



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

DANIEL CAMERON
ATTORNEY GENERAL

CAPITOL BUILDING, SUITE 118
700 CAPITAL AVENUE
FRANKFORT, KENTUCKY 40601
(502) 696-5300
FAX: (502) 564-2894

23-ORD-258

September 25, 2023

In re: Meg Jamison/Wolfe County Clerk

Summary: The Wolfe County Clerk (“the Clerk”) subverted the intent of the Open Records Act (“the Act”), within the meaning of KRS 61.880(4), when she imposed an excessive fee to reproduce a record. The Clerk also subverted the Act by charging a fee for a physical copy of an electronic record she was unable to redact electronically. However, the Clerk did not subvert or violate the Act when she did not tailor a record to meet the formatting specifications of the requester.

Open Records Decision

Meg Jamison (“Appellant”) submitted two requests to the Clerk for records related to the May 2023 primary elections. Specifically, she sought a copy of “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. In a timely response, the Clerk invoked KRS 61.872(5), stating the requested surveillance video was “in active use” and could not be provided until June 16, 2023, which was the first day after the primary election on which the surveillance was permitted to end. *See* KRS 117.295(1). The Clerk further advised the Appellant should “be prepared to pay for the cost of a media storage device capable of storing the requested amount of video footage” in addition to applicable mailing costs. However, with respect to the Appellant’s second request, the Clerk advised she did not possess the requested voter signature roster because it had “not yet been produced as of” the date of the request.

In the weeks following her original request, the Appellant and the Clerk exchanged emails about the status of the requested records. The Clerk advised she had received an electronic copy of the voter signature roster from the vendor, but the

Clerk needed to redact from it addresses and dates of birth of the voters. The Clerk stated she intended to print the voter signature roster and manually redact the printed copy. As a result, the Clerk advised the “cost for the copies will be \$226.50.” By separate email, the Clerk also provided the Appellant with a quote from a vendor who would retrieve the requested surveillance video in the amount of \$17,500. The Appellant then initiated this appeal, primarily objecting to the costs the Clerk had imposed to obtain the requested records. However, the Appellant also claims the Clerk should provide her with an electronic copy of the voter signature roster in the file format she requested.

“If a person feels the intent of [the Act] 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.” KRS 61.880(4). Originally, the vendor’s invoice reflected a charge of \$15,000 for “labor” costs and \$2,500 for “equipment,” for a total charge of \$17,500. However, on appeal, the Clerk states the vendor’s initial quote was erroneous. Rather, the vendor claims the actual cost of labor to reproduce the video is \$1,500, and the cost for equipment is \$250, for a total cost of \$1,750.

A “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.” KRS 61.874(3) (emphasis added). In numerous recent decisions, the Office has been asked to adjudicate the propriety of the fee vendors charge county clerks to obtain copies of the surveillance video required to be maintained under KRS 117.295, which the county clerks propose to thereafter pass on to the requesters. The fees charged have ranged from as low as \$75 to as high as \$500. *Compare* 23-ORD-172 (involving a \$75 fee) *with* 23-ORD-178 (involving a \$500 fee); *see also* 23-ORD-158 n.1 (involving a \$150 fee); 23-ORD-215 (involving a \$315 fee). In each of these decisions, relying on KRS 61.874(3), the Office held the county clerks could recover the “actual cost” incurred to reproduce the video. However, the Office noted in 23-ORD-178 that \$500 was the maximum fee that had been charged thus far, and the Office questioned its reasonableness. And in each of these decisions, the Office focused on whether the fee being charged reflected the “actual cost” of reproduction; however, the provision of KRS 61.874(3) stating an agency may only prescribe a “reasonable fee” was not squarely at issue. While it is true on the one hand that the statute deems any fee exceeding the actual cost of reproduction to automatically be unreasonable, it is not necessarily true on the other hand that any fee reflecting the actual cost will automatically be deemed “reasonable.”¹

¹ To the extent any statement in 23-ORD-178 can be read otherwise, the Office clarifies that the “actual cost” is not automatically to be considered “reasonable” under KRS 61.874(3).

Here, the fee the Clerk intends to charge the Appellant is three times higher than the highest amount the Office is aware any other county clerk has charged to reproduce an identical record.² Accordingly, the Office asked the Clerk to provide additional information to substantiate the propriety of the fee. *See* KRS 61.880(2)(c). In response to the Office’s request, the vendor, which is located in Paducah, states it is “only” charging the Clerk for travel to and from Wolfe County—a round trip it estimates will take 10 hours at a rate of \$150 per hour. The vendor states it is not charging the Clerk for the actual time it will take to reproduce the video on site. But if the vendor is not charging the Clerk for the actual time needed to reproduce the record, then the Clerk is not incurring an actual cost to reproduce *the record*. It is not the Appellant’s fault the Clerk has chosen a vendor located five hours away to reproduce the requested record, and there is no basis to conclude the Act permits an agency to recover travel expenses associated with reproducing a record. Moreover, the vendor’s original mistake of misquoting the “actual cost” by *tenfold* calls into question the validity of its newest quote. Simply put, \$1,750 to produce the same record several other county clerks have produced for a fraction of that cost is not “reasonable” under KRS 61.874(3). As such, the Clerk subverted the intent of the Act by imposing an excessive fee on the Appellant.

In 23-ORD-178, the Office also addressed the Appellant’s second objection relating to fees—the cost associated with redacting the voter signatures roster that exists in electronic form. As stated in that decision:

While it was proper for the Clerk to redact from the records dates of birth, 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 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.

The same is true here. The only reason the Clerk has incurred a cost to reproduce the voter signature roster is because she is unable to redact the electronic copy the vendor provided to her.³ But just as the Kentucky State Police could not pass on to the requester the cost of redacting electronic copies of its police citations, the Clerk may

² The Office notes it has received more than 25 appeals related to the surveillance video of the election equipment from the May 2023 primary elections.

³ The Office notes that inexpensive software exists that will permit the Clerk to redact PDF files, which the Clerk might consider purchasing for this very purpose.

not pass on to the Appellant the costs associated with redacting its electronic voter signature roster.

Finally, the Office has also addressed in previous decisions the Appellant's objection to not receiving the electronic record in a particular format. *See, e.g.*, 23-ORD-210; 23-ORD-211. "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). But it is the State Board of Elections—not the county clerks—that determines in which format the record the Appellant has requested will exist. *See* KRS 117.025(3)(d); *see also* 23-ORD-210. Any request to obtain the voter signature roster in a format other than that designated by the State Board of Elections, and which is produced by the vendors in compliance with that designation, is a request to tailor a public record to a particular format that need not be honored by the county clerks. *See, e.g.*, 23-ORD-210. As such, the Clerk did not violate the Act when she did not provide the voter signature roster in the format requested by the Appellant.

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. Pursuant to 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/ Marc Manley
Marc Manley
Assistant Attorney General

#316

Distributed to:

Meg Jamison
Corinna Groves