



COMMONWEALTH OF KENTUCKY
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23-ORD-223

August 18, 2023

In re: Brooke Burkhart/Estill County Clerk

Summary: The Estill 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, and when he invoked KRS 61.872(5) but failed to dispense with the request by the date he said records would be available for inspection.

Open Records Decision

On May 25, 2023, Brooke Burkhart (“Appellant”) submitted two requests to the Clerk to inspect records relating to the May 2023 primary elections.¹ On June 5, 2023, the Clerk responded, invoking KRS 61.872(5) because the requested surveillance video was in active use. The Clerk also stated he did not possess electronic voter signature rolls because they had not been produced by the vendor. The Clerk notified the Appellant the video would be available on June 16, but was unable to estimate when the electronic signature rolls would be produced. Regarding both categories of records, the Clerk invited the Appellant to resubmit her requests. This appeal followed.

Upon receiving a request to inspect records, a public agency must decide within five business days whether to grant the request, or deny the request and explain why. KRS 61.880(1). Here, the Clerk’s response to the Appellant’s two requests was untimely because it was issued on the seventh business day after receipt 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” primary election.

requests. Accordingly, the Clerk violated the Act when he failed to issue a timely response.

A public agency may also delay access to responsive records if such records are “in active use, storage, or not otherwise available.” KRS 61.872(5). A public agency that invokes KRS 61.872(5) to delay access to responsive records must also notify the requester of the earliest date on which the records will be available, and provide a detailed explanation for the cause of the delay. The Office has previously found that an agency violates the Act when it invokes KRS 61.872(5) to delay access to records and then fails to produce the records by the date to which it committed itself. *See, e.g., 23-ORD-079; 21-ORD-011.*

With respect to the request for video, the Clerk invoked KRS 61.872(5) and notified the Appellant that the earliest date on which the video would be available would be 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. *See 23-ORD-178* (holding the same). However, the Appellant claims the video was not made available to her on June 16, 2023, and the Clerk has not disputed that claim.² Accordingly, the Clerk violated the Act when he failed to produce the surveillance video on the date he stated it would be available.

With respect to the request for electronic signature rolls, the Clerk stated he “does not currently possess” signature rolls because the vendor had not provided them as of the date of the request. Once a public agency states affirmatively that a record does not exist, the burden shifts to the requester to present a *prima facie* case that the requested record does or should exist. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov’t*, 172 S.W.3d 333, 341 (Ky. 2005). If the requester is able to make a *prima facie* case that the records do or should exist, then the public agency “may also be called upon to prove that its search was adequate.” *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 848 n.3 (Ky. 2013) (citing *Bowling*, 172 S.W.3d at 341).

Here, the Appellant has not established a *prima facie* case that the Clerk possessed electronic signature rolls on the date of the request. Further, the Clerk explained that the electronic rolls would not exist until they were produced by the vendor. Accordingly, the Clerk did not violate the Act when he did not provide the records it did not possess at the time of the request.³

² The Clerk confirmed receipt of this appeal but did not otherwise respond to it.

³ The Office notes that several county clerks obtained these records from their vendors in June 2023. *See, e.g., 23-ORD-173.* Thus, it may no longer be true that the Clerk does not possess the requested

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.

Daniel Cameron
Attorney General

s/ Zachary M. Zimmerer
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Assistant Attorney General

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Distributed to:

Brooke Burkhart
Brian Crowe
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records. Moreover, with respect to the Clerk's statement that the Appellant should be prepared to pay costs for copying and mailing the records, the Office notes that the vendors have been providing these records in electronic PDF format, meaning there should be no cost in reproducing them. To the extent the Clerk intends to print the records so that they may be redacted of personal information, such as dates of birth or addresses, he may not pass along the costs associated with printing and redacting the records to the Appellant. *See id.*