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20-ORD-143

September 2, 2020

In re: David C. Emerson/University of Kentucky Alumni Association

Summary: Even if the University of Kentucky Alumni Association ("Association") is a public agency subject to the Open Records Act ("the Act"), it was not required to comply with a request seeking information as opposed to existing public records.

Open Records Decision

C. David Emerson ("Appellant") asked the Association to provide him "with the names and last known addresses for all persons who signed up through your organization to take the Grand Seine River & Normandy Passage tour" from June 6-14, 2020. Although he directed his August 3, 2020, request to "UK Alumni Association King Alumni House 400 Rose Street Lexington, KY," in a timely response, the Official Records Custodian for the University of Kentucky ("University") denied Appellant's request because the Association "is not subject to the Kentucky Open Records Act. Therefore, we have no documents responsive to your request." Shortly thereafter, Appellant initiated this appeal challenging the disposition of his request by the University.

On appeal, William E. Thro, General Counsel for the University, responded on behalf of the Association. Although Appellant requested the information directly from the Association, Mr. Thro framed the issue as being whether the University "must disclose documents which are not in its possession but are in the possession of a private organization known as the University of Kentucky Alumni Association." The University acknowledged that it and "its affiliated corporations

are subject to the Open Records Act," but maintained that "private entities that are not created by, controlled by, or funded by the University are not subject to the Open Records [Act]." According to Mr. Thro, the Association is "not an affiliated corporation, was not created by the University, is not controlled by the University and is not funded by the University. Unlike the University and its affiliated corporations, the [Association] does not have sovereign immunity, is not included on the University's financial statements, is not covered by the University's insurance policies, and is not represented by the University's legal counsel."

In relevant part, KRS 61.872(1) provides that "[a]ll public records shall be open for inspection by any person . . . and suitable facilities shall be made available by each public agency for the exercise of this right." Pursuant to KRS 61.870(2), "public record" means records that "are prepared, owned, used, in the possession of or retained by a public agency." Here, the University argued that the Association is not a "public agency" within the meaning of KRS 61.870(1). However, it is unnecessary for this Office to resolve that question because even if the Association is a public agency, it was not required to honor Appellant's request for information. *See Dept. of Revenue v. Eifler*, 436 S.W.3d 530, 534 (Ky. App. 2013) ("The ORA does not dictate that public agencies must gather and supply information not regularly kept as part of its records."); *see also* 20-ORD-098.

In OAG 94-063, this Office found that the Association "is not a public agency; it is a private corporation organized under KRS Chapter 273; UK does not exercise effective control over it; and it could exist and operate without substantial assistance from the [U]niversity." However, in that opinion this Office did not analyze the question in the context of the Open Records Act. The Act broadly defines "public agency" at KRS 61.870(1). Under KRS 61.870(1)(h), a private entity can become a public agency if more than twenty-five percent of its expenditures were derived from public funds. In addition, pursuant to KRS 61.870(1)(i) and (j), an entity can become a public agency if a majority of its governing body is appointed by a public agency or it is otherwise created and controlled by a public agency. Determining whether an entity qualifies as a "public agency" under these provisions can be a fact-intensive inquiry. *See, e.g.*, 17-ORD-248 (holding that the Office could not determine whether an entity was a public agency without access to financial records for a full fiscal year). Here, however, it is unnecessary to engage in such a fact-intensive inquiry because this appeal can be resolved on other grounds.

This Office has repeatedly stated that "[t]he purpose of the Open Records Law is not to provide information, but to provide access to public records which are not exempt by law." OAG 79-547, p. 2. For this reason, the Attorney General has consistently held that requests for information as opposed to requests for public records, "need not be honored." 00-ORD-76, p. 3. Here, Appellant did not request to inspect public records but requested the Association to provide him the names and addresses of individuals who registered for a tour it sponsored. Even if the Association were a public agency subject to the Act, it would not be required to conduct research or compile a list of names to comply with Appellant's request. *See, e.g.,* 96-ORD-251 (recognizing that public agencies are not required to compile a list in response to an open records request and citing earlier decisions holding the same).

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court per KRS 61.880(5) and KRS 61.882. Pursuant to KRS 61.880(3), the Attorney General shall be notified of any action in circuit court, but shall not be named as a party in that action or in any subsequent proceeding.

Daniel Cameron
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/s/ Michelle D. Harrison

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Distributed to:

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