by the State Board of Elections to be produced in order for an e-Poll Book vendor to be certified in Kentucky. These reports must be created by [the] vendor and provided to [the Clerk]. They are only provided in the .PDF format and [Casey County] may not choose what specific information fields are included in them.

Thus, both the Clerk's vendor in 23-ORD-210, and SBE here, have confirmed that the official e-poll book signature log cannot be generated from the ePulse system and must instead be provided by the vendor to the county clerks in the format SBE has designated under KRS 117.025(3)(d). Accordingly, like the Clerk in 23-ORD-210, the Clerk here has carried his burden that the record the Appellant requested did not exist at the time of her request, and it still does not exist in the specific format she has requested.

It is immaterial whether the ePulse system can generate custom reports. It is also immaterial if it can generate those custom reports in .csv or .xlsx. The Appellant did not ask for "custom reports," and the Act would not require the Clerk to generate them even if she had. *See* KRS 61.874(3) ("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"); *see also* 23-ORD-093 ("if an agency does not maintain a pre-existing 'query, filter, or sort[ing mechanism] capable of extracting the requested information,' the request may be denied in the agency's discretion under KRS 61.874(3)"); 12-ORD-028 (same); 05-ORD-116 (same). Rather, the Appellant asked for the "*complete* voter sign-in rosters for every precinct, absentee, early, and election day voters from" the primary election (emphasis added), which did not exist until it was provided to the Clerk by the vendor according to the format established by SBE.

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 carried his burden of showing that the requested record did not exist at the time the Appellant submitted her request, and that no record in her preferred format exists. While the Appellant may indeed inspect and obtain copies of the now-completed, and therefore "the official," e-poll book signature logs, the Act does not require the Clerk to tailor that record to the format the Appellant desires. 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.

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Distributed to:

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Casey Davis