

19-ORD-233

December 27, 2019

In re: Glenn Hayden/Graves County Judge/Executive

Summary: Graves County Judge/Executive violated the Open Records Act (“the Act”) by failing to respond to open records requests emailed to him and by failing to state whether requested records existed.

Open Records Decision

The question presented in this appeal is whether the Graves County Judge/Executive violated the Act in response to Glenn Hayden’s open records requests, sent by email, concerning salaries and employer contributions for the Sheriff and Interim Sheriff. For the reasons set forth herein, the Judge/Executive violated the Act by failing to respond to some requests for records and by failing to state whether the requested records existed.

On Tuesday, October 1, 2019, Glenn Hayden (“Appellant”) sent an email to the Graves County Judge/Executive (“Judge/Executive”), requesting records regarding employer contributions to the Kentucky Retirement System on behalf of the Graves County Sheriff for the period of July 1, 2018, through September 30, 2019. Appellant amended his request later that day to ask for the “requested information in monthly increments – make it easy for me to decipher.” Appellant sent a second request by email, also on October 1, asking for records reflecting the amounts of employer contributions for health benefits for the Sheriff for the same period. Appellant emailed a third request on October 1 requesting records reflecting the total salary paid to the Sheriff for July 2018

through February 2019. Appellant sent another email on Thursday, October 3, regarding the Judge/Executive's response, questioning whether the salaries for the Sheriff were "gross or net" salaries and asking why the Sheriff's salary for December 2018 was increased by approximately \$4,000.

On Friday, October 4, Appellant sent another email to the Judge/Executive requesting the monthly gross salary, from February 2019 to present, and employer contributions to the Kentucky Retirement System, for the Interim Sheriff. Not having received a response by Wednesday, October 9, Appellant sent emails to the Judge/Executive, asking for responses to his requests of October 3 and 4. On Thursday, October 10, Appellant sent a final email to the Judge/Executive, the substance of which is that he had not received a response to his request of Friday, October 4. With no response, this appeal followed.

The Judge/Executive responded to this appeal by stating that the Judge/Executive is not required to answer open records requests via email, and that Appellant "continues to request information and not records."¹ The Judge/Executive further stated that he "cannot always discern what information is requested" by Appellant, but that he has attempted to respond in good faith.

The Judge/Executive contends on appeal that the emailed records requests "are not proper." The Act as it existed prior to June 27, 2019, did not explicitly permit the electronic submission of open records requests. However, the regular session of the 2019 General Assembly amended KRS 61.872 to include email as an authorized means of transmitting an open records request. 2019 Senate Bill 230; KRS 61.872(2)(c). That amendment became effective June 27, 2019. Ky. Const. § 55. Although the statute does not define the phrase "signed by the applicant" as used in the context of emailed requests, KRS 369.107(4) provides that "[i]f a law requires a signature, an electronic signature satisfies the law."

Because Appellant complied with the requirements of KRS 61.872(2) as amended, the Judge/Executive was bound to comply with the Act once he received Appellant's emailed requests. The record on appeal indicates, however,

¹ The email address used by Appellant to send his requests to the Judge/Executive is the email address listed on Graves County's website as the Judge/Executive's official email address.

that Appellant sent the Judge/Executive an emailed request on October 4, requesting records regarding certain gross monthly salaries and retirement contribution. As set forth above, the Judge/Executive must comply with the Act and respond to emailed requests for records.

Appellant's October 3, 2019 email asks, "are the salaries you include for Sheriff Redmon Gross Salary, or Net? If net, we really need the Gross Salary." Appellant also request an explanation for a December salary increase. The record reveals no response from the Judge/Executive. Instead, the Judge/Executive responds to this appeal by stating that Appellant's request is one for information rather than for records.

Of course, "[p]ublic agencies are not required by the Open Records Act to gather and supply information independent of that which is set forth in public records." OAG 87-84, p. 3. This is apparent from language of the Act itself. KRS 61.871 (providing that "free and open examination of public *records* is in the public interest"); KRS 61.872(1) (providing that "[a]ll public *records* shall be open for inspection by any person"). A request under the Act requires a response. A public agency cannot choose inaction. 05-ORD-190. Failing to respond, as the Judge/Executive did here, violates the mandatory language of the Act.

A public agency's response violates KRS 61.880(1), when it fails to advise the requesting party whether the records being sought exist in the possession of the agency, but discharges its duty under the Act in affirmatively indicating that certain records do not exist, following a reasonable search, and explaining why, if appropriate. This office has expressly so held on many occasions. 04-ORD-205, p. 4; 12-ORD-056.

When, as is the case in this appeal, a public agency has not affirmatively stated that responsive records do not exist, it has failed its obligations under the Act. Pursuant to KRS 61.880(2)(c), "the burden of proof in sustaining the action [of denying the requested records] shall rest with the agency[.]" The Judge/Executive has not explained whether the requested records exist or not, has not explained whether it conducted a good faith search or, if it has conducted such a search, how the search was conducted in such a manner calculated to produce the records if they do exist. As such, the Judge/Executive violated the Act and must promptly produce the requested records, if any exist. If such

records do not exist, the Judge/Executive must promptly advise Appellant and explain the reason for their nonexistence.

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court pursuant to KRS 61.880(5) and KRS 61.882. 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 proceeding.

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Distributed to:

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Jesse Perry, Graves County Judge\Executive