



COMMONWEALTH OF KENTUCKY
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21-ORD-228

November 24, 2021

In re: Michelle Oney/Elliott County Clerk's Office

Summary: The Elliott County Clerk's Office (the "Clerk's Office") violated the Open Records Act ("the Act") when it failed to provide records within five business days and did not properly invoke KRS 61.872(5). The Clerk's Office subverted the intent of the Act within the meaning of KRS 61.880(4) when it imposed an excessive fee for processing a request. However, the Clerk's Office's unintentional initial misdirection of the requester did not amount to subversion within the meaning of KRS 61.880(4).

Open Records Decision

On October 4, 2021, Michelle Oney ("Appellant") made a request to the Clerk's Office, hand-delivered by her son, for copies of the monthly bank statements from all accounts "relevant to the County Clerk's duties" from January 2020 through August 2021. In the request, the Appellant stated that the records were "not being sought for commercial purposes." The deputy clerk who received the request, and who was not familiar with the open records process, believed the request was for court records and directed the Appellant's son to the office of the circuit court clerk, who in turn directed him back to the Clerk's Office. A second deputy clerk, who was also unfamiliar with open records requests, initially refused to acknowledge receipt of the request and only did so after obtaining authorization by telephone from the County Clerk.

In its written response to the request, issued on October 7, 2021, the Clerk's Office stated that the records were "expect[ed] to be available for pickup within 5 business days" and that the Appellant would be charged 50 cents per page "along with a \$50.00 processing fee." The Appellant then contacted the Clerk's Office by telephone to inquire about the "processing fee" and was

informed that it represented staff costs. After the Appellant protested that staff costs cannot be assessed for a noncommercial request, the Clerk's Office withdrew its demand for the processing fee. However, the Clerk's Office then sent the Appellant a standardized open records request form and indicated that the form "need[ed] to be returned" to the Clerk's Office "by the time" the Appellant picked up the records. The Appellant inquired why she "would need to fill out a new form." The Clerk's Office responded that the Appellant's written request was "fine," but the Clerk's Office "need[ed] this form on record as well." On October 13, 2021, the Clerk's Office notified the Appellant that it "hope[d]" to have the records available by October 14, 2021, the date indicated in the October 7 response. Having received no further notification by October 15, 2021, the Appellant initiated this appeal.

On appeal, the Clerk's Office states that the deputy clerks were not familiar with processing requests submitted under the Act because the Clerk normally handles all such requests herself. The Clerk, however, was not in the office at the time the request was received. The Clerk's Office further explains that it encountered difficulties with the bank that possessed copies of the requested financial records, which was the cause for delay in producing the responsive records. For that reason, the Clerk's Office was unable to provide a specific date or time on which the records would be available for inspection. Nevertheless, the Clerk's Office states that all of the requested records were provided to the Appellant on October 22, 2021.

A public agency has five business days to fulfill a request for public records or deny such a request and explain why. KRS 61.880(1). This time may be extended if the records are "in active use, in storage or not otherwise available," but the agency must give "a detailed explanation of the cause . . . for further delay and the place, time, and earliest date on which the public record[s] will be available for inspection." KRS 61.872(5). Here, the Clerk's Office responded within five business days, but it did not provide the records nor did it deny the request and explain why. Instead, the Clerk's Office gave an "expected" production date eight business days from the date of the request. Then, the date of production came and went without any further correspondence from the Clerk's Office. Clearly, the technical problems experienced by the bank were beyond the control of the Clerk's Office. However, the Clerk's Office did not give the Appellant a detailed explanation of the cause for delay, as required under KRS 61.872(5). *See, e.g.*, 21-ORD-011 (finding a violation when an agency failed to provide records on the earliest date it had identified and failed to explain why further delay was necessary). Therefore, the Clerk's Office violated the Act.

Furthermore, under KRS 61.880(4), a person may petition the Attorney General to review an agency's action if the "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, delay past the five (5) day period described in [KRS 61.880(1)], excessive extensions of time, or the misdirection of the applicant[.]" Here, the Clerk's Office initially miscommunicated and directed the Appellant's son to the circuit clerk's office. However, this miscommunication appears to have been unintentional and caused only a negligible delay. Therefore, this Office finds that the Clerk's Office's initial miscommunication directing the Appellant to the incorrect agency did not constitute subversion by "misdirection" under KRS 61.880(4).

However, a public agency may also subvert the intent of the Act by imposing excessive fees. KRS 61.880(4). Initially, the Clerk's Office imposed a processing fee of \$50.00, representing staff costs, in addition to copying fees at the rate of \$0.50 per page. However, "staff costs" may only be charged when a request is made for a commercial purpose. KRS 61.874(4)(c). The Clerk's Office was aware that the Appellant's request was not for a commercial purpose. Thus, the \$50.00 processing fee was excessive, notwithstanding the fact that the Clerk's Office later withdrew its demand for this fee, because "[i]t is the imposition of the fee – not its collection – that constitutes the subversion." *See* 20-ORD-087. Accordingly, the initial attempt at imposing the processing fee subverted the intent of the Act within the meaning of KRS 61.880(4).

The Appellant claims that the copying fee of \$0.50 per page was also excessive. However, KRS 64.019(2)(a) authorizes a county clerk to charge up to \$0.50 per page for copies of records. While the Appellant argues that it is "absurd" for the Clerk's Office to charge this fee, the Clerk's Office has the authority to do so. Therefore, the copying fee was not excessive.

Finally, the Appellant claims that the Clerk's Office violated the Act by requiring her to submit a standardized request form. Under KRS 61.872(2)(c), "[a] public agency shall not require the use of any particular form for the submission of an open records request, but shall accept for any request the standardized form developed under KRS 61.876(4)." Here, in e-mails to the Appellant, the Clerk's Office twice used the word "need" in relation to the standardized form, implying that the standardized form was required before the Clerk's Office would allow inspection of any records. However, the Clerk's Office accepted and processed the Appellant's original written request, and

ultimately it did not insist upon her submitting the standardized form. Accordingly, the Clerk's Office did not violate KRS 61.872(2)(c).

In sum, the Clerk's Office violated the Act when it failed to provide the requested records within five business days or properly invoke KRS 61.872(5) to delay the Appellant's inspection. The Clerk's Office also subverted the intent of the Act within the meaning of KRS 61.880(4) by attempting to impose a processing fee for staff costs, but the Clerk's Office did not otherwise violate or subvert the intent of the Act.

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 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 e-mailed to OAGAppeals@ky.gov.

Daniel Cameron
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/s/ James M. Herrick

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Distributed to:

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