

## **16-ORD-133**

June 30, 2016

In re: Campaign for Accountability/Rowan County Clerk

*Summary:* The Rowan County Clerk did not violate the Open Records Act in responding to a request through private counsel. In failing to produce records for which exemptions were claimed for *in camera* inspection, the Rowan County Clerk did not meet its burden to establish the exemptions, and violated the Open Records Act.

### ***Open Records Decision***

The questions presented in this appeal are whether the Rowan County Clerk violated the Open Records Act in responding to a request through private counsel and in not producing records for which exemptions were claimed for *in camera* review. We find that the Rowan County Clerk did not violate the Open Records Act in responding to a request through private counsel. In failing to produce records for which exemptions were claimed for *in camera* inspection, the Rowan County Clerk did not meet its burden to establish the exemptions, and violated the Open Records Act.

### **Background**

Campaign for Accountability (“CfA”) submitted an open records request by email to Rowan County Clerk Kim Davis on Mar. 1, 2016. CFA requested:

First, CfA requests copies of all retainer agreements and attorney-client engagement agreements from January 1, 2013, to the present between you and/or any of your staff and Liberty Counsel, including anyone acting on behalf of liberty Counsel.

Second, CfA requests copies of all other documents that evidence or reflect an attorney-client relationship between you or your office and Liberty Counsel from January 1, 2013, to the present.

Third, CfA requests copies of all documents that authorize you to enter into an attorney-client relationship with an outside entity or individual in your governmental capacity on behalf of Rowan County.

Liberty Counsel responded to the request on behalf of Kim Davis on Mar. 4, 2016, stating that “on the Authority of Ms. Davis, the instant letter constitutes her response to the Request. The Request is improper and facially deficient for multiple reasons and no public disclosure or inspection of documents purportedly covered by the Request will be forthcoming from Ms. Davis.” Liberty Counsel argued that the request: 1) was procedurally defective based upon improper service by email; 2) seeks private documents that are not public records; 3) failed to describe the requested documents with sufficient specificity; 4) seeks documents that are publicly available and equally accessible; 5) the requested documents are exempt as privileged attorney-client and attorney work-product, and “to the extent they exist, they would be exempt from disclosure”; and 6) the requested documents are exempt as preliminary, and “to the extent they exist, they too would be exempt from disclosure.” Liberty Counsel further specified that “Ms. Davis—and only Ms. Davis—is being represented by [Liberty Counsel]. This representation is pro bono. [Liberty Counsel] has not (and does not) represent any individual employees in the Rowan County Clerk’s Office.” Liberty Counsel also stated that “representation of Kentucky public officials and governmental agencies by private law firms is routine in state and federal court litigation.”

CfA initiated this appeal on Mar. 31, 2016, arguing that: 1) “CfA made its request of the Rowan County Clerk’s office, not Liberty Counsel, pursuant to the [Open Records Act], which imposes on public agencies an obligation to make

public records open for inspection”; 2) “Ms. Davis received CfA’s email request, which was the clear goal of the statute’s service requirement,” and that Ms. Davis had responded to an open records request submitted by email in November of 2015; 3) the Rowan County Clerk was obligated to perform a search for records; 4) the request sought precisely defined documents relating to attorney-client relationships between Liberty Counsel and the Rowan County Clerk’s office; 5) Liberty Counsel did not provide any documentation to verify that its representation of Ms. Davis was *pro bono*, and 6) Liberty Counsel asserts broad claims of privilege when there is an open question about the capacity in which it represents Ms. Davis.<sup>1</sup>

Liberty Counsel responded to the appeal on behalf of Rowan County Clerk Kim Davis on Apr. 11, 2016,<sup>2</sup> in which it reiterated the reasons set forth in its response to the request. Additionally, Liberty Counsel stated that “the March 4, 2016 letter was sent to CfA “[o]n the authority of Ms. Davis” and that letter “**constitutes her response to the Request.**” . . . The statute specifically provides that “The response shall be issued by the official custodian **or under his authority . . .**”

On Apr. 14, 2016, CfA sent a letter indicating that it had resubmitted its open records request to Ms. Davis via facsimile. Liberty Counsel responded to that letter on Apr. 15, 2016, stating that “CfA’s new request cures a facial defect in CfA’s original Request on appeal to your office, which was facially denied as improperly served nearly six weeks ago. This new request . . . triggers duties and obligations on Ms. Davis to respond . . . . This new response will be forthcoming.” On Apr. 19, 2016, Liberty Counsel responded to the Apr. 14, 2016 request, producing some documents, and withholding others on the grounds of attorney-client privilege, attorney work product, and the preliminary documents exceptions of KRS 61.878(1)(i) and (j). After subsequent correspondence, Liberty Counsel submitted a letter to this office on May 9, 2016, in which it argued that it would be improper to consider matters relating to CfA’s Apr. 14, 2016 open records request in the context of its appeal of the Mar. 1, 2016 request. Liberty

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<sup>1</sup> CfA also argues that “these actions appear to violate several provisions of the Kentucky Executive Branch Code of Ethics.” The Attorney General does not have jurisdiction to determine such questions in the context of an open records appeal.

<sup>2</sup> On Apr. 8, 2016, the Rowan County Attorney sent a letter stating that “the Rowan County Attorney’s Office has not been requested to provide any information on behalf [of] Kim Davis, Rowan County Clerk. Therefore, I am unable to respond to any of the allegations.”

Counsel further stated that in response to the Apr. 14, 2016 request, **“Ms. Davis conducted a search and produced responsive documents within her understanding of the request, which were in the possession of or retained by the office of the Rowan County Clerk and were not privileged.”**

On May 11, 2016, this office requested to view the documents withheld under KRS 61.880(2)(c). Liberty Counsel responded on May 19, 2016, stating that it was improper for this office to request to review the materials in connection with the Apr. 14, 2016 request, since that request had not been appealed. Liberty Counsel then argued that the request “is improper because Ms. Davis presently maintains claims against the Kentucky Governor and KDLA Commissioner in their official capacities,” on the grounds that “even though the Attorney General is not presently representing the Kentucky Governor or KDLA Commissioner in the pending litigation, . . . [t]he Attorney General is the chief law officer of the Commonwealth.” Liberty Counsel then provided the attorney-client agreement with Ms. Davis and a privilege log for other documents “in a good faith effort to comply with your office’s request.”<sup>3</sup>

### Analysis

The Rowan County Clerk argues that it did not need to respond to a records request submitted by email. KRS 61.872(2) provides that “the application shall be hand delivered, mailed, or sent via facsimile to the public agency.” “A public agency is not obligated to accept an open records request transmitted by email, but may ‘consent, by a clear course of conduct, to transact [its] open records business by email.’” 06-ORD-134 n. 1. “Such a ‘course of conduct arises when the requester transmits, and the agency accepts without objection, an open records request by email.’” 12-ORD-036 n.1. In this case, Liberty Counsel timely responded to CfA’s request, but expressly raised the objection that it was improperly submitted by email, both in its response to the request and on appeal. Rather than objecting to submissions by email in the response or appeal, this office has advised that “public agencies are encouraged to immediately notify requesters utilizing e-mail that the agency does not accept e-mailed open records requests and that the requester should submit the request by hand

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<sup>3</sup> In accordance with 40 KAR 1:030 § 3, the attorney-client agreement has been destroyed concurrent with the issuance of this decision.

delivery, U.S. Mail, or facsimile.” 14-ORD-050. However, given that CfA has submitted the same request by fax, the issue is now moot.

Liberty Counsel argues that the Mar. 1, 2016 request submitted by email and the Apr. 14, 2016 request submitted by fax constitute two different requests, and that the Apr. 14, 2016 request has not been appealed. However, the requests are identical; only the manner of their submission is different, and counsel for both sides have continued to vigorously argue in the context of the appeal of the Mar. 1, 2016 request. In the interests of administrative economy and resolution of the issues,<sup>4</sup> we treat the requests as one appeal.

CfA argues that it is entitled to a response from the Rowan County Clerk’s Office itself, and a response from Ms. Davis’ personal attorney is insufficient. KRS 61.880(1) provides that “the response shall be issued by the official custodian or under his authority.” Liberty Counsel maintains that its response is issued under the authority of Ms. Davis, and the attorney-client agreement provided by Liberty Counsel establishes that they have such authority. The Rowan County Clerk is permitted to engage outside counsel on a *pro bono* basis if she so chooses.<sup>5</sup> Accordingly, the Rowan County Clerk did not violate the Open Records Act in responding to a request through private counsel.

Liberty Counsel argues that the request is deficient because it “fails to describe the requested documents with sufficient specificity,” and that the requests seek “documents that are not in the custody, possession, and control of the Rowan County Clerk.” However, after initially refusing to conduct a search in response to the improperly submitted email request, the Rowan County Clerk subsequently conducted a search and produced responsive, non-exempt records in response to the fax request, effectively conceding that the request was sufficiently specific and that there were responsive records in the possession of the Rowan County Clerk.

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<sup>4</sup> See generally *Reilly v. Pinkus*, 338 U.S. 269, 276 (1949) (“A large amount of discretion in the conduct of a hearing is necessarily reposed in an administrative agency.”); 73A C.J.S. *Pub. Admin. Law and Procedure* § 277 (“An administrative body may generally conduct its proceedings in such a manner as will best conduce to the proper dispatch of its business and to the ends of justice.”).

<sup>5</sup> See generally *Conrad v. Lexington-Fayette Urban Cnty. Gov't*, 659 S.W.2d 190, 198 (Ky. 1983) (“In the absence of a specific statutory prohibition, a municipal corporation is generally permitted to contract with outside counsel.”).

Liberty Counsel invoked the attorney-client privilege, attorney work product, and the preliminary documents exceptions of KRS 61.878(1)(i) and (j) in withholding other documents. KRS 61.880(2)(c) provides that “the burden of proof in sustaining the action shall rest with the agency, and the Attorney General may request additional documentation from the agency for substantiation. The Attorney General may also request a copy of the records involved but they shall not be disclosed.” Referring to KRS 61.880(2)(c) and 40 KAR 1:030 § 3, we have stated that “the General Assembly has twice vested the Attorney General with the authority to require production of public records, for which a claim of exemption has been made, for in camera review. . . . We are not prepared to accept, without independent confirmation, that all of the responsive documents are shielded from public inspection.”<sup>6</sup> 10-ORD-079. When an agency refuses to produce documents that it claims are exempt for *in camera* inspection, we have found that “the agencies whose denials were challenged had not met their burden of proof in sustaining those denials under KRS 61.880(2)(c).” *Id*; see also 05-ORD-185; 95-ORD-61.

Although Liberty Counsel has made a good faith effort to provide a privilege log for its attorney-client communications, KRS 61.880(2)(c) provides that the Attorney General may request the documents themselves, and makes no provision for privilege logs. Additionally, Liberty Counsel at various points invokes the preliminary documents exceptions of KRS 61.878(1)(i) and (j), but did not address whether it was continuing to maintain those exemptions in its May 19, 2016 correspondence, and did not include them in its privilege log. It is unclear whether Liberty Counsel continues to withhold documents under the

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<sup>6</sup> Liberty Counsel argues that KRS 61.880(2)(c) “should not be interpreted to demand the production of materials from a party who is arguably adverse to the Attorney General,” referring to pending litigation between Ms. Davis and the Governor and the Department for Libraries and Archives. Liberty Counsel claims that “lawyers representing the Commonwealth, which is adverse to Ms. Davis in pending litigation, cannot ‘un-see’ any privileged materials.” However, by Liberty Counsel’s own admission, the Attorney General is no part of that litigation. The attorney or attorneys reviewing any documents requested in the context of an open records appeal have nothing to do with such litigation. Further, “the Attorney General recognizes that he is bound to observe the confidentiality of the records, and does not share [the agency’s] apparent view that disclosure to this office pursuant to KRS 61.880(2)(c) constitutes waiver as to any legitimate privilege [or exemption] asserted.” 10-ORD-079. Liberty Counsel’s attempt to manufacture a conflict by alleging that this office’s open records attorneys would somehow insert themselves into pending litigation in which the Attorney General is not involved, or break confidentiality to share information with attorneys for other agencies of the Commonwealth, is unfounded and does not provide any grounds for refusing a request under KRS 61.880(2)(c).

preliminary documents exceptions. An agency “cannot benefit from intentionally frustrating the Attorney General's review of an open records request; such result would subvert the General Assembly's intent behind providing review by the Attorney General.” *Cabinet for Health & Family Servs. v. Todd Cnty. Standard, Inc.*, No. 2012-CA-000336-MR, 2015 WL 8488911, at \*6 (Ky. Ct. App. Dec. 11, 2015). Accordingly, in refusing to produce documents for which exemptions were claimed for *in camera* inspection by the Attorney General, the Rowan County Clerk has not met its burden of proof to substantiate withholding records, and has violated the Open Records Act.

In summary, the Rowan County Clerk did not violate the Open Records Act in responding to a request through private counsel. In failing to produce records for which exemptions were claimed for *in camera* review, the Rowan County Clerk did not meet its burden to establish the exemptions, and violated the Open Records 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. Pursuant to KRS 61.880(3), the Attorney General should be notified of any action in circuit court, but should not be named as a party in that action or in any subsequent proceedings.

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