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23-ORD-285

October 24, 2023

In re: Kurt Wallace/Metcalf County Clerk

Summary: The Metcalfe County Clerk (“the Clerk”) did not violate the Open Records Act (“the Act”) when she responded timely to a request to inspect records and charged a copying fee of \$0.50 per page for responsive records that do not exist in electronic format. The Clerk also complied with the Act by publishing the agency’s rules and regulations for submitting requests on the agency’s website. However, the Clerk violated the Act when she did not respond to a portion of the request.

Open Records Decision

On Friday, September 8, 2023, at 5:11 p.m., Kurt Wallace (“Appellant”) emailed a request to the Clerk seeking copies of the oaths of office, bonds, and powers of attorney for public servants executed by 16 public officials.¹ He also sought a copy of any contract between the Clerk and “the corporation” that “provides the services of <https://www.kycountyrecords.com/Account/Terms>.”

In a timely response, the Clerk notified the Appellant she possessed copies of her own oath of office and the requested contract. She also stated she could provide copies of the powers of attorney for several of the identified public officials. However, the Clerk did not state whether she was providing a copy of her or the other public officials’ bonds. The Clerk advised the responsive records consisted of 28 pages and copies could be obtained for \$0.50 per page, for a total of \$14.00. In the event the Appellant wanted the records to be mailed to him, the Clerk further advised the cost

¹ The public officials consisted of the Clerk, two Kentucky Court of Appeals judges, a district court judge, the Metcalfe Circuit Court Clerk, the Metcalfe County Judge/Executive, the Sheriff, the County Attorney, the Commonwealth’s Attorney, the Jailer, and 6 Barren County public officials.

of postage would be \$2.00. However, the Clerk stated she did not possess copies of the oaths of office for the other public officials because they “were not filed in the Metcalfe County Clerk’s Office.” This appeal followed.

First, the Appellant claims the “presiding officer” failed to respond to his complaint “within 3 days of the [a]ppeal.”¹ Before initiating his appeal to this Office, the Appellant attempted to “appeal” the Clerk’s disposition of his request to the Metcalfe County Judge/Executive, alleging he was “the presiding officer” of the agency.² The Appellant appears to have confused the requirements of the Open Records Act, KRS 61.870, *et seq.*, with the requirements of the Open Meetings Act, KRS 61.800, *et seq.* If a person wishes to enforce the Open *Meetings* Act, he must first submit a complaint to the “presiding officer” of the agency accused of violating the Open Meetings Act. KRS 61.846(1). In contrast, a person attempting to appeal an agency’s disposition of a request to inspect records under the Open *Records* Act may initiate the appeal directly with the Attorney General or in a circuit court of competent jurisdiction. KRS 61.880(2); KRS 61.882(1). If the person seeks the Attorney General’s review under the Open Records Act, he must provide the Office a copy of his request to inspect records and the agency’s response to it. KRS 61.880(2)(a). Here, the Appellant has not alleged any violation of the Open Meetings Act.

When an agency receives a request to inspect records under the Open Records Act, it “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.” KRS 61.880(1). Here, the Appellant submitted his request to inspect records after business hours on Friday, September 8, 2023. As such, the Clerk did not receive his request until Monday, September 11, 2023. Accordingly, the Clerk’s September 15 response was timely.

The Appellant next alleges the Clerk imposed an unreasonable fee for copies of records. Relatedly, he claims the Clerk did not provide copies of records in electronic format free of charge. Under KRS 61.874(3), an 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.” Here, however, the Clerk

² The Appellant has also appealed the Metcalfe County Judge/Executive’s disposition of his correspondence. *See* 23-ORD-286, issued concurrently with this decision.

claims none of the requested records exist in an electronic format. An agency is not required to convert records in “hard copy format” into electronic records. *See* KRS 61.874(2)(a). As such, the Clerk did not violate the Act when she did not provide electronic copies of the requested records.³

Nor did the Clerk violate the Act by charging \$0.50 per page for copies of the records that exist in “hard copy format.” While the Office has previously found \$0.10 per page is a reasonable fee to reproduce hard copies of records, *see, e.g.*, 18-ORD-013, a different statute applies to copies of records in the possession of county clerks. Specifically, KRS 64.019(2)(a) authorizes county clerks to charge \$0.50 per page for “paper copies of records or documents” in their possession. *See, e.g.*, 21-ORD-228. Accordingly, the Clerk did not violate the Act when she imposed a copying fee of \$0.50 per page.

The Appellant’s third allegation is that the Clerk failed to provide responsive records. However, the Clerk stated she does not possess the oaths of office for public officials, other than her own, because those records were not filed in the Clerk’s office. Moreover, on appeal, the Clerk argues she has not refused to provide responsive records in her possession, but rather, she has requested prepayment of the copying fee before providing the records to the Appellant. The Clerk is correct that she may require prepayment of the copying fee before providing responsive records. KRS 61.872(3)(b); *see also* 18-ORD-013. However, in addition to requesting the oaths of office for various public officials, the Appellant also requested copies of the bonds they executed, including any bond the Clerk executed.⁴ Neither the Clerk’s initial response to the request nor her response on appeal indicate whether she possesses any of the requested bonds. Rather, her responses addressed only the requested oaths of office and powers of attorney for public servants. An agency cannot ignore portions of a request. *See, e.g.*, 21-ORD-090. Accordingly, the Clerk violated the Act when she did not respond to the Appellant’s request for copies of bonds.

³ The Appellant claims the requested records are available in electronic format on kycountyrecords.com, and therefore, he is entitled to copies of them free of charge. Not so. Even if the records the Appellant requested were available on that website, under KRS 61.874(6), an agency has discretion whether to provide online access to public records and may first require the requester to enter a licensing agreement or contract. The public agency may also charge a fee for online access not to exceed “computer . . . access charges.” *Id.* The Clerk explains this service is provided by a third party, and significant costs are involved to access the records. Accordingly, even if the requested oaths of office, bonds, or powers of attorney are available on that website, the Clerk was not required to provide the Appellant access to them free of charge. *Id.*

⁴ Under KRS 62.055(1), “[e]very county clerk, before entering on the duties of his office, shall execute bond to the Commonwealth, with corporate surety authorized and qualified to become surety on bonds in this state.”

With respect to the requested oaths of office, the Clerk claims she possesses only her own because the other public officials' oaths were not filed in the Clerk's office. 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 exist. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov't*, 172 S.W.3d 333, 341 (Ky. 2005). The Office has found that the existence of a record “can be presumed where statutory authority for its existence has been cited or can be located.” 11-ORD-074. If the requester makes 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 cited any authority to make a *prima facie* case that the requested oaths should exist and the Clerk should possess them. However, the Office notes that under KRS 62.020(2)(d), the oaths of office for officials “elected to countywide office or office for a district within the county” shall be filed “[i]n the office of the county clerk for the county from which [the] officer is elected.” As such, the oaths of office for each of the identified Metcalfe County public officials should have been filed with the Clerk.⁵ Notwithstanding KRS 62.020(2)(d), the Clerk explains the oaths of office were never filed in the Metcalfe County Clerk's office. When evidence supports a finding that a public record should exist but it in fact does not, the requester is entitled to a written explanation for why the record does not exist. *See Eplion v. Burchett*, 354 S.W.3d 598, 603 (Ky. App. 2011). Here, the Clerk has discharged her duty under the Act by explaining to the Appellant that the requested oaths were not filed in the Clerk's office.

Finally,⁶ the Appellant claims the Clerk has failed to publish her rules and regulations for requesting public records on the agency's website. *See* KRS 61.876(2) (requiring each public agency to adopt rules and regulations for submitting requests to inspect records and to publish them on the agency's website). However, on appeal, the Clerk provides proof she has published the agency's rules and regulations on the

⁵ In contrast, the oaths of office for the identified judicial officers and Barren County officials were not required to be filed with the Metcalfe County Clerk.

⁶ The Appellant also complains that the website <https://www.kycountyrecords.com> requires “assent to a third party privacy policy in violation of the Kentucky Open Records Act.” However, the Act does not govern the terms of service for public agency websites. The Act governs access to public records, which may be requested by submitting an application to the agency's official records custodian. KRS 61.872(2). The Office lacks jurisdiction, in an appeal under the Act, to opine on ancillary issues of law. *See, e.g.*, 23-ORD-218.

Metcalfe County Clerk's website.⁷ Accordingly, the Clerk complied with the Act by posting on the agency's website the Clerk's rules and regulations for requesting public records.

In sum, the Clerk violated the Act when she did not respond to the Appellant's request for bonds. However, the Clerk otherwise complied with the Act by issuing a timely response, charging a reasonable fee for paper copies of records, explaining why some requested records do not exist, and publishing on the agency's website the Clerk's rules and regulations for submitting requests under the Act.

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/ Marc Manley
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Distributed to:

Kurt Wallace
Sharon Bowles Howard
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⁷ See <http://www.metcalfecountyclerk.com/deed.htm> (last accessed October 24, 2023). The website about which the Appellant complains is not controlled by the Clerk. Whether that website complies with KRS 61.876 is addressed in 23-ORD-286.