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21-ORD-007

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In re: Eddie McGuire/Marshall County Judge/Executive

Summary: Because the Office of the Marshall County Judge/Executive (“Judge/Executive”) failed to respond to requests to inspect records within the statutory time for doing so, it violated the Open Records Act (“the Act”). The Judge/Executive also violated the Act when it denied an open records request based on the requester’s alleged noncompliance with requirements of the Freedom of Information Act (“FOIA”).

Open Records Decision

On October 15, 2020, Marshall County Sheriff Eddie McGuire (“Appellant”) submitted written requests to inspect records via e-mail to the Judge/Executive and Marshall County E-911 (“E-911”). He requested to inspect or obtain copies of e-mails between specific county e-mail addresses and certain entities, and e-mails to or from specific county e-mail addresses containing certain words and phrases, within specified date ranges.

The Deputy Judge/Executive responded to both requests on October 27, 2020, and claimed that the Appellant’s request did “not contain enough descriptive information to permit a search of our records.” The Deputy Judge/Executive then cited various provisions of FOIA that require requests for records submitted to federal agencies to “reasonably describe” the records sought. *See* 5 U.S.C. § 552(a)(3)(A). The Deputy Judge/Executive claimed that he was not denying the Appellant’s request, but that he was instead asking the Appellant to

resubmit his request using a suggested form that complied with FOIA. This appeal followed.

First, the Judge/Executive violated the Act by failing to respond to the Appellant's requests within ten days. Normally, a public agency must respond to an open records request within three business days. KRS 61.880(1). In response to the public health emergency caused by the novel coronavirus, however, the General Assembly modified that requirement when it enacted Senate Bill 150 ("SB 150"), which became law on March 30, 2020, following the Governor's signature. SB 150 provides, notwithstanding the provisions of the Act, that "a public agency shall respond to the request to inspect or receive copies of public records within 10 days of its receipt." SB 150 § 1(8)(a). The Appellant's requests were received via e-mail on October 15, 2020. Thus, the response was due by Monday, October 26, 2020, the next business day after the tenth day. KRS 446.030(1)(a). Because no response was provided until October 27, the Judge/Executive violated the Act.

The Judge/Executive also violated the Act by requiring the Appellant to submit his request on a form compliant with FOIA. Although FOIA is the federal analogue to the Open Records Act, it has no application to the records of state and local agencies. Requests for records made on county agencies are governed by the Act. The Act permits a public agency to require "[w]ritten application, signed by the applicant and with his name printed legibly on the application, describing the records to be inspected." KRS 61.872(2)(a). That is precisely what happened here. The Appellant submitted a request via e-mail, described the records sought, and signed the e-mail using an electronic signature.¹

Finally, the Judge/Executive violated the Act when it denied the requests as unreasonably burdensome. KRS 61.872(6) permits a public agency to "refuse to permit inspection of the public records or mail copies thereof" if "the application places an unreasonable burden in producing public records." However, such a refusal must "be sustained by clear and convincing evidence." *Id.*

On appeal, the Judge/Executive argues that the Appellant's request "is unduly burdensome and lacks the substantial specifics to conduct an accurate and responsive search." However, the Appellant's request contains the specificity the

¹ See KRS 369.107 (authorizing electronic signatures).

Act requires. The request sought records for specific date ranges from December 2015 to 2019 and a portion of 2020. As such, the Appellant's request was reasonably limited in temporal scope. The Appellant also limited his requests to e-mails containing specified keywords "sent to or from any [E-911] employee with a marshallcountky.gov address." These descriptions are sufficient under KRS 61.872. *See, e.g.*, 14-ORD-109 (finding that a request for e-mails containing "certain domain names as either the senders or recipients . . . for a nineteen (19) month period" precisely described the records under KRS 61.872(3)(b)); 19-ORD-182 (same as applied to several requests covering ranges of one to three years). The Judge/Executive has merely alleged that the request was insufficient to enable a search for responsive records. But the Judge/Executive has not proven by clear and convincing evidence that the request placed an unreasonable burden on the agency, as the Act requires. Accordingly, the Judge/Executive violated the Act by refusing to provide the records that Appellant requested.

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 proceedings.

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/s/ James M. Herrick

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