



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

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22-ORD-030

February 22, 2022

In re: Lawrence Trageser/Spencer County Judge/Executive's Office

Summary: The Spencer County Judge/Executive's Office's ("Judge/Executive") original denial of a request under the Open Records Act ("the Act") is moot. The Judge/Executive did not subvert the intent of the Act when it ultimately provided hundreds of requested records within a reasonable time.

Open Records Decision

On January 13, 2022, Lawrence Trageser ("Appellant") requested "all correspondence," including emails, documents, and letters, between the Judge/Executive and the County EMS Director ("Director"). The Appellant specified that the "timeframe" of the request included records created between January 1, 2015 and December 31, 2017. The Judge/Executive responded by email to the County Attorney, stating that the request is overly broad and that "[t]hose documents no longer exist." The Judge/Executive stated the requested communications were beyond the records retention schedule for preservation. The County Attorney then forwarded the Judge/Executive's email to the Appellant, and added that he did not agree that the request was overly broad, but the requested records did not exist. The Appellant then sent another request to the Judge/Executive seeking any certificates of destruction for the records the Judge/Executive claims were destroyed. Again, the Judge/Executive responded that no such record existed. This appeal followed.

On appeal, the Judge/Executive has located hundreds of responsive emails and provided them to the Appellant. "If the requested documents are made available to the complaining party after a complaint is made, the Attorney General shall decline to issue a decision in the matter." 40 KAR 1:030 § 6. However, the Appellant argues that the appeal is not moot, and instead

accuses the Judge/Executive of creating unnecessary delay in access to the records by claiming the records did not exist when they in fact did exist. The Appellant also accuses the Judge/Executive and the Director of using personal email accounts to conduct public business.

“If a person feels the intent of [the Act] is being subverted by an agency short of denial of inspection, including but not limited to . . . delay past the five (5) day period [to respond] . . . excessive extensions of time, or the misdirection of the applicant, the person may complain in writing to the Attorney General, and the complaint shall be subject to the same adjudicatory process as if the record had been denied.” KRS 61.880(4). Here, the Appellant accuses the Judge/Executive of bad faith in originally claiming responsive records did not exist, and thus, the Appellant claims to have experienced unnecessary delay. But the Judge/Executive explains that when he first searched his emails, he was unable to recover them because the emails are five to seven years old and cover a span of three years. The Judge/Executive also states that the county “changed web hosting and email server service” two years ago and he had assumed the emails were lost as part of the transition. Upon receiving the Appellant’s appeal, the Judge/Executive sought assistance from the Kentucky Department of Libraries and Archives to recover the emails, and provided approximately 400 responsive records to the Appellant. Because the Judge/Executive’s initial search of his own emails did not locate responsive records, this Office cannot find that the Judge/Executive subverted the Act by causing unnecessary delay. With the assistance of the Kentucky Department of Libraries and Archives, the Judge/Executive was able to provide responsive records within a reasonable time under these facts.

The Appellant also alleges that the Judge/Executive and Director have violated the Act by using personal email accounts to conduct business. The Judge/Executive denies using a personal email account to conduct business, and the Appellant has not directed this Office to an email sent from the Judge/Executive’s personal email account. From the records provided by the Judge/Executive, it does appear as though the Director has used a personal email account to conduct business. The Appellant asks this Office to find that the use of a personal email account is itself a violation of the Act.

In 15-ORD-226, this Office first confronted whether emails exchanged using personal email accounts were public records subject to inspection. In that decision, the Office held that such personal emails were not public records, but the Attorney General nevertheless admonished public agencies to refrain from using personal email accounts. However, whether emails created on a personal

account are subject to inspection is a different question than whether using personal accounts is *itself* a violation of the Act.¹ Noticeably, in 15-ORD-226, the Attorney General “admonished” public agencies to refrain from such behavior, yet found no violation of the Act. That is because of the practical difficulties associated with retaining and preserving records exchanged on personal email accounts, and the spirit of the Act is thwarted when personal email accounts are used to conduct public business. But no provision of the Act explicitly states that the use of a personal email account to conduct public business is unlawful. In fact, the Act does not provide any guidance on how public records shall be created. Instead, it only provides the procedure for inspecting public records that already exist.

Here, like in 15-ORD-226, all the Attorney General can do is admonish public agencies to conduct government business on government owned email accounts. Accordingly, the Attorney General hereby admonishes all public employees to use government owned email accounts when conducting public business.

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
Attorney General

/s/Marc Manley
Marc Manley
Assistant Attorney General

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¹ Here, although the Director appears to have used a personal account to exchange emails, the emails were nevertheless preserved because they were sent to the Judge/Executive’s official government account. Thus, the Appellant has not been denied access to the emails the Director sent using a personal email account.

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Distributed to:

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