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21-ORD-185

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In re: Barry King/Kentucky Horse Racing Commission

Summary: The Kentucky Horse Racing Commission (the "Commission") did not violate the Open Records Act ("the Act") when it did not produce for inspection a record that does not exist in its possession.

Open Records Decision

Barry King ("Appellant") asked the Commission for copies of the "Kentucky Red Sample Randomizer" test results performed by a specific laboratory at a specific track on several dates in July and August 2021. In a timely response, the Commission provided him with responsive records for one of the dates the Appellant had identified and stated it did not possess any responsive records for the other dates identified in the request. This appeal followed.

When a public agency states affirmatively that it does not possess records responsive to the request, the burden shifts to the requester to present a *prima facie* case that requested records do exist in the possession of the public agency. *See Bowling v. Lexington-Fayette Urb. Cnty. Gov.,* 172 S.W.3d 333, 341 (Ky. 2005). This Office has found that a requester can make a *prima facie* case if the requester is able to show that potentially responsive documents exist in the agency's possession. *See* 20-ORD-085 at * 2. If the requester is able to make a *prima facie* case that the records do or should exist, then the public agency "may also be called upon to prove that its search was adequate." *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 848 n.3 (Ky. 2013) (citing *Bowling*, 172 S.W.3d at 341).

Here, to make his *prima facie* case, the Appellant claims that if the Commission possesses a responsive record for one specific date then the Commission should possess the same type of record for any of the other dates he identified. However, without more, the fact that the Commission possesses responsive records for one date does not necessarily mean it possesses responsive records for other dates. The Appellant does not offer any evidence that the laboratory conducted tests on the dates he identified and that such records should be in the Commission's possession. Nevertheless, on appeal, the Commission explains that although the laboratory is "contracted as the [Commission]'s official drug testing laboratory," the laboratory only "prepares and submits data packets" to the Commission when "a positive test is returned" and only if "that positive test is disputed[.]"

The Commission has explained that if the laboratory had conducted tests on the dates the Appellant requested and such tests were negative or undisputed, then it would not possess responsive records for those dates. Thus, the Commission states that "the only instance in which [the laboratory] submitted a data packet to the [Commission] during the dates covered in [the Appellant's] request was August 23, 2021," and it has provided those records to the Appellant. Even if the Appellant had made a *prima facie* case that additional records should exist in the Commission's possession, the Commission has adequately explained why no additional records exist. Accordingly, the Commission did not violate the Act when it did not produce responsive records that do not exist in its possession.

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

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/s/Matthew Ray
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Distributed to:

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