COMMONWEALTH OF KENTUCKY
BOONE CIRCUIT COURT
DIVISION I
CASE NO. 23-CI-00978

CHRISTINE MCLAUGHLIN **PLAINTIFF**

VS.

BOONE COUNTY CLERK
JUSTIN CRIGLER **DEFENDANT**

ORDER

This matter is before the Court on Plaintiff's Motion for Summary Judgment and Defendant's Cross-Motion for Summary Judgment. Pursuant to an initial agreed scheduling Order entered on November 21, 2023, the Motions were to be submitted December 19, 2023. However, prior to submission, the Kentucky County Clerks Association moved the Court to allow an *amicus curiae* brief on their behalf, which the Court granted. The Court entered a new agreed scheduling Order on January 2, 2024. For reasons explained below, the matter would not stand submitted until February 7, 2024. Having considered the memoranda and evidence submitted by the Parties, arguments of counsel and, being in all ways sufficiently advised, the Court enters this Order.

FACTUAL BACKGROUND

On June 16, 2023, pursuant to KRS 61.872(2) and KRS 61.872(3)(a), Plaintiff Christine McLaughlin submitted to Defendant Justin Crigler, in his capacity as Boone County Clerk, an open records request. In it, she made the request to inspect ballots from ten precincts in Boone County for the May 16, 2023, Kentucky primary election (the "Request").

Defendant responded the same day stating a written response would be provided within five days. Four days later, on June 22, 2023, Defendant denied Plaintiff's Request. Plaintiff

filed her Petition and Complaint with this Court on July 21, 2023. Initially, Plaintiff believed her Request involved approximately 1,267 ballots but, according to information subsequently provided, she learned there are 1,513 ballots responsive to her Request.

PROCEDURAL POSTURE

Upon the Court's initial review of the arguments contained in the parties' memoranda, the Court required confirmation as to whether the ballots at issue contained any personally identifying information of voters. Thus, on January 12, 2024, the Court entered an Order directing the parties to file a notice with the Court by February 6, 2024, if they intended to dispute that the ballots at issue were free of personally identifying information. The Order further indicated that, if no hearing was noticed, the matter would be taken under submission on February 7, 2024.

On January 18th, Defendant filed a supplemental affidavit containing more information on barcoding but did not request a hearing. Plaintiff responded stating that, if Plaintiff meant to indicate the ballots contained any personally identifiable information of the voters, a hearing was required. By Order entered February 28th, the Court then set the matter for March 5th to resolve that question or to schedule an evidentiary hearing. However, in the interim, Defendant filed a Motion to vacate the March 5th hearing as moot by clarifying that "Defendant never intended, nor meant to suggest or imply that the barcode data contained a voter's personally identifiable information."[1] Based upon Defendant's clarification, the Court agreed the question was moot and vacated the March 5, 2024 hearing, thus keeping the submission date of February 7, 2024.

[1] Def's February 28, 2024 Mot.to Vacate, p. 1.

ARGUMENTS PRESENTED

In her Motion, Plaintiff argues that, because the Kentucky Open Records Act favors transparency and disclosure, Defendant bears the burden of proof to show her Request should be denied. In support, Plaintiff points to KRS 61.880(2)(c) and various precedent. According to Plaintiff, although Defendant proposed six reasons for denying her Request, he failed to provide adequate explanation or support for the purported reasons given. Plaintiff asserts that, pursuant to KRS 61.880(1), Defendant cannot deny her request without first identifying a specific statutory exemption for the denial and, second, providing a brief explanation of how each statutory exemption relied upon applies to the information requested. Plaintiff insists that Defendant has failed to provide any grounds under which he may refuse her Request, either in his initial denial or in Answer to her Complaint.

Additionally, Plaintiff argues that Defendant advanced only "frivolous and misleading" grounds for denying her Request. Thus, Plaintiff asserts, Defendant's denial constitutes a willful violation under KRS 61.882 and that, consequently, she should be awarded her costs and attorney's fees.

Defendant, in his Response and Cross-Motion, argues that the ballots Plaintiff seeks to inspect are not public records under the Open Records Act. This is so, Defendant argues, because Kentucky's Constitution guarantees elections by secret ballot. Defendant insists that, under Kentucky's statutes, only government agencies may examine ballots to ensure elections are free and fair, namely, the Office of the Attorney General, the State Board of Elections, and the County Board of Elections. According to Defendant, "[a] private citizen cherry-picking

particular ballots and conducting private, vigilante audits of election results does not satisfy the public interest in the operations of the Clerk's office."[2]

Defendant further argues that even if the ballots are public records, exemptions apply that prohibit disclosure. Defendant insists that secrecy of the secret ballot process attaches to the paper ballot itself. In support, Defendant cites Chapters 117 and 118 of the Kentucky Revised Statutes. More specific to the argument of secrecy, Defendant points to Precinct C126 for the premise that, if Plaintiff is allowed to inspect the ballots sought (for the May 2023 primary election), she can ascertain how some voters voted. This is so, Defendant insists, because only seven votes were cast in the Democratic primary and all voted for the same candidate. Thus, because the voter sign-in logs are public records, Plaintiff could ascertain how those voters voted. Finally, Defendant argues that if the Court were to find that the ballots are subject to disclosure, there is insufficient basis to find its denial of Plaintiff's request was willful.

In its *amicus* brief, the Clerks' Association asserts that Plaintiff's request threatens the very integrity of the secret ballot system. This is so, they argue, because the identity of the voters can be determined from the ballots. According to the Clerks' Association, "[c]ast ballots (which have bar codes) can be decoded, which would provide information to someone seeking to reverse engineer and determine how an individual cast his or her ballot."[3] However, *amicus* further indicates that decoding could identify only the date of the election, the type of blank ballot used, and whether it was a primary or general election.

The Clerks' Association further argues that, if the ballots are found to be public records, exceptions apply that restrict access to only government agencies and officials. In support of this premise, *amicus* points to the statutes that prescribe the manner in which voting equipment and

[2] Def's Combined Memorandum, p. 13.
[3] Amicus Curiae Brief, p. 4.

cast ballots are to be secured during the election process, that require ballots to be stored after an election for 22 months and then destroyed, and that provide criminal penalties for unlawfully taking or accessing cast ballots.

In her Reply, Plaintiff argues that Defendant violated the Open Records Act by: (a) failing to identify an applicable exemption that could justify denying her request, together with the explanation required by KRS 61.880(1), failing to provide clear and convincing evidence that compliance would constitute an unreasonable burden under KRS 61.872(6), and (c), and failing to prove that ballots are not subject to the Open Records Act under KRS 61.870(2).

More specifically, Plaintiff insists that both ballot secrecy *and* inclusion of personal information on a ballot cannot co-exist. Rather, Plaintiff asserts, "the secrecy that makes the secret ballot secret is the anonymity process, not the ballot."[4] Plaintiff also argues that ballots from low-turnout precincts are not exempt from the Open Records Act. Contra Defendant's and *amicus'* contentions otherwise as to Precinct C126, Plaintiff states that this same information was already made public by the Kentucky Secretary of State on its Website following certification of the election results.

As to Defendant's argument that ballots are generally exempted from disclosure under Chapters 117 and 118 of the Kentucky Revised Statutes, Plaintiff points to KRS 117.085(12) and KRS 117.086(4), which provide that absentee ballots are not to be made public until after close of the election. Plaintiff emphasizes that absentee ballots contain the most personal connections with a voter. Thus, according to Plaintiff, the fact that these statutes provide for the release of absentee ballots, it cannot be disputed that ballots are public records that are subject to disclosure.

[4] Plaintiff's Reply, p. 23.

Plaintiff also cites a 1983 Opinion of the Kentucky Attorney General holding that, "ballots are therefore public records open to public inspection while in the custody of the clerk"[5] but that removal therefrom requires a court order. According to Plaintiff, Westlaw® presents this opinion in less than a minute when searching with the words "ballot and open record." Plaintiff further insists that Defendant has also failed to prove that only government officials, and not citizens, may inspect ballots to ensure a fair and honest process.

Finally, Plaintiff contends that Defendant denied her Request as a blanket denial, or for reasons that he always knew to be false. Plaintiff argues that, from the first, Defendant insisted that the ballots contained personal identifying information of voters, all while knowing the opposite to be true. Thus, Plaintiff asserts, under the statutes of this Commonwealth, and the Opinion of its Attorney General which she has presented, Defendant cannot have any good faith basis for his denial. Plaintiff further complains that Defendant has amplified his bad faith by making statements which, she asserts, serves no other purpose than "to insult an innocent Plaintiff who is participating in this costly process only because of Defendant's meritless actions."[6] Consequently, Plaintiff seeks costs and fees under KRS 61.882, and also sanctions under CR 11.[7]

ANALYSIS

Civil Rule 56.02 of the Kentucky Rules of Civil Procedure states, "A party against whom a claim . . . is asserted . . . may, at any time, move . . . for a summary judgment in his favor as to all or any part thereof." Ky. R. Civ. P. 56.02. Additionally, Civil Rule 56.03 states that summary

[5] Plaintiff's Reply, pp. 7-8, quoting Ky. Op. Atty. Gen. 2-567 (1983).
[6] Plaintiff's Reply, p. 32.
[7] Defendant argues that Plaintiff's arguments under Rule 11 are improper because it was not brought by motion. The Court agrees. Rule 11 states that, upon motion or upon [the Court's] own initiative," sanctions may be imposed. Moreover, the Court further notes that sanctions under Rule 11 are "intended only for exceptional circumstances." *Clark Equip. Co., Inc. v. Bowman,* 762 S.W.2d 417, 420 (Ky.App.1988).

judgment is appropriate whenever, "the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ky. R. Civ. P. 56.03. The Kentucky Supreme Court has stated that the proper use of summary judgment is, "to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 483 (Ky. 1991). To be able to succeed against a motion for summary judgment, a non-moving party must present, "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Id.*, at 482.

Pursuant to KRS 61.880(2)(c), the burden of proof is placed upon the agency denying a citizen's request to inspect records. The Kentucky Supreme Court has further explained that, in meeting this burden, the public agency must "rebut the strong presumption in favor of disclosure." *Commonwealth v. Chestnut*, 250 S.W.3d 655, 660 (Ky. 2008). A "bare assertion" does not satisfy that burden. Ky. Op. Atty. Gen. 19-ORD-045, at 9.

When boiled down, the Court is presented with three questions. The threshold question is whether the ballots covered by Plaintiff's Request are public records. Secondly, if so, whether those ballots are subject to any exceptions that should prohibit inspection. Finally, if the ballots are records subject to inspection, whether Defendant's denial of the Request was willful.

A. Ballots are Public Records

KRS 61.872 provides, in relevant part, as follows:

> (1) All public records shall be open for inspection by any resident of the Commonwealth, except as otherwise provided by KRS 61.870 to 61.884, and suitable facilities shall be made available by each public agency for the exercise of this right. No resident of the Commonwealth shall remove

> original copies of public records from the offices of any public agency without the written permission of the official custodian of the record.
>
> (2) (a) Any resident of the Commonwealth shall have the right to inspect public records. The official custodian 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. . . .

There is no dispute that Plaintiff is a resident of Boone County, Kentucky. Nor is there a dispute that the Boone County Clerk is a "public agency" under the meaning of this statute.

Turning to the threshold question, then, the statute defines "public records" as: "all books, papers, maps, photographs, cards, tapes, discs, diskettes, recordings, software, or other documentation regardless of physical form or characteristics, which are prepared, owned, used, in the possession of or retained by a public agency." Ballots are "papers," on which a citizen "records" their vote. And that ballot constitutes the original "documentation" of their vote. Ballots are also "prepared, owned, used, [and] in the possession of or retained by a public agency." Clearly, ballots fall under the definition of a "public record."

As to the argument of Defendant and *amicus* that ballots are nonetheless excluded because of the constitutional mandate for secret ballots, the Court disagrees. Firstly, Plaintiff points to a Kentucky Attorney General Opinion that answered the question 40 years ago. That opinion states: "Applications and absentee ballots are therefore public records open to public inspection while in the custody of the clerk. However, removal may only be gained by court order."[8] Given the lack of any contrary opinions, the Court finds it perplexing that Defendants would not follow this guidance.

Even ignoring the Kentucky Attorney General Opinion that Plaintiff has presented, the logic of her argument on this question, as quoted below, is unassailable:

[8] Ky. Op. Atty. Gen. 2-567 (1983).

> The problem . . . is secrecy[] and personal information cannot exist on the same ballot. Either the process for creating a secret ballot has been correctly followed, and there is no personal information on the ballot, or the anonymity process failed and the ballot contains personal information of a voter.
>
> The interesting thing about a properly-processed, and cast, Secret Ballot, is it has no secrets on it. If a ballot is secret, then the identity of the voter is not on the ballot. After a secret ballot is properly processed and cast, nobody can look at that secret ballot and determine the identity of the voter. . . .
>
> The secrecy that makes a Secret Ballot secret is created during the voting process, which makes all voters anonymous by, among other things, separating the individual's personal information from the ballot. . . .

Defendant and *amicus* insist that only government officials may be trusted to see the ballots. This, they contend, is presented as the unquestionable policy of the Commonwealth, resting on the premise that voters might be identified by the ballots. Not so. Giving government agents unfettered access to voter-identifiable ballots would do equal violence to the Constitution as allowing a citizen such access. Indeed, if precedent is any indicator, the worst examples of abuse in our Commonwealth came from government agents intimidating private citizens, not the other way around. Perhaps the most egregious example of this is *Scholl v. Bell*, 102 S.W. 248, 262 (Ky. 1907). After narrating both the crimes and the culprits in that case, Kentucky's then highest court concisely summarized the situation as follows: "[i]t is sufficient to say that every note on the gamut of election crimes was sounded on election day ***by those whose sworn duty it was to prevent it***."[9]

In any event, as Plaintiff points out, our Constitution's secrecy mandate pertains to the conduct of the election, that is, the private marking of an anonymous ballot. "[A]ll elections by the people shall be by secret official ballot, furnished by public authority to the voters at the polls, and marked by each voter in private at the polls, and then and there deposited . . . ." KY.

[9] Emphasis added.

CONST. § 147. The whole point of the Austrian-style secret ballot (which Kentucky adopted) is to have uniform ballots forms that can be marked in private, and that can be placed in a ballot box without any distinguishing markings that could disclose the voter's identity.

Indeed, Kentucky law is well settled that ballots may not be counted if they contain personally identifiable information. Nearly 100 years ago, the General Assembly passed a statute that would allow ballots to be counted if the voter inadvertently deposited their ballot without removing a "secondary stub" that contained identifying information. The Kentucky Court of Appeals, then Kentucky's highest court, declared the statute unconstitutional on grounds that, "the constitutional requirement of secrecy" is violated "where ***the officers of the election may see*** how he voted." *State Board of Election Com'rs v. Coleman*, 29 S.W.2d 619, 623 (Ky. 1930) (emphasis added).[10]

B. Defendant has Presented No Exceptions to Bar Inspection of Ballots

When a government agency withholds records from an open records request, that agency must comply with KRS 61.880(1). KRS 61.880(1) requires that:

> An agency response denying, in whole or in part, inspection of any record shall include a statement of the specific exception authorizing the withholding of the record and a brief explanation of how the exception applies to the record withheld. The response shall be issued by the official custodian or under his or her authority, and it shall constitute final agency action.

Here, Defendant's denial purports to list six reasons for denying the Request.[11] Plaintiff has demonstrated all to be without merit. As Plaintiff points out, Defendant's Response and

[10] *See also, Nall v. Tinsley*, 107 Ky. 441, 54 S.W. 187, 189 (1899) (finding constitutional secrecy mandate was violated by election officials marking the ballots without justifiable exception via sworn proof of voter's disability); and, *Banks v. Sergent*, 104 Ky. 843, 48 S.W. 149, 151, 20 Ky. L. Rptr. 1024 (1898) (finding a violation by election officers accompanying voters into election booth and by their marking ballots of persons without proof of their disability), *overruled on other grounds by Widick v. Ralston*, 197 S.W.2d 261 (1946).

[11] In Defendant's Answer to the Petition, he also asserted that the ballots were not public records. The Court has addressed that argument in part A. above.

Cross-Motion presents neither rebuttal to the position she advanced, nor any argument whatsoever to support the 2nd, 3rd, and 6th reasons Defendant asserted for denying Plaintiff's Request. Nevertheless, the Court will briefly address each of the six grounds raised in Defendant's denial.

1. **Defendant's first reason for denying the Request points to KRS 61.878(1)(a), asserting that the ballots contain "information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy."**

Notwithstanding this assertion, Defendant and *amicus* have effectively stipulated that the ballots do not contain any personal identifying information.[12] As to their argument that Plaintiff may deduce how some voters voted in low voter precincts, Plaintiff's logic is again unassailable. The results at C129 and precincts like it were made public by the Kentucky Secretary of State on its Website following certification of the election results.[13] Checking that tally by viewing the underlying ballots does nothing different.

2. **Defendant's second reason points to KRS 61.878(1)(k), asserting that inspection of the ballots "is prohibited by federal law or regulation or state law," because KRS 117.295(1) requires a 30-day lock-down period after the election, and KRS 117.275(16) requires the ballots to be preserved by the Clerk for 22 months after the election and then destroyed. According to Defendant, when read together, these statutes prohibit access for any reason except for election contests, recanvasses or recounts pursuant to KRS 120.250.**

KRS 117.295(1) requires ballots to be locked down for 30 days and released only pursuant to court order for recounts or other specific reasons. There is no dispute that Plaintiff submitted her Request after the 30-day-lock-down. Hence, this provision is no basis for denial. KRS 117.275(16) states that, "[e]xcept as otherwise required in this chapter, all records and

[12] The Court's January 12, 2024, Order provided this question would be deemed stipulated unless notice was filed by February 6, 2024. Defendant's February 28th Motion acknowledges that the ballots do not contain the voter's personally identifiable information.

[13] There is no dispute that the voter rolls are public records.

papers relating to specified elections shall be retained for twenty-two (22) months . . . after which time they shall be destroyed . . . if no contest or recount action has been filed."

The Court first notes, as Plaintiff points out, that the statute uses the words "all records and papers relating to specified elections" in a way that encompasses ballots. Second, it begins with a clause excepting other provisions in the Chapter, which include provisions that expressly carve out exceptions for the release of absentee ballot, and associated applications, as public records, namely, KRS 117.085(12) and KRS 117.086(4).

Third, but perhaps most importantly, KRS 117.275(16) requires the ballots "shall be retained for twenty-two (22) months . . . after which time they shall be destroyed . . . if no contest or recount action has been filed." Nothing in Plaintiff's Request sought to remove the ballots from the custody of the Clerk. It seeks only inspection. Again, the guidance of the 1983 Opinion of the Kentucky Attorney General to which Plaintiff cites is directly on point ("ballots and applications are in the custody of the circuit clerk and are public records open to inspection . . . [But] removal of the records from the clerk can only be gained through court order"). Removal was not sought here.

3. **Defendant's third reason contends that allowing inspection of the ballots would violate KRS 119.195(4), which states "Any person . . . entrusted with the custody or control of any official ballot, either before or after it has been voted, who . . . marks, mutilates or defaces any official ballot . . . for the purpose of vitiating the official ballot shall be guilty of a Class C Felony."**

Defendant has not stated why Plaintiff's inspection equates to being "for the purpose of vitiating the official ballot," or what justifies such a presumption. This is especially true since the inspection is to be done while in the custody of the Clerk and can be performed under the observation of the Clerk or his agent. Moreover, the election was already certified long before Plaintiff's Request.

4. Defendant contends that allowing inspection of the ballots would constitute an unreasonable burden . . . . that it would be necessary to have both a deputy sheriff and a deputy clerk present and tasked with observing the handling of the ballots. Thus, they argue, taking them away from their regular duties is unreasonable.

Pursuant to KRS 61.872(6), refusal of a request as being an unreasonable burden may only "be sustained by clear and convincing evidence." Defendant asserts that, because inspection would have to be onsite, it "would need to be in a location with video surveillance and separate from the office areas of the Clerk's office containing confidential information, all while being spacious enough to properly accommodate the inspection."[14] Defendant further contends that, because the records are ballots, the presence of Sheriff's deputy or other law enforcement official would be required. Based upon this, Defendant insists, the "inspection would require extensive preparation and attention, crippling the Clerk's office."[15]

Defendant has not shown an unreasonable burden. "[T]he obvious fact that complying with an open records request will consume both time and manpower is, standing alone, not sufficiently clear and convincing evidence of an unreasonable burden." *Department of Kentucky State Police v. Courier Journal*, 601 S.W.3d 501, 506 (Ky. App. 2020). "[F]ree and open examination of public records is in the public interest and the exceptions provided for by KRS 61.878 or otherwise provided by law shall be strictly construed, even though such examination may cause inconvenience or embarrassment to public officials or others." *Id.*, at 505.

In *Department of Kentucky State Police v. Courier Journal*, the Kentucky Court of Appeals held that, to provide the non-exempt data that had been requested, it was not an unreasonable burden for the Kentucky State Police to have to redact exempt information from

[14] Def's Combined Memorandum, p. 12.

[15] *Id.*

over 8 million records in a database. Nor did the fact that it would cost $15,000 render it unreasonable.

Here, the ballots do not contain any exempt information. In fact, by law, they may not. Thus, it is matter of accommodating the inspection of less than 2,000 ballots. Furthermore, the election is well past the 30-day-lock-down and the results have long ago been certified.

Defendant states that the inspection will require that either the Clerk himself, a deputy clerk or other agent from the Clerk's office will have to monitor the inspection. That is likely true. But since complying with open records requests is part of Defendant's duties, this is not an unreasonable burden. The Kentucky Court of Appeals has recently, and clearly, said so. *Department of Kentucky State Police*, 601 S.W.3d, at 506 ("that complying with an open records request will consume both time and manpower is . . . not . . . an unreasonable burden").

Defendant also asserts that records inspection will require the presence of a Deputy Sheriff and videotaping. Defendant has presented no evidence to demonstrate that armed guards are required for an inspection of ballots that are already slated to be destroyed, and that pertain to election(s) that have long ago been certified as final. It is certainly true that county clerks have the duty to maintain ballots during this phase, just as they do other very important records in their custody. Presumably, the latter are routinely viewed without the presence of law enforcement. Defendant has not demonstrated why that should be required here.

It remains true, of course, that if Defendant desires the presence of law enforcement during inspection of its records, be it old ballots or otherwise, that is Defendant's prerogative. But that does not turn the inspection into an unreasonable burden. In any case, since Defendant has not demonstrated that law enforcement is *required*, that "burden" cannot be imputed (or charged) to Plaintiff.

Similarly, Defendant has not demonstrated why videotaping the inspection is required. Again, if desired, that is certainly the Defendant's prerogative. Indeed, it may be well advised that both parties capture the moment. But that does not make the Request unreasonable. Gone are the days when recording video and audio required expensive equipment and personnel. Now nearly every pocket, purse, and backpack contain devices capable of not only recording, but recording in high definition. And nearly everyone—even children—are proficient in the use of these devices.

5. **Defendant contends that the documents covered by Plaintiff's Request "would offer no insight to the actions of the Clerk's office or the execution of his duties; contain no identifying information nor information that would serve a purpose other than a private recount."**

In its memoranda, Defendant states that, "[a] private citizen cherry-picking particular ballots and conducting private, vigilante audits of election results does not satisfy the public interest in the operations of the Clerk's office."[16] Defendant advances the premise that "the policy of disclosure is to subserve the public interest, not to satisfy the public's curiosity," pointing to *Kentucky Bd. Of Examiners of Psychologists & Div. of Occupations & Professions, Dep't for Admin. v. Courier-Journal & Louisville Times Co.*, 826 S.W. 2d 324, 328 (Ky. 1992). That case, however, was about information that was "of a *very* personal nature," the disclosure of which "would constitute a serious invasion of the personal privacy" of individuals who had alleged details of sexual misconduct suffered at the hands of their psychologist. *Id*. That's not even close to the circumstance here.

The reason for a records request is not weighed against the public's interest in transparency *unless* substantial privacy issues are at stake. On the contrary, disclosure is mandated, without regard to the purpose or reason behind the request, unless it would result in a

[16] Def's Combined Memorandum, p. 13.

breach of substantial privacy interests. "That means, in the first place, that any private interest the requester may have in the information is irrelevant. Under the Act, records that are open are open to 'any person' for any purpose. KRS 61.872(1)." *Kentucky New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76, 85–86 (Ky. 2013). Here, the ballots contain no personally identifiable information. Thus, compliance here is mandatory.

Plaintiff, understandably, is aggrieved by Defendant's characterization of her, *i.e.*, that she is conducting a "vigilante audit." Based upon all that has been presented, Plaintiff has done nothing other than seek information to which she is entitled. Under the law, her motives should be deemed irrelevant.

Nevertheless, as to the implication in the record that only ugly motives underly Plaintiff's Request, more must be said. First, there is no basis to assume that Plaintiff's Request is in any way motivated by distrust of any government officials or their service to the people. But even if it were, that's hardly grounds for *ad hominem* given the heritage of our nation's founding.

Whatever the reason, however, a citizen should not be disparaged for seeking to verify the process of our elections. On the contrary, it is more likely an act worthy of praise. Under the Kentucky Open Records Act, government agents have no monopoly on verifying the accuracy of the process. Even if the Request were motivated by distrust, the solution is transparency not secrecy. That is the whole point of the Open Records Act.

6. Defendant points to KRS 120.185, on the premise that "[t]he right to a recount or to contest an election, and the procedure to be followed is purely statutory."

Plaintiff sought to inspect records under the Open Records Act, not to conduct a recount. The procedure for inspecting records under the Open Records Act is also statutory. And Plaintiff followed the statutory process. Had Plaintiff sought a recount, then KRS 120.185 would be

relevant, and her request also would have to have been filed within ten days of the election, not *after* the election was certified, and not *after* the 30-day-lock-down.

The Court agrees with Plaintiff that Defendant has not presented any valid exception to justify denying her Request.

C. Costs and Fees Pursuant to KRS 61.882(5)

Plaintiff insists that the record supports a finding that Defendant's denial of her Request was willful, at least from the point in time she filed her Petition. In support, Plaintiff advances many persuasive arguments that, purportedly, eliminate any other purpose or intent. Defendant argues his denial should be construed to have been made in good faith. However, before making a factual finding under CR 56, the record must be clear that the parties have no additional evidence to present on the question, or that the facts have otherwise been conclusively established. Hence, the parties will be afforded opportunity to present evidence on this question.

Meanwhile, however, KRS 61.882(4) requires the Court to give Plaintiff's Request priority over all other matters. "Except as otherwise provided by law or rule of court, proceedings arising under [the Open Records Act] take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date." KRS 61.882(4). Mindful of this, the Court will bifurcate the question of willfulness so that Plaintiff's access to the records is not further delayed.

IT IS HEREBY ORDERED AND ADJUDGED that the ballots Plaintiff sought to inspect by her June 16, 2023, Request are public records, that the ballots are not subject to any exceptions that would otherwise prevent Plaintiff's inspection, and that the inspection Request does not constitute an unreasonable burden upon Defendant; consequently, Defendant shall preserve said ballots until Plaintiff is able to complete her inspection.

THEREFORE, IT IS FURTHER HEREBY ORDERED AND ADJUDGED that Plaintiff's Motion for Summary Judgment is **GRANTED in part** and Defendant shall, within three (3) business days of the entry date of this order, provide to Plaintiff a reasonable range of dates and times during which Plaintiff may inspect the ballots subject to her request.

IT IS FURTHER HEREBY ORDERED AND ADJUDGED that adjudication of Plaintiff's Motion for Summary Judgment is **RESERVED in part** as to the issue of the willfulness of Defendant's denial under KRS 61.882(5); and that, for the resolution of which, either party may, by motion, move to schedule trial on that issue, or otherwise notify the Court that there is no additional evidence for it to consider and that the question of willfulness is ripe for final adjudication on the record as it currently stands.

IT IS FURTHER HEREBY ORDERED AND ADJUDGED that Defendant's Cross-Motion for Summary Judgment is **DENIED**.

IT IS SO ORDERED.

/s/ HON. RICHARD A. BRUEGGEMANN
electronically signed
3/7/2024 9:21:59 AM ET

JUDGE RICHARD A. BRUEGGEMANN
BOONE CIRCUIT COURT

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