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26-ORD-168

April 16, 2026

In re: Deronda Southard/Breathitt County Clerk

Summary: The Breathitt County Clerk (“the Clerk”) did not violate the Open Records Act (“the Act”) when she timely responded to a request for records. The Clerk violated the Act when her response failed to explain the nonexistence of records required to be maintained by a county clerk and failed to furnish the name and location of the custodian of those records.

Open Records Decision

On March 4, 2026, Deronda Southard (“the Appellant”) submitted a request to the Clerk for “the Notice of Estray, the Affidavit of Publication (if applicable), and any/all documentation identifying the ‘taker-up’ (the person holding the horse) and legal signatures of the removal of” two specific stray horses purportedly found in Breathitt County. However, on March 9, 2026, after the Clerk’s office had closed for the day, the Appellant submitted an email titled “Amended and Expanded Open Records Request.” In that email, she notified the Clerk that she was “amending [her] previous request” and was “now requesting [a] copy of all entries in the ‘Stray Book’ (as mandated by KRS 259.120(3)) for the period of January 1, 2022, to the present”; “[c]opies of all ‘Stray Certificates’ and supporting documentation (including veterinarian descriptions and photographs) delivered by the County Judge/Executive to the [Clerk] during this same period”; a “copy of the current contract between the County Judge/Executive and the licensed veterinarian(s) tasked with documenting stray equines as required by KRS 259.120(1)(c)1.”; and “[a]ny record of the oaths administered to ‘takers-up’ for the removals recorded in the aforementioned Stray Book.” On March 16, 2025, the Clerk responded with the following statement: “We did [*sic*] not have these records. I am not sure but the Animal control office may have these.” This appeal followed.

The Appellant claims the Clerk failed to issue a timely response to both her original request and her amended request. Upon receiving a request for records, a public agency must decide within five business days “after the receipt of any such

request” whether to grant or deny the request and “notify in writing the person making the request, within the five (5) day period, of its decision.” KRS 61.880(1). Here, however, the Appellant amended her request on the third business day. An amended request supersedes the original request. *See, e.g.*, 19-ORD-224; 09-ORD-054. Thus, having received the amended request within the five-day response period, the Clerk had no further obligation to respond to the original request. Moreover, because the Appellant’s amended request was sent after business hours on March 9, 2026, it is deemed to have been received by the Clerk on the following business day, March 10, 2026. *See, e.g.*, 21-ORD-113. Accordingly, the Clerk’s response was due on March 17, 2026. Because the Clerk responded on March 16, 2026, the fourth business day after receipt of the amended request, the response was timely.

The Appellant further alleges the Clerk’s response was insufficient under the Act. Once a public agency states affirmatively that it does not possess any responsive records, the burden shifts to the requester to make a *prima facie* case that it does possess the requested records. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov’t*, 172 S.W.3d 333, 341 (Ky. 2005). If the requester makes a *prima facie* case that the records do or should exist, the agency must provide “a written explanation for their nonexistence.” *Eplion v. Burchett*, 354 S.W.3d 598, 603 (Ky. App. 2011) (quoting 10-ORD-078). Further, “the 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). A requester must provide some evidence to make a *prima facie* case that the records exist, such as the existence of a statute or regulation requiring the creation of the records or other factual support for the existence of the records. *See, e.g.*, 21-ORD-177; 11-ORD-074.

Here, the Appellant cites KRS 259.120, which imposes certain duties on county officials with respect to stray horses. Under KRS 259.110, a “stray equine may be taken up and posted by any person or entity if it is found running at large outside of its enclosure or if it can be determined from the circumstances that the owner has abandoned it.” When this occurs, “[d]ocumentation of stray equines shall be taken before a county judge/executive of the district, who shall administer to the taker-up an oath, in substance, that the equine was taken up by him as a stray and that he has not defaced or altered the [identifiers] of the equine.” KRS 259.120(1)(a). The county judge/executive must “[c]ontract with a licensed veterinarian, who shall document” certain information about the horse. KRS 259.120(1)(c)1. Further, the county judge/executive must “[r]ecord the veterinarian’s findings, the name and residence of the taker-up, and the location of the stray equine in a book to be kept by him for that purpose.” KRS 259.120(1)(c)2. “The county judge/executive shall give to the taker-up a copy of the documentation for the record and *immediately deliver to the county clerk a certified copy of the same record.*” KRS 259.120(2) (emphasis added). Having received this documentation, “[t]he clerk shall immediately record the stray

certificate of the county judge/executive as provided by the taker-up *in a book to be kept by him for that purpose.*” KRS 259.120(2) (emphasis added).

These statutory provisions are sufficient to make a *prima facie* case that the following requested records exist: the “Stray Book” (KRS 259.120(3)), “Stray Certificates” (KRS 259.120(2)), a contract between the county judge/executive and a licensed veterinarian (KRS 259.120(1)(c)1.), and documentation relating to an oath administered to takers-up of stray horses (KRS 259.120(1)(a)). Thus, the Appellant was entitled to an explanation for why those records did not exist and some documentation of the search conducted by the Clerk. When responding to a request for public records, a public agency must “make a good faith effort to conduct a search using methods which can reasonably be expected to produce the records requested.” 95-ORD-96 (quoting *Cerveney v. Cent. Intel. Agency*, 445 F. Supp. 772, 775 (D. Colo. 1978)). Here, the Clerk merely stated her office “did not have these records.” This was an insufficient explanation under the Act.

Further, “[i]f the person to whom the application is directed does not have custody or control of the public record requested, that person shall notify the applicant and shall furnish the *name and location of the official custodian* of the agency’s public records.” KRS 61.872(4) (emphasis added). Here, the Clerk merely stated “the Animal control office may have” the records requested. Under KRS 258.195(1), “[t]he governing body of each county shall employ, appoint, or contract with an animal control officer, or shall contract with an entity that employs, appoints, or contracts with an animal control officer.” As the name and location of the Breathitt County Animal Control officer appears on the website of the Breathitt County Fiscal Court,¹ it may be assumed that the Clerk could have easily provided that information to the Appellant. Therefore, the Clerk violated the Act by failing to explain the nonexistence of the requested records and the nature of the search conducted, and by failing to provide the name and location of the person she believed to be the official custodian of the records.

A party aggrieved by this decision may appeal it by initiating an action in the appropriate circuit court pursuant to 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.

¹ See <https://www.breathitt.org/courthouse-offices> (last accessed Apr. 2, 2026).

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Distributed to:

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