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22-ORD-173

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In re: Lawrence Trageser/Shelby County Clerk

Summary: The Shelby County Clerk (the "Clerk") did not violate the Open Records Act ("the Act") when she permitted onsite inspection of records and further attempted to provide copies of requested records on a USB drive mailed to the requester.

Open Records Decision

Lawrence Trageser ("Appellant") submitted a request to the Clerk for all emails she had sent or received between January 1, 2020, and March 23, 2022. The Appellant asked for responsive records to be sent to an email address that he provided, and if that was not possible, he would invoke the right of in-person inspection under KRS 61.872(3)(a). In a timely response, the Clerk granted the Appellant's request but also indicated that substantial amounts of records were responsive to his request and that she lacked the technical expertise to download her emails in the format the Appellant requested. The Clerk offered to allow the Appellant to come in and inspect all responsive records on her government computer.

The Appellant declined the Clerk's offer to use her computer to review the emails individually. Instead, the Appellant asked the Clerk to copy all of her emails to a folder on her computer so the Appellant could insert his own USB drive to copy the folder of emails. The two parties exchanged numerous emails to coordinate a time for the Appellant to exercise the right of in-person inspection. In his appeal, the Appellant does not mention whether he entered the Clerk's office to perform his inspection in person. Rather, he provides an email from the Clerk, dated April 11, 2022, in which the Clerk claims to have located a person to assist her with copying

the files to a USB drive and that it had been mailed to the Appellant. The Appellant claims the USB drive the Clerk mailed to him did not contain any records, and therefore he initiated this appeal alleging violations of KRS 61.872(1), (2), and (3).

On appeal, the Clerk claims the Appellant has not been "totally honest" about the Clerk's attempts to satisfy his request. She admits to struggling with technology, and that she essentially offered her computer to the Appellant so that he could copy the files he wanted. The Clerk claims that when the Appellant attempted to copy the emails to the USB drive he brought with him the Appellant also struggled and was unable to do so. The Clerk claims the Appellant called a friend to provide assistance over the phone, but ultimately the Appellant could not successfully copy the files to his USB drive. Thus, the Clerk obtained assistance from a software company to copy the emails to a USB drive to mail to the Appellant. After he received the USB drive, the Appellant allegedly called the Clerk "cursing and using not very nice adjectives" because he could not open the files contained on the USB drive. The Clerk then had the software company email the files in a zip folder on April 26, 2022, and left a voicemail for the Appellant explaining how to access the files. The Appellant allegedly never called the software company back and he ceased his communications with the Clerk, causing the Clerk to believe the Appellant was satisfied that his request had been fulfilled.

For the reasons explained below, the Clerk did not violate KRS 61.872(1), (2), or (3) as the Appellant alleges. But first, the Office addresses the parties' misunderstanding about electronic records. Under the Act as it is currently written, the only electronic files that a resident of the Commonwealth may demand in electronic form are electronic files "in a flat file electronic American Standard Code for Information Interchange (ASCII) format." KRS 61.874(2)(b). But on appeal, the Clerk provides a letter from the software company that assisted her. The software company describes the emails as being in "PST format." Thus, the emails are not in ASCII format. "If the public agency maintains electronic public records in a format other than ASCII, and this format conforms to the requestor's requirements, the public record *may* be provided in this alternate electronic format for standard fees as specified by the public agency." *Id.* (emphasis added). Thus, the Clerk could have exercised her discretion to deny the Appellant's request for electronic copies of the emails outright. *Id.* Instead, the Clerk attempted to assist the Appellant with his request. That allegedly resulted in the Appellant "cursing" at her.

Turning to the Appellant's claims on appeal, under KRS 61.872(1), "[a]ll public records shall be open for inspection by any resident of the Commonwealth . . . and

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suitable facilities shall be made available by each public agency for the exercise of this right." Here, the Appellant never claims to have been denied the ability to inspect records in person. To the contrary, the Clerk allowed the Appellant access to her computer. Allegedly, the Appellant inserted his own USB drive into the Clerk's government computer to make an electronic copy of the emails. The Act certainly does not require a public agency to permit members of the public to insert USB drives in government equipment. Under no circumstances should public agencies allow such activity to occur, as it constitutes a serious security risk and could lead to a breach of government systems. Regardless, the Clerk provided a suitable facility for the Appellant's inspection of the responsive records. She therefore complied with KRS 61.872(1).

Second, under KRS 61.872(2)(a), an agency "may require a written application, signed by the applicant and with his or her name printed legibly on the application, describing the records to be inspected" and "may require the applicant to provide a statement in the written application of the manner in which the applicant is a resident of the Commonwealth[.]" Here, the Clerk did not require the Appellant to provide a statement regarding residency or submit a written application. The Appellant asked to inspect records, and the Clerk obliged. Thus, the Clerk did not violate KRS 61.872(2).

Finally, under KRS 61.872(3), there are two ways a resident of Kentucky can inspect records—"[d]uring the regular office hours of the public agency" or "[b]y receiving copies of the public records from the public agency through the mail." Here, the Appellant availed himself of both options. As discussed, he was permitted access to the Clerk's suitable facilities during normal work hours. Thus, the Clerk did not violate KRS 61.872(3)(a). Moreover, the Clerk claims to have mailed to the Appellant a USB drive containing the electronic files. She provides a statement from the software company in which it claims to have emailed the files to the Appellant in addition to providing instructions by voicemail for how to access the files.

The Appellant, however, claims the USB drive he received did not contain files and that a "forensic investigator will send the file on the USB" to the Office.[1] The Office cannot decide the factual dispute between the parties about whether the USB drive the Clerk mailed to the Appellant contained the requested emails. *See, e.g.,* 22-ORD-010 (declining to resolve a factual dispute that the records received were different from the records requested); 21-ORD-163 (declining to resolve conflicting

[1] The Office has not received correspondence from the Appellant's "forensic investigator."

factual narratives). Accordingly, the Office cannot find that the Clerk violated the Act as alleged by the Appellant.

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court under KRS 61.880(5) and KRS 61.882 within 30 days from the date of this decision. Under 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.

Daniel Cameron
Attorney General

s/Matthew Ray
Matthew Ray
Assistant Attorney General

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Distributed to:

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