

**COMMONWEALTH OF KENTUCKY  
FRANKLIN CIRCUIT COURT  
DIVISION I  
CIVIL ACTION NO. 23-CI-00544**

**ALISON LUNDERGAN GRIMES PLAINTIFF/APPELLANT v. FINAL ORDER  
EXECUTIVE BRANCH ETHICS COMMISSION DEFENDANT/APPELLEE**

This matter is before the Court for judicial review of a final administrative order entered by the Executive Branch Ethics Commission finding former Secretary of State Alison Grimes (“Grimes”) guilty of 2 counts of violating the Executive Branch Ethics Code, in connection with allegations she misused her access to the Voter Registration System. The final order of the Commission was entered on May 19, 2023,<sup>1</sup>*See Pet’r’s Pet. on Appeal*, at 1. This Court has jurisdiction under KRS §13B.140 and KRS §11A.100. *Id.* Grimes argues that the Commission’s charges are barred by the statute of limitations, and the record does not support a finding of any violations of the Executive branch Code of Ethics. *Id.* at 1-2, ¶ 2.

The Commission charged that Grimes violated the Ethics Statute by sharing voter information without requiring an Open Records request or other “established process of government.” Grimes submits that the voter data at issue is all information in the public domain, that she had full legal authority and discretion in her capacity as Secretary of State to access and share such information, and that no statute or regulation was violated by the sharing of such public

information. Grimes argues that the sharing of such public information cannot support a finding OG : 000001 of

of a violation of KRS 11A.020, and that the charges against her should be dismissed.

<sup>1</sup>See *Ex. A, Pet'r's Pet. on Appeal*. Exhibit A of Grimes' Petition on Appeal is an attached copy of the Commission's Final Order.

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The Ethics Commission did not conduct an evidentiary hearing in this case, but rather decided the case without any testimony or cross-examination of witnesses, on cross-motions for summary judgment. The Court has conducted its review mindful of the fact that if there are disputed issues of material fact, an evidentiary hearing would be required. Because the administrative proceeding was decided without a hearing on cross-motions for summary judgment, the evidence in the record relied upon by Grimes is not disputed.

Under the Court's analysis, the Ethics Commission's order must be reversed on strictly legal grounds: 1) the administrative complaint was filed outside the applicable statute of limitations set forth in KRS 413.120 for liability created by statute; and 2) the information shared by Secretary Grimes is public information and there is no statute or administrative regulation that prohibited her from accessing or sharing that information under the facts alleged by the Commission.

It is noteworthy that these allegations of misconduct related to the Voter Registration System against Secretary Grimes have been pending for over 8 years of investigation by both the Attorney General and the Ethics Commission. After exhaustive investigation by both the Attorney General and the Ethics Commission, there was no allegation concerning any substantive violation of any statute or regulation regarding the integrity of the voting rolls. There was no allegation of tampering with the voting rolls, no allegation of improper registration or voting, no allegation of any irregularity in any vote count or tabulation, no allegation of altering any identification of any voter, no allegation of any action that could impact the outcome of any

election during Secretary

Grimes' tenure as chief state election officer. After years of investigation by the Attorney General, OG : 000002 of

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no criminal charges were brought, and the matter was referred to the Ethics Commission.

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The only allegations pursued by the Ethics Commission are that Secretary Grimes allegedly acted unethically in accessing public information in the VRS system by downloading voter information on to a thumb drive when she was a candidate for re-election, and that she improperly shared information on new voter registration for certain House districts at the request of another constitutional officer, the Speaker of the House, without requiring a formal Open Records request or charging a fee.

While the Commission's Final Order does not dispute that Secretary Grimes would have had lawful access to the VRS data in the scope of her public duties, the crux of Count I is that she "downloaded the lists for a private purpose, without paying the mandatory fees or submitting sworn forms required by law." *See Ex. A*, at 2, *Pet'r's Pet. On Appeal*. However, the Commission failed to expressly allege what "private purpose" was being served by placing VRS data on a flash drive, and what that "private purpose" could have been is entirely unclear to the court. It further remains unclear what "established process of government" was violated by Grimes' act of downloading VRS data onto a flash drive. This lack of detail relating to what "established government process" was violated and how using a flash drive constitutes a violation of KRS 11A

casts doubt that the Commission met its standard to prove Count I by clear and convincing evidence. It is undisputed that the Secretary of State is designated by statute as the “chief election official of the Commonwealth.” KRS 117.015(a)(2). It is unclear how the Commission can penalize the Commonwealth’s chief election official for having access to voter data, or downloading it to a flash drive when it has failed to identify any illegal or unethical use of such data.

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Further, the crux of Count II in the Commission’s Final Order is whether Grimes was actually responding to an Open Records Request about VRS data, and further whether voter lists

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can be distributed as part of those Open Records Requests without the payment of a fee. *See Ex. A*, at 2, *Pet’r’s Pet. On Appeal*. The Commission accuses Grimes of using her position to direct subordinates to download and distribute customized VRS lists without paying required fees. *Id.* However, the Commission fails to point to any “established process of government” that requires payment of fees for the data from the VRS data identified in these charges.

## INTRODUCTION

The Final Order of the Ethics Commission sets forth each of the alleged violations of KRS 11A.020(1)(a) and (d):

### Count I

Respondent is a public servant that used her position and influence to download voter lists for a personal purpose without following the processes of government. Doing so conflicted with and was in derogation of the public interest which mandates that officials apply the processes of government as they are prescribed by the legislature and collect fees due the Commonwealth under the laws of Kentucky. Respondent's actions involved a substantial conflict between her personal interest and her duties in the public interest. Respondent acted knowingly because she directed the actions that violated the law, and she is charged with knowledge of the law. Additionally, her culpability is not negated, nor the blameworthiness of her actions mitigated, by any good faith misunderstanding of

the law.

### Count II

Respondent is a public servant that used her position and influence to improperly download and distribute voter lists without following the processes of government. She did so in order to confer a benefit and advantage to others, to wit, access to information to which they were not entitled without submitting the requisite forms and paying the mandatory fees. Conferring that benefit and advantage to others by circumventing the processes of government accomplished her own private interest rather than the interest of the public. Doing so conflicted with and was in derogation of the public interest which mandates that officials apply the processes of government as they are prescribed by the legislature and collect fees due the Commonwealth under the laws of Kentucky. Respondent acted knowingly because she directed the actions that violated the law, and she is

charged with knowledge of the law. Additionally, her culpability is not negated, nor the blameworthiness of her actions mitigated, by any good faith misunderstanding of the law.

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*See Ex. A, at 17, Pet'r's Pet. On Appeal.* The Commission's description of the Counts is summarized as follows in the Final Order:

**Count I** alleges that **Respondent used her position to direct subordinates to use state time and resources to download and store information** from the Voter Registration System (hereinafter, "VRS") onto **flash drives for a personal, private purpose without following the established processes of government to obtain the information.**

*See Ex. A, at 2, Pet'r's Pet. On Appeal.* (Court's bolded emphasis) Additionally:

**Count II** alleges that **Respondent used her position to direct subordinates to use state time and resources to download and distribute customized voter lists without paying the required fees.** Again, Respondent admits downloading and distributing customized voter lists free of charge, but claims it was in response to an Open Records request and fees were not required. The key **question is whether voter lists can be distributed via the Open Records Act without payment of fees and whether Respondent in fact was processing an Open Records request.**

*See Ex. A, at 2, Pet'r's Pet. On Appeal.* (Court's bolded emphasis).

The Court will refer to Count I as the allegation primarily concerned with using the VRS flash drives for an unspecified personal, private purpose outside the “established processes of government.” The Court will refer to Count II as the allegation mostly concerned with the non-payment of fees and whether Grimes’ actions directing her subordinates to distribute the VRS data free of charge was allowed under the Open Records Act (“ORA”). The Commission’s ruling to sustain both Count I and II was based on the notion that KRS 11A.020(1)(a) and (d) were violated with respect to each count.<sup>2</sup>

*See Ex. A, at 18, Pet’r’s Pet. On Appeal.*

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<sup>2</sup>In other words, Count I does not only refer to the alleged violation of KRS 11A.020(1)(a) and Count II does not exclusively refer to a violation of KRS 11A.020(1)(d). Count I was sustained based on the violation of KRS 11A.020(1)(a) and (d), while Count II also relied on findings of violations of KRS 11A.020(1)(a) and (d). Therefore, it would *not* be appropriate to refer to Count I as the violation of KRS 11A.020(1)(a) or Count II as the violation of KRS 11A.020(1)(d).

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KRS 11A.020(1)(a) and (d), relied upon by the Commission, provide as follows:

- (1) No public servant, by himself or through others, shall knowingly:
  - (a) Use or attempt to use his influence in any matter which involves a substantial conflict between his personal or private interest and his duties in the public interest; ...
  - (d) Use or attempt to use his official position to secure or create privileges, exemptions, advantages, or treatment for himself or others in derogation of the public interest at large.

*See Ex. A, at 3, Pet’r’s Pet. On Appeal.* The Commission further relies on KRS 11A.005 as useful in interpreting and applying the public policy behind KRS 11A.020(1)(a) and (d), pointing to the KRS 11A.005 language requiring:

- (a) A public servant be independent and impartial;
- (b) Government policy and decisions be made through the established processes of government;

- (c) A public servant not use public office to obtain private benefits; and
- (d) The public has confidence in the integrity of its government and public servants.

*See Ex. A*, at 3, *Pet’r’s Pet. On Appeal*. The Commission also notes it has the burden to prove by clear and convincing evidence<sup>3</sup>that Secretary Grimes violated KRS 11A.020(1). *Id.*

Grimes asserts that the Commission’s Final Order violates the five-year limitations period in KRS §413.120(2), which applies to liability created by statute. The Commission argues it is not subject to any statute of limitations. Secretary Grimes further argues the Commission’s order was made without the support of substantial evidence in the record, and it is erroneous, arbitrary, and capricious by not being “supported by clear and convincing evidence or other proof of any violation of **KRS 11A.020(1)(a) or (d)**, as required by **KRS 11A.100(3)**.” *See Pet’r’s Pet. On*

*Appeal, supra* at 3, ¶ 5. (Court’s bolded emphasis) Former Secretary Grimes also warns of the chilling effect the Commission’s Final Order would have on “the willingness of executive branch

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chilling effect the Commission’s Final Order would have on “the willingness of executive branch

<sup>3</sup>Under KRS 11A.100(3), the Commission must make a finding there has been “clear and convincing proof of a violation of this chapter.”

employees to disclose public records in response to requests for them, as intended by the Kentucky Open Records Act, KRS 61.870, *et seq.*” *Id.* at ¶ 6.

The Commission, in its Brief, explained that the:

Commissioners adopted the Hearing Officer’s Recommended Order, finding Alison Lundergan Grimes was in violation of the two remaining counts, but increased the penalty to \$5,000 for each violation for a total of \$10,000 for both counts.

*See Appellee's Br.*, at i. It rebuts Grimes' theory of the case that the Commission acted outside the permissible statute of limitations by asserting that "the statute of limitations in KRS 413.120 was never meant to be used for disciplinary proceedings in administrative law." *Id.* at ii. The Commission's theory that KRS 413.120 is inapplicable to the Commission's administrative proceedings is based on the legislature's decision not to impose a specific statute of limitations in the text of KRS 11A.020. *Id.* In the alternative, the Commission argues that if the Court rules KRS 413.120 does apply to these proceedings, that the Commission was compliant "as the cause of action did not accrue until the Commission learned of Grimes's actions through a complaint in 2017." *Id.* It is undisputed that the conduct that gives rise to the Commission's charges all took place prior to November 5, 2016, over 5 years prior to the Commission's filing of the administrative complaint.

For reasons outlined further below in this Order, the Court **GRANTS the Petitioner's, Alison Lundergan Grimes, Petition on Appeal and REVERSES the Commission's Final Order.**

### **FACTUAL BACKGROUND**

This case centers on former Secretary Grimes' access of VRS data managed by the State Board of Elections (SBE), in her role as Chief Election Officer of the state. *See Appellee's Br., supra* at

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1. According to the Commission, registration data "may be subject to public inspection

or copying pursuant to the Kentucky Open Records Act, KRS 61.870 to 61.884, and KRS 116.095, but receiving information is not instantaneous, nor is it guaranteed." *See Appellee's Br., supra* at 1. Under the Commission's theory of the Kentucky Open Records Act ("ORA"),



requests for VRS data are not guaranteed because they contain “all the data of registered voters in Kentucky, including one’s name, address, political party affiliation, birth year, and social security number.” *Id.* Consequently, the Commission maintains that to protect the personal data of over three million Kentuckians, “the SBE is tasked with fielding Open Records Requests and determining whether the information can or should be made available to the requesting party.”

*Id.*

As part of the SBE’s procedure to ensure the protection of Kentuckians’ voter data, the Commission asserts that “Any person requesting voter lists must state under oath on Form SBE 84 their name and the legal basis under which he or she qualifies to have access to them.” *Id.* This is because the Form SBE-84 “creates a public record and provides a paper trail of those requesting access to these documents.” *Id.* Additionally, the Ethics Commission asserts the Form SBE-84 ensures that only those qualified to receive VRS data are given access, such as qualified candidates, political parties, and committees which advocate for or against an amendment or public question. *Id.* Ultimately, the Commission emphasizes that every request for VRS data must be submitted to the SBE. *Id.* The Commission fails to cite any statute or administrative regulation that supports this position, and it is undisputed that Secretary Grimes had a legal right to access this information in her capacity as chief election officer of the state. *See* KRS §117.025(3)(a) and KRS §117.015(2)(a).

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The Commission highlights that under KRS 117.025(3)(i), the SBE shall furnish at a reasonable price any and all *precinct lists* to qualified candidates, political party committees, or

committees advocating or opposing an amendment or public question; and that the SBE may furnish precinct lists to others at the board’s discretion, also at a reasonable price. *See Appellee’s*

*Br., supra* at 2. However, the Commission also cites to 31 KAR 3:010, Section 3, to emphasize that the SBE shall not furnish precinct lists to persons who intend to use them for commercial purposes. *Id.* There is no allegation that Grimes provided such information to anyone for a commercial purpose. Moreover, it is clear that *precinct lists* identified in KRS 117.025(3)(i) is only one subset of data included in the voter registration system. There is no allegation that Secretary Grimes improperly accessed or shared *precinct lists*.

The Commission argues Grimes was aware “of this process”, even though the procedure referenced by the Ethics Commission is not set forth in any statute or regulation. *Id.* While it is undisputed that the Open Records Act and the SBE’s regulation provide a legal framework for public access to voter information compiled in *precinct lists*, the Ethics Commission complaint is based on the assumption that those are the exclusive legal (or ethical) means to access any information in the voter registration system. The Court believes this is an assumption unsupported by the law or facts in this case.

The Ethics Commission relied on Steve Spisak, an independent contractor hired by the Secretary of State’s Office, to verify that “requests for information to be placed on the flash drives were made around the time of the primary to Grimes’s re-election campaign.” *Id.* (internal citation to ROA-1077 to 1078). Mr. Spisak told the Ethics Commission in an interview that either Secretary Grimes, or Deputy Secretary Lindsey Hughes Thurston, told him that the Grimes campaign was unable to understand the information placed on the flash drives. *Id.* Consequently, OG : 000009 of

when the data was three months old, Spisak chose to update the information as part of a requested reorganization. *Id.* While the first round of data was given to “other candidates,” only

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Grimes's received the re-organized and more easily accessible data. *See Appellee's Br., supra* at 2. There is no evidence that any other campaign had problems accessing the information, or sought assistance in interpreting the data provided.

Later, Secretary Grimes asked Spisak to create and extract specific lists of newly registered voters organized by House precinct within the VRS, for the purpose of distributing the information to specific Democratic Party candidates for the House of Representatives. This request was made informally through the office of the Speaker of the House. *Id.* at 3. Here, the Commission alleges Grimes "was aware she was bypassing the governmental disclosure process as she had previously filed for and paid the required \$450.00 to obtain statewide voter lists as a candidate." *Id.*<sup>4</sup> Again, the Commission incorrectly assumes the statutory fees for *precinct lists* apply to all other requests for voter data.

Grimes rebutted that Count I, which related to the placement of VRS data on flash drives, "did not allege any use of state time and resources to "re-organize" any data for Secretary Grimes's own political benefit," further explaining:

The evidence of record reflects that during the same 2015 election cycle (when Secretary Grimes was serving as Secretary State and also running for re-election to that office), her campaign paid \$450.00 to the State Board of Elections for a CD-ROM of statewide precinct lists – which negates any inference that her campaign would have needed to obtain the same information from Mr. Spisak.

*See Pet'r's Reply Br., supra* at 11, fn. 8. (internal citation to ROA 001246-48) Grimes further rebuts the notion she violated KRS 11A.020(1)(d) by criticizing that:

Nevertheless, the Commission continues to maintain that because her campaign had paid \$450.00 to the State Board of Elections for a CD-ROM of *statewide*

*"precinct lists"* that Secretary Grimes "had to know" that any request for any

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<sup>4</sup>*See Ex. A*, at 12, *Pet'r's Pet. on Appeal*. The Commission's Final Order, attached as Exhibit A to Grimes' Petition on Appeal, makes an undisputed finding she previously paid the \$450 fee as a candidate.

voter data in any form required completion of a form SBE-84 and payment to the State Board of Elections – and that by providing requested voter data in electronic form without charge, she knowingly violated KRS 11A.020(1)(d).

*See Pet'r's Reply Br., supra* at 13, fn. 10.

The Commission further alleges that all the requests made to Spisak “were made around an election, with the contractor understanding his assistance re-organizing the data on these thumb drives was to make information understandable to members of Grimes’s campaign.” *See Br. for Appellee, supra* at 21. The Commission went on to explain that Spisak “was asked to help Grimes’s campaign by taking unorganized fields and translate information into something readable. This is before the Secretary asked Spisak to download specific lists of newly registered voters, with the purpose of having state workers distribute that information to selected Democratic Party candidates.” *Id.*

The Commission further explained that the difference between the data Grimes received and the data intended for the other candidates:

Spisak was clear in his interview that requests for new downloads came from Grimes and others asking on Grimes’s behalf around a primary or general election. This included the primary and general elections during Secretary Grimes’s own re-election campaign. Re-organization was provided for Grimes specifically, where other candidates would have to seek this service out themselves.

*Id.* at 22.

There is no allegation that any other candidate or campaign, Republican or Democratic, made a similar request for data that was denied. There is no allegation that any of the data provided to the Grimes campaign was not in the public domain.

Finally, Mr. Spisak explained that there was a third request made to him by Deputy

Secretary Thurston which sought the same thing given to Grimes' campaign, and that along with

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the request he was given a thumb-drive onto which to place the data. *See Br. for Appellee, supra* at 3. In other words, for this charge related to VRS data Mr. Spisak placed on flashdrives, it appears that Secretary Grimes lawfully accessed the data the same way any other candidate did but her campaign had difficulty understanding the way the data was formatted, and Mr. Spisak (a contractor for the Secretary of State) helped them by re-formatting the information in a manner more easily understood. One would expect any state employee or contractor in charge of such requests to help any campaign in this matter, and there is no indication that Secretary Grimes was personally involved in this request, or that she pressured Mr. Spisak or used her official authority in any way in connection with this request. Likewise, there is no allegation that any other candidate made a similar request of Mr. Spisak and was denied the same assistance.

For these three requests – first by Secretary Grimes around the time of her primary in her re-election campaign, second by Secretary Grimes or Deputy Secretary Thurston to provide re-organized data more easily understood, and third by Deputy Secretary Thurston for the same re-organized data that was provided to Grimes' re-election campaign – the Ethics Commission crucially alleges, “No payment was provided for any of these specifically crafted downloads.” *See Br. for Appellee, supra* at 3. Crucially, IT IS UNDISPUTED THAT SECRETARY GRIMES, IN HER CAPACITY AS A CANDIDATE, REQUESTED THE PRECINCT LISTS AS PROVIDED BY LAW, AND PAID THE REQUIRED FEE.<sup>5</sup> There is no citation to any statute or administrative regulation that imposes a fee for downloading public data, other than *precinct lists*, onto a thumb drive.

<sup>5</sup>*See Ex. A*, at 12, *Pet'r's Pet. on Appeal*. Grimes “in the past, as a candidate, paid the required minimum fee (at that time \$450.00) to obtain statewide voter lists.”

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Separately from these requests, Grimes also asked Spisak “to extract and create specific lists of newly registered voters organized by House precinct from the VRS, with the purpose of distributing that information to selected Democratic party candidates.” *See Br. for Appellee, supra* at 3. (internal citation to ROA 001078 – 001080). It appears from the record that Secretary Grimes made this request in response to a request from the Speaker of the House. The Ethics Commission maintains that this data on new voters could not be provided, except through a formal Open Records request. Again, there is no statute or administrative regulation that supports the Commission’s legal conclusion that this is “an established process of government” that created a mandatory prohibition that prevented Secretary Grimes from sharing this public information.

This additional request, which the Court will designate as the fourth relevant request to Spisak, is especially crucial to the case of the Ethics Commission because it is the basis for their theory of the case that “Secretary Grimes was aware she was bypassing the governmental disclosure process as she had previously filed for and paid the required \$450.00 to obtain statewide voter lists as a candidate.” *Id.* (internal citation to ROA-001190; KRS 117.025(3)(i), 31 KAR 3:010, and SBE Form-84) The Commission takes issue with the fact that Grimes provided this information to political colleagues “without advising them they needed to pay or requiring them to file the public disclosure on Form SBE-84.” *Id.*

This action not to charge a fee or require the filling out of the Form SBE-84 by the recipient Democratic Party candidates, in the eyes of the Ethics Commission, constituted the

or advantage to which the candidates were not entitled.” *Id.* Here, the Ethics Commission claims that the consequence of Secretary Grimes “side-stepping the respective ORR and statutory VRS

information request process” was to deprive the public of notice that public information had been made available to these recipients, and the purposes for which the recipients intended to use it.

*See Br. for Appellee, supra* at 3. The Ethics Commission further contends that the contents of the requested voter information are not subject to the Open Records Act, but instead may only be released under KRS 117.025. *Id.*

The Commission advances novel arguments based on its own subjective understanding of the internal policies of the SBE rather than on any statute or administrative regulation. First, as noted in the preceding paragraph, the Commission alleged Grimes side-stepped the ORR and statutory VRS information request process. *Id.* However, in the very next breath, the Commission claims the information that Grimes caused to be received “was not obtainable under the Open Records Act; such information was only obtainable pursuant to KRS 117.025.” *Id.* This begs the question which position the Commission advances? Are they alleging Grimes violated an Open Records process, or do they assert the entire Open Records process is inapplicable in light of the Commission’s preferred reliance on KRS 117.025? The Commission alludes to the public’s interest in public officials collecting fees and that “the processes of government are applied equally to all as written.” *Id.*

The Commission’s order ignores the basic question: is the VRS data at issue public data? Is there any statute or regulation that prohibits the release of this data without a formal Open Records request or written request to the SBE? Ultimately, the Commission argues Secretary Grimes was statutorily obligated under KRS 11A.005(b) and (c) “to use the established processes

of government for government policy and decisions and not to obtain private benefits for herself OG : 000014 of

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or others.” *Id.* at 3-4. Yet if the information is public data, it is unclear how it can be unethical to provide public data to any citizen who requests it.

Here, Grimes explains that:

The evidence of record tendered to the hearing officer also included the testimony of former Director of Elections Mary Sue Helm, who testified that the Secretary of State’s Office regularly accessed the VRS to respond to inquiries from voters and candidates. Moreover, the evidence of record reflected the testimony of Katie Gabhart, former General Counsel to the SBE, that the SBE provided voter registration information in response to open records requests, including “home address ... and voting history.” Ms. Gabhart also testified that in her experience, such requests had been made informally by email.

*See Pet’r’s Pet. on Appeal, supra* at 16. The Court finds that this evidence from Mary Sue Helm and Katie Gabhart persuasively demonstrates that Grimes’ actions under scrutiny were fully consistent with the Secretary of State’s Office’s historical practice in accessing VRS data and responding to public inquiries. This evidence undermines the Commission’s ruling that the “established processes of government” were violated. The Commission appears to the Court to base its charges on internal policy (about how to respond to public inquiries for VRS data), not clear language derived from a statute or promulgated regulation. KRS 11A.020 contains no



express references to flashdrives and fees charged for Open Records requests. The

Commission's attempt to extrapolate a violation of KRS 11A.020 from a deviation of its faulty understanding of another agency's internal policy is fatal to the charges.

The Ethics Commission cannot "circumvent the legislative process by administrative fiat." *See Kentucky Exec. Branch Ethics Comm'n v. Wooten*, 465 S.W.3d 453, 456 (Ky. Ct. App. 2014) Because the Ethics Commission bases its Final Order on internal policy, and not statute or regulation, the Court could rule the final agency decision was arbitrary and without the support of substantial evidence. KRS 13A.100, 13A.120. While the State Board of Elections has the authority to adopt a regulation that reflects the Ethics Commission's belief that all public information requests for VRS data must be made in writing, using a SBE form, the record is clear that no such administrative regulation has ever been adopted. As noted by the Court of

Appeals, "an administrative agency is prohibited from modifying or expanding any statute of administrative regulation by internal policy, memorandum or other action and any attempt to do so is unenforceable, null and void." *Commonwealth, Education & Humanities Cabinet, Dept. of Educ. v. Gobert*, 979 S.W.2d 922, 926 (Ky. App. 1998).

However, the Commission's Final Order also failed to comply with the applicable statute of limitations. At the time the Commission's administrative complaint was filed, over five years had elapsed since any of the conduct that forms the basis of the administrative complaint.

Grimes maintains that the Commission's preliminary investigation always centered on those allegations raised by Mr. Selph related to whether she "influenced a contract computer programmer to improperly make complete copies of the Voter Registration System (VRS)," which then allegedly "were placed on flash drives and given to [he]r subordinate for [he]r use."

*See Pet'r's Pet. on Appeal, supra* at 5, ¶ 12.

Concurrent with the Commission's investigation, correspondence dated September 27, 2018, from the Office of then-Attorney General Andy Beshear notified Garrard County Attorney Mark Metcalf of his "Appointment as Independent Counsel in the Matter of Alison Lundergan Grimes." *Id.* at 5-6, ¶ 14. The Metcalf investigation originated from a letter including allegations made by another employee of the SBE, Jared Dearing. *Id.* at 5-6, ¶ 14. Grimes explains that the central focus of the Dearing allegations – and the focus of the ensuing Metcalf investigation – "was the allegation that Secretary Grimes and her staff had improperly accessed the VRS, the electronic database of registered voters that Secretary Grimes was responsible for maintaining pursuant to federal law, and for which she was expressly authorized to "obtain immediate electronic access.'" *Id.* at 6, ¶ 15. OG : 000016 of 00003<sup>3</sup>

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The Court takes judicial notice of the many problems associated with the Metcalf investigation, especially this Court's earlier rulings related to questions of whether there was a valid authority to appoint a special prosecutor and the many issues related to impermissible prosecutorial overreach. *See Pet'r's Pet. on Appeal, supra* at 6-8, ¶ 17 – 21. Grimes crucially notes that while the Metcalf investigation ultimately terminated in or around July 2021 – over six years after the 2015 primary for Secretary Grimes' re-election – "the Commission inexplicably delayed in filing its Initiating Order and Formal Complaint in the underlying proceeding until November 18, 2021." *Id.* at 8, ¶ 21 – 22.

The Court further notes that the Commission had long been on notice of the substance of the Metcalf investigation before it ended in July 2021. *Id.* at 8, ¶ 21. The Commission is charged

with awareness of the Metcalf investigation based on the dual roles of Meena Mohanty, who joined Mr. Metcalf’s investigation as deputy special prosecutor while also serving as Deputy General Counsel for the Commission. *Id.* at 6, ¶ 16. It further appears that Ms. Mohanty served simultaneously as a criminal prosecutor and counsel for the Commission between October 2018 and May 2021. *Id.*

Grimes rebuts Count I, the allegation primarily concerned with using the VRS flash drives for a personal, private purpose outside “the established processes of government” (which the Commission alleges is required for one seeking to obtain the voter registration information) *Id.* at 8, ¶ 23. Petitioner Grimes argues with respect to Count I, the Commission “failed to allege, among other details, the time, place or manner of any purported violation of Chapter 11A by Secretary Grimes – or the “personal, private purpose” for which Secretary Grimes had allegedly  
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obtained any information from the VRS.” *Id.*

Likewise, in Count II Grimes refutes the allegation that:

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“prior to the November 2016 election, [Secretary Grimes] used her position to direct her subordinates to use state time and resources to engage in political activities,” by “direct[ing] an independent contractor of her agency to create lists of newly registered democratic voters and then directed a subordinate employee to email the lists to some democratic candidates,” and that, “[t]he lists were created using the Voter Registration System and were provided to the candidates at no cost in a format that is not provided by law.”

*See Pet’r’s Pet. on Appeal, supra* at 9, ¶ 24. In rebutting the allegations contained in Count II, Grimes also argued the “Commission further asserted erroneously that “[b]y statute and regulation, candidates must pay a fee to receive this information,” and claimed that “[t]hese facts

constitute violations of KRS 11A.005 and KRS 11A.020(1)(a) and (d).” *Id.*

With respect to Count I, Grimes admitted “she asked state workers to download information from the Voter Registration System onto flash drives for her use,” but denied “she made such request for any purpose other than performing her official duties as Secretary of State and Chief Election Official of the Commonwealth.” *Id.* at 9. (internal citation to Verified Answer to Initiating Order and Formal Complaint dated December 3, 2021, at ¶ 11.) Beyond this, Grimes affirmatively denied that, in her role as Secretary of State and Chief Election Official, she was obligated under KRS 11A.020 or any other Kentucky law to follow another formal process to obtain the requested information. *Id.*

Regarding Count II, Grimes expressly denied that “prior to the November 2016 election, she used her position to direct subordinates to use state time and resources to engage in political activities.” *Id.* (internal citation to Verified Answer to Initiating Order and Formal Complaint

dated December 3, 2021 ¶ 16) She specifically denied that “she personally directed an independent contractor of her agency to create lists of newly registered voters in an effort to prepare for the 2016 election, but she admit[ted] that she later requested that such lists be provided electronically to candidates who had requested them.” *Id.* at 9-10. (internal citation to

Verified Answer to Initiating Order and Formal Complaint dated December 3, 2021, at ¶ 17) Grimes admitted that the relevant lists “were created using the Voter Registration System and were provided to candidates who had requested them at no cost.” *Id.* at 10. (internal citation to Verified Answer to Initiating Order and Formal Complaint dated December 3, 2021, at ¶ 18.) Last, though, Grimes expressly denied both that “the lists were provided in a format not provided by law” and that “by statute and regulation, candidates must pay a fee to receive this

information.” *See Pet’r’s Pet. on Appeal, supra* at 10. (internal citation to Verified Answer to Initiating Order and Formal Complaint dated December 3, 2021, at ¶ 18 – 19)

Much of the dispute in this case arises from the reality that the administration of elections is the fundamental duty of the Secretary of State. It is her job to know and understand voter registration data. Accordingly, any action taken by the Secretary of State can be deemed “political” and subjected to criticism by partisan opponents. Here, the question is whether the Secretary of State was exercising legitimate discretion in gathering and sharing public information regarding voter information, or whether she violated a well established duty rooted in statute or administrative regulation. While reasonable people may disagree on this issue, this Court finds that to sustain a violation of the Executive Branch Code of Ethics, the Commission must prove a violation of statute or administrative regulation. Allegations of misconduct based on the Commission’s subjective ethical judgment, or its subjective understanding of SBE internal policy, are not sufficient to sustain a finding that Grimes violated KRS 11A.020. They have failed to show that Secretary Grimes’ actions violated any statute or administrative regulation.

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## **BURDEN OF PROOF**

### **KRS 13B JUDICIAL REVIEW OF A FINAL AGENCY ORDER**

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Kentucky courts are bound to follow the criteria for judicial review of an agency decision in KRS Chapter 13B. Pursuant to KRS 13B.150(2),

The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the final order or it may reverse the final order, in whole or in part, and remand the case for further proceedings if it finds the agency’s final order is:

- (a) In violation of constitutional or statutory provisions;
- (b) In excess of the statutory authority of the agency;

- (c) **Without support of substantial evidence** on the whole record;
- (d) **Arbitrary**, capricious, or characterized by abuse of discretion;
- (e) Based on an ex parte communication which substantially prejudiced the rights of any party and likely affected the outcome of the hearing;
- (f) Prejudiced by a failure of the person conducting a proceeding to be disqualified pursuant to KRS 13B.040(2); or
- (g) Deficient as otherwise provided by law.

(emphasis added). In reviewing an agency decision, this **Court may only overturn** that decision if the agency acted arbitrarily or outside the scope of its statutory authority; if the agency applied an incorrect rule of law; or **if the decision itself is not supported by substantial evidence on the record**. See *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 301 (Ky. 1972); see also *Kentucky Board of Nursing v. Ward*, 890 S.W.2d 641, 642-43 (Ky. Ct. App. 1994).

“Judicial review of an administrative agency’s action is concerned with the question of arbitrariness.” *Commonwealth, Transportation Cabinet v. Cornell*, 796 S.W.2d 591, 594 (Ky. Ct. App. 1990), quoting *Am. Beauty Homes Corp. v. Louisville & Jefferson County Planning & Zoning Comm’n*, 379 S.W.2d 450, 456 (Ky. 1964). Arbitrariness means “clearly erroneous, and by ‘clearly erroneous’ we mean unsupported by substantial evidence.” *Crouch v. Police Merit Board*, 773 S.W.2d 461, 464 (Ky. 1988). Substantial evidence is “evidence of substance and relevant

consequences, having the fitness to induce conviction in the minds of reasonable men.” *Fuller*, OG : 000020 of

481 S.W.2d at 308.

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“The trier of facts in an administrative agency may consider all the evidence and choose the evidence he believes.” *Bowling v. Natural Resources and Environmental Protection Cabinet*, 891 S.W.2d 406, 410 (Ky. Ct. App. 1994). Upon review of a denied application for benefits, the reviewing court must accept the Board’s findings of fact as true if they are supported by substantial evidence. *Id.* at 409. A reviewing court must be guided by the principle that the “trier of facts is afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses appearing before [it].” *Fuller*, 481 S.W.2d at 308. So long as the agency’s findings are supported by substantial evidence, the Court must defer to the agency, even if there is conflicting evidence. *Kentucky Comm’n on Human Rights v. Fraser*, 625 S.W.2d 852, 856 (Ky. 1981).

If it is determined that the agency’s findings are supported by substantial evidence, the next task is to assess whether the agency has correctly applied the law to the facts as found. *Kentucky Unemployment Ins. Comm’n v. Landmark Cmty. Newspapers of Kentucky, Inc.*, 91 S.W.3d 575, 578 (Ky. 2002). An agency’s conclusions of law are reviewed *de novo*. See *Aubrey v. Office of Attorney General*, 994 S.W.2d 516, 519 (Ky. Ct. App. 1998). When an administrative agency’s findings are supported by substantial evidence, and when the agency has applied the correct rule of law, these findings must be accepted by a reviewing court. *Ward*, 890 S.W.2d at 642.

Finally, case law is helpful in guiding the Court on its analysis of an arbitrary agency action. The Court’s analysis is bound by §2 of the Kentucky Constitution, which prohibits an administrative agency from exercising arbitrary power. *Cabinet for Health and Family Services v. Appalachian Regional Healthcare, Inc.* 606 S.W.3d 623, 632 (Ky. 2019). Specifically, OG : 000021 of 00003<sup>3</sup> Kentucky courts look to three important factors in evaluating whether an agency acted arbitrarily. *Commonwealth Transportation Cabinet Department of Vehicle Regulation v. Cornell*,

796 S.W.2d 591, 594 (Ky. App. 1990) First, judicial review centers on, “whether the agency acted within the constraints of its statutory powers or exceeded them.” *Id.* at 594. (internal citation omitted) Second, the Court should **scrutinize Agency procedures** to see if the party affected by an administrative order was **afforded procedural due process**, meaning the party was given a meaningful opportunity to be heard. *Id.* at 594. Last, judicial review, “...must **determine whether the agency’s action is supported by substantial evidence.**” *Id.* at 594. Importantly, if any of the three factors fails, then a reviewing court has the authority to find the agency’s action was arbitrary. *Id.* at 594.

### **KRS §413.120 – STATUTE OF LIMITATIONS**

The relevant statute of limitations, KRS §413.120, provides as follows:

413.120 Actions to be brought within five years.

The following actions shall be commenced within five (5) years after the cause of action accrued:

(2) An action upon a liability created by statute, when no other time is fixed by the statute creating the liability.

The instant case implicates KRS §413.120(2), which Secretary Grimes argues controls the timely prosecutions of the alleged KRS §11A.120(1)(a) and (d) violations.

### **KRS §11A.020 – PUBLIC SERVANT PROHIBITED CONDUCT**

The Court produces the salient portions of KRS §11A.120(1)(a) and (d):

11A.020 Public servant prohibited from certain conduct -- Exception --  
Disclosure of personal or private interest.

(1) No public servant, by himself or through others, shall knowingly:

(a) Use or attempt to use his influence in any matter which involves a substantial conflict between his personal or private interest and his duties in the public interest;

(d) Use or attempt to use his official position to secure or create privileges,

exemptions, advantages, or treatment for himself or others in derogation of the public interest at large.



## ANALYSIS

The Commission asserts that violations of KRS 11A.020 are not subject to *any* statute of limitations. *See Appellee's Br., supra* at 6. It rebuts Grimes' argument that the statute of limitations embodied in KRS 413.120(2) applies to this action for civil liability arising from a statute. *Id.* The Commission concedes that KRS 413.120(2) imposes a five-year limitation, after accrual of the cause of action, for civil liabilities created by statute when no other time is fixed by the statute creating the liability. *See Appellee's Br., supra* at 6. Instead, the Commission boldly asserts that it is exempt from any statute of limitations for actions brought under KRS 11A.020. *Id.*

The Commission bases its argument that it is not subject to the KRS 413.120(2) statute of limitations on *Nat. Res. And Envtl. Cabinet v. Ky. Ins. Guar. Ass'n*, 972 S.W.2d 276 (Ky. App. 1997). ("KIGA") *Id.* at 8. The Commission misconstrues *KIGA*. The Court in *KIGA* applied a general statute of limitations for *civil actions* to an *administrative enforcement action*, almost identical to the situation here. Like the present case, *KIGA* held that an administrative action to impose liability created by a statute is subject to statutes of limitations expressed in KRS §413.

The Commission ignores the central holding of *KIGA*, that KRS §413 statute of limitations fully apply to administrative proceedings. Here, there is no question that the liability the Ethics Commission seeks to impose was created by statute, and there is no common law analog to the liability the Ethics Commission seeks to enforce. Further, the Ethics Commission employs a quasi-judicial process that requires the Commission to file a formal complaint, and

KRS 11A.100.

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The Court in *KIGA* did note that “not all administrative proceedings are court proceedings to which statutes of limitations apply.” *Id.* However, the category of administrative actions subject to the statutes of limitations discussed in *KIGA* are very similar to the proceedings of the Ethics Commission. Here, as in *KIGA*, the administrative proceeding was a quasi-judicial proceeding, with notice and hearing, presided over by a hearing officer, where the agency acted in a quasi-judicial capacity, where enforcement of a statutory mandate was adjudicated, and where the agency attempts to impose a financial penalty.

Upon the Court’s independent review of the *KIGA* case, it is clear the statute of limitations in KRS 413.120(2) applies to administrative proceedings, like this one, initiated by the Executive Branch Ethics Commission. The *KIGA* case dealt with the issue of whether a seven-year statute of limitations embodied in KRS 413.320(3) applied to claims against the Kentucky Insurance Guaranty Association (“*KIGA*”) arising from the insolvency of sureties who issued performance bonds. *See KIGA, supra* at 277. The Natural Resources and Environmental Protection Cabinet challenged the Franklin Circuit Court and Court of Appeals decisions that time-barred several claims the Cabinet had against *KIGA* because the Cabinet failed to initiate administrative proceedings within the seven-year statute of limitations in KRS 413.320(3). *See KIGA, supra* at 277-278.

In *KIGA*, the Cabinet there relied heavily on the *Metts* case (internal citation to *Metts v. City of Frankfort*, Ky. App., 665 S.W.2d 318, 319 (1984)) to argue that the limitations statutes in KRS Chapter 413 only apply to judicial, and not administrative, actions.<sup>6</sup>*Id.* at 279. The *KIGA* Court rejected the Natural Resource Cabinet's reliance on *Metts* as misconstruing the takeaways OG : 000024 of

from that case, especially because the facts in *Metts* were so easily distinguishable from those in

<sup>6</sup>The Defendant Ethics Commission, here, advances an almost identical argument.

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*KIGA*, where an administrative proceeding was available to the Cabinet after it issued notices of noncompliance, but where it failed to do so within the applicable seven-year statute of limitations. *See KIGA, supra* at 278-279.

Crucially, the *KIGA* Court explained that the Natural Resource Cabinet's hearing officers:

Have quasi-judicial powers; they make findings of fact which are binding on appeal to the circuit and appellate courts unless not supported by substantial evidence. They are granted authority by statute to impose fines, revoke permits and order the forfeiture of performance bonds. Clearly the *Metts* case did not require the court to consider the applicability of statutes of limitations to administrative proceedings such as these quasi-judicial proceedings available to the Cabinet.

*See KIGA, supra* at 279. Here, the Ethics Commission has hearing officers who also possess quasi-judicial powers that make the *KIGA* analysis exactly on point. This Ethics Commission proceeding was brought to impose a statutory liability with no express statute of limitations, making it a proceeding plainly controlled by KRS 413.120(2).

The Court is persuaded by the arguments of Secretary Grimes that KRS 413.120 applies a

five-year statute of limitations to actions initiated by the Respondent Ethics Commission.

Clearly, KRS 11A is the basis on which the Commission brings the instant charges against Secretary Grimes, and it is rather obvious these Ethics charges qualify under KRS 413.120(2) as an “Action upon a liability created by statute, when no other time is fixed by the statute creating liability.” KRS 11A creates Ethics liability by statute and does not include a fixed statute of limitations in the language of the enactment, squarely placing it within the scope of the Legislature’s previous enactment in KRS 413.120.

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The Court notes that the Ethics Commission, recognizing its failure to initiate an administrative action within the 5 year limitations period, also argues that its cause of action did

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not accrue until after it received a complaint in 2017. However, the *KIGA* Court provided constructive guidance that “a cause of action accrues when the Cabinet first has the right to institute an action of any kind, administrative or judicial.” *See KIGA, supra* at 282.

Further, the appellate courts in Kentucky have rejected the use of the “discovery rule” to toll a statute of limitations, “with the exception of cases involving latent injuries from exposure to harmful substances” *See Roman Catholic Diocese of Covington v. Sector*, 966 S.W.2d 286, 288 (Ky. 1988), or cases in which there is an on-going violation of civil rights. *See Ammerman v. Board of Education of Nicholas County*, 30 S.W.3d 793 (Ky. 2000). Neither situation applies here. The Court of Appeals has recently declined to extend this discovery rule to cases involving the 5 year statute of limitations for breaches of fiduciary duty. *Middleton v. Sampey*, 522 S.W.3d 875 (Ky. App. 2017). There is no basis to extend this rule to this case, when the Ethics Commission had years to investigate Secretary Grimes before its filing of a formal complaint over half a decade after the events in question. As the Court of Appeals held in *Middleton*, “we

decline to apply ‘the discovery rule without statutory authority to do so.’” (internal citation omitted). *See* 522 S.W.3d at 879.

Consequently, the **Court rules KRS 413.120(2) applies to the instant action, that the action accrued no later than November 8, 2016, when the last alleged violations at issue took place. The November 18, 2021 filing of this Ethics Commission complaint, after years of investigation, clearly falls outside the five-year window in which to bring these claims.**

**THE ETHICS COMMISSION HAS NOT IDENTIFIED A STATUTE OR ADMINISTRATIVE REGULATION WHICH PROHIBITS THE RELEASE OF THE PUBLIC INFORMATION FROM VOTER ROLLS THAT WOULD CONSTITUTE A VIOLATION OF KRS CHAPTER 11A.**

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Even if the Court had ruled that KRS 413.120 did not apply to bar this proceeding on statute of limitations grounds, this Court would still find that the Agency’s **Final Order must be overturned under KRS 13B as an arbitrary action made without the support of substantial evidence.** Here, when the Commission charged Secretary Grimes with violations of KRS 11A.020 (1)(a) and (d) in both Counts I and II, it did so based on its subjective interpretation of ethical standards held by the Commission members. On one level, the Commission argues all requests for VRS information must be processed as an Open Records Request, and in the next breath argues that VRS requests must be processed under KRS 117.025.

However, on the Court’s review of the plain language of KRS 117.025(i), it appears the requirement of a reasonable price only applies to furnishing “precinct lists,” which is a defined term in the law which does not include the voter information at issue here. The Court notes that

precinct lists are merely one type of VRS data, and that not all VRS data qualify as precinct lists. In the instant case, Secretary Grimes legally accessed VRS data acting in the scope of her public duties as the Secretary of State. She then shared lists of newly registered voters, which are public data, and which are not “precinct lists” as defined in KRS 117.025(i). There is no legal or ethical prohibition against sharing this information with any member of the public.

Further, there is **no substantial evidence to support the Count I allegation that she used her influence as the Secretary of State in a way that caused a substantial conflict between her public duties and her personal interest when she had the data downloaded and stored on flashdrives, or the Count II allegation that she violated some statutory or ethical standard in distributing VRS data without charging a fee or requiring the filling out of an** OG : 000027 of

**SBE form.** The Commission cites no case law, regulation, or statute which made illegal Secretary Grimes’ conduct in having VRS data placed on a flash drive or demonstrates that

doing so would constitute a personal, private purpose. No citations demonstrate to the Court that there was an “established process of government” for how VRS data must be distributed, or that placing VRS data on a flash drive was conduct outside a so-called “established process.” The way a “process of government” is “established” is by statute or administrative regulation. *See* KRS 13A.100, *et seq.* Neither the State Board of Elections, nor the Secretary of State, can establish a uniform and binding method of accessing public information without enacting an administrative regulation. Secretary Grimes, in essence, is charged with violating an *internal policy*, which does not have the force of law. The Commission cannot bootstrap a

violation of the Ethics Code on to such an alleged violation of internal policy, because such an internal policy is “null, void and unenforceable” under KRS 13A.130. *See Commonwealth, Education & Humanities Cabinet v. Gobert*, 979 S.w.2d 922, 926 (Ky. App. 1998). This conclusion is reinforced by the uncontested statements from former Director of Elections Mary Sue Helm, and former General Counsel to the Secretary of State Katie Gabhart, that it has long been the practice of the Secretary of State’s office to access such information in response to legitimate inquiries from the public and the press.

Moreover, the record is undisputed that Secretary Grimes, in her capacity as a candidate for office, legally obtained the statewide VRS data appropriately, and paid the required fee. There is no allegation that any of the data in dispute was secret or not subject to public disclosure. The only question is whether it was a violation of the *ethics statute*, for her to provide this public information without a formal request under the Open Records statute, or through the SBE process for obtaining “precinct lists”. There is no allegation that any VRS information was altered or tampered with. There is no allegation that Secretary Grimes’ action violated any statute or administrative regulation, only that her actions failed to comport with an

alleged “established processes of government” that is in effect an “internal policy”, not set forth by statute or administrative regulation.

The Commission also failed to support Count II’s finding that the distribution of the VRS data without the payment of a fee was outside any established process of government. The Secretary of State has discretion in how to format the VRS data that is distributed, and only the furnishing of KRS 117.025(i) precinct lists to candidates or campaigns, *a narrow subset of all available VRS data*, requires payment to receive the data. It appears to the Court that VRS data is

generally subject to the Open Records Act (“ORA”) as public information, that Secretary Grimes has a duty under the ORA to respond to Open Records Requests, and that the only exceptions to fulfilling the request for this public information are based on commercial uses<sup>7</sup> or distribution of highly sensitive social security numbers. Consequently, the **Commission’s reasoning in Count II that Secretary Grimes provided VRS data outside the procedures required by “established processes of government” (i.e., internal policy) is arbitrary and without the support of substantial evidence. That charge is based only on the Commission’s subjective ethical standards rather than on the basis of any relevant statute or duly promulgated regulation.**

It would set a dangerous precedent to hold that a public official cannot informally provide public information to citizens without requiring a formal Open Records request, or be subject to a fine and penalty from the Ethics Commission. The Open Records Act provides the bare *minimum* in terms of public disclosure. If the Secretary of State, or the State Board of Elections decides to promulgate a policy that limits distribution of this voter data to the filing of formal OG : 000029 of

Open Records requests, or requires the filing of a formal written request with the SBE, it may do

<sup>7</sup>See 31 KAR 3:010(3).

so. But neither the SOS nor the SBE has promulgated any such administrative regulation. Secretary Grimes cannot be liable for a violation of the Ethics statute for violating an alleged internal policy that is not adopted by law. There was no ethical or legal prohibition that prevented Secretary Grimes from obtaining and sharing this public information.



## CONCLUSION

IT IS HEREBY ordered that **the Commission’s Final Order is REVERSED, and Petitioner Grimes’ Petition on Appeal is GRANTED.** The Commission’s Final Order clearly violates KRS 413.120(2)’s statute of limitations applicable to this agency action. The Ethics Commission’s arguments not to apply the five-year statute of limitations to KRS 11A violations are unavailing. KRS 11A does not contain an express statute of limitations, so the Ethics Commission enforcement action is subject to the five year limit for actions to impose liability created by statute set forth KRS 413.120. Secretary Grimes is entitled to an order setting aside the agency’s Final Order purely on the basis of her Statute of Limitations defense.

Further, the Court notes that even if the KRS 413.120 statute of limitations defense did not fully protect Secretary Grimes from the Ethics Commission’s untimely prosecution of these KRS 11A charges, the Commission’s findings that the Secretary committed the violations expressed in Count I and II are arbitrary and without the support of substantial evidence. The Commission cites no “established process of government” that required Secretary Grimes to distribute VRS data in a way that would require the formal completion of an SBE form or Open Records request. But the Commission cites no “established process” that would outlaw the use of flash drives to distribute

the public information contained in the data. Finally, the Commission can point to no “established

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process of government” requiring the payment of a fee to access any kind of VRS data beyond the scope of precinct lists (which are not at issue in the instant action).

The Commission's Final Order establishing violations of Count I and II was based on subjective, ethical opinions about proper government processes, not any kind of substantial evidence found in promulgated regulations, statutes, or case law. The Commission's Order punishes Secretary Grimes for accessing VRS data she was clearly allowed to access in the scope of her public duties as Secretary of State. But, the Commission's reasoning and imposition of fines as punishment are not based on any case law, statute, or regulation specifically requiring Secretary Grimes to fulfill VRS requests in the Commission's proposed way.

The Open Records Act provides the bare *minimum* for public access to this data. Under the Commission's ruling, a formal Open Records request would be required for any public access to voter information, thus delaying or denying members of the public quick access to voter data that is clearly public (e.g., whether a candidate is registered to vote, or the identity of newly registered voters).

The only specific exceptions to the general availability of public information embodied in VRS data are for precinct lists in KRS 117.025(3)(i). That statute prohibits requests for VRS data for commercial purpose, but does not otherwise limit public access. Thus, the Court is compelled to also **rule in favor of Secretary Grimes on the merits of her defenses to Count I and II expressing alleged violations of KRS 11A.020(1)(a) and (d)**. That statute does not prohibit use of flash drives, require the payment of fees, or the use of a form to complete VRS data requests that qualify as requests for public information. The only statute that requires payment of fees, for precinct lists, was fully complied with by Secretary Grimes.

Accordingly, the **Court GRANTS Secretary Grimes' Petition on Appeal of the Ethics** OG : 000031 of

**Commission's Final Order, and REVERSES the Agency's Final Order affirming violations of Count I and II and the imposition of fines.** The Court rules that the Commission's initiation

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of these Counts was time-barred by the Statute of Limitations in KRS 413.120, and further that Secretary Grimes must prevail on the merits that the Final Order was arbitrary in failing to be supported by substantial evidence that she violated any clearly “established process of government.” The Commission points to the requirement in KRS 11A.020 to follow “established processes of government”, but fails to identify any statute or administrative regulation that “establishes” the process the Commission seeks to enforce. The Commission seeks to penalize Grimes for an alleged violation of an internal policy that is not set forth in administrative regulation or statute. Such actions are “null and void and unenforceable” under KRS 13A.120(4).

**SO ORDERED** this 29<sup>th</sup> day of April,

2024.

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PHILLIP J. SHEPHERD, JUDGE  
Franklin Circuit Court, Division I

DISTRIBUTION:

Jon Salomon  
Dentons Bingham Greenebaum LLP  
3500 PNC Tower  
101 South Fifth Street  
Louisville, KY 40202-3120  
[Jon.salomon@dentons.com](mailto:Jon.salomon@dentons.com)

J. Guthrie True  
True Guarnieri Ayer LLP  
124 W. Clinton St.  
Frankfort, KY 40601  
[gtrue@truelawky.com](mailto:gtrue@truelawky.com)

Kent Wicker  
Wicker/Brammell PLLC  
323 W. Main Street, Suite 1100  
Louisville, KY 40202  
[Kent@WickerBrammell.com](mailto:Kent@WickerBrammell.com)

*Counsel for Petitioner/Appellant, Alison Lundergan Grimes*

Edin Davis Stephens  
Meena Mohanty  
1025 Capital Center Dr., Ste. 104  
Frankfort, KY 40601  
[Eden.stephens@ky.gov](mailto:Eden.stephens@ky.gov)

*Counsel for Respondent/Appellee, Executive Branch Ethics Commission*