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25-ORD-096

April 8, 2025

In re: David McAnally/Kentucky Horse Racing and Gaming Corporation

Summary: The Kentucky Horse Racing and Gaming Corporation (“the Corporation”) did not violate the Open Records Act (“the Act”) when it stated that it had no responsive records and the requester did not present a *prima facie* case that any such records existed.

Open Records Decision

David McAnally (“Appellant”) submitted a 13-part request to the Corporation seeking records related to a variety of employment records, the Corporation’s policies, and the Appellant’s termination. In response, citing KRS 61.872(5), the Corporation stated that “due to the voluminous nature of the potentially responsive documents to be reviewed” he would receive responsive records on or before March 28, 2025. The Appellant did not object to this response as to the first 12 subparts of his request, but took issue as it related to subpart 13, which requested “[a]ny information on why it appears [the Appellant’s] Unemployment was not paid for the last quarter of CY 24 and . . . CY25 or any other items were not paid.”¹ In response, the Corporation stated that it “does not have any records to send” the Appellant regarding subpart 13 of his request.² This appeal followed.³

On appeal, the Corporation maintains that it “does not have any responsive records to [the Appellant’s] request.” Once a public agency states affirmatively that it does not possess any responsive records, the burden shifts to the requester to make

¹ The Appellant specified that this requested sought “emails, folders, phone records, texts, taped team meetings, meeting requests, team meetings regarding the above” and identified eleven specific individuals.

² The Corporation did advise that it had contacted the Kentucky Education and Labor Cabinet, and the issues regarding the Appellant’s unemployment payments would be resolved.

³ On appeal, the Appellant does not challenge the Corporation’s invocation of KRS 61.872(5) or the timeliness of the Corporation’s responses.

a *prima facie* case that the records do exist and that they are within the agency's possession, custody, or control. See *Bowling v. Lexington–Fayette Urb. Cnty. Gov't*, 172 S.W.3d 333, 341 (Ky. 2005). If the requester makes a *prima facie* case that the records do or should exist, “then the 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).

To make a *prima facie* case that the agency possesses or should possess the requested records, the requester must provide some statute, regulation, or factual support for that contention. See, e.g., 23-ORD-207; 21-ORD-177; 11-ORD-074. Here, in an effort to make a *prima facie* case that the Corporation possesses responsive records, the Appellant cites KRS 230.225(7), which requires the Corporation's records to be open and subject to public inspection in accordance with the Act. The Appellant also provides a copy of a memorandum of understanding between the Corporation and the Public Protection Cabinet (“PPC”) which states that the PPC will “maintain records related to . . . payroll processing.” Thus, the Appellant has presented a *prima facie* case that the PPC, on behalf of the Corporation, maintains payroll processing records. However, the Appellant did not request general payroll records. Rather, he requested records containing information regarding why his unemployment was not paid. The Appellant has not presented a *prima facie* case that records containing that information exist in the possession of either the Corporation, or the PPC on behalf of the Corporation.

Further, in order to make a *prima facie* case that particular records exist, the Appellant provides copies of emails he had sent to the Corporation regarding his unemployment. The emails consist of the Appellant asking why his “Unemployment was not reported,” the Corporation's employee stating she would look into this matter, and the Appellant thanking her. The Corporation, on appeal, explains the emails were not provided in response to the request because they did “not explain why his unemployment would not have been paid and [are] therefore non-responsive.” The Office agrees that the provided emails are not responsive to the Appellant's request. Thus, the Appellant did not present a *prima facie* case that responsive records exist by providing emails he has exchanged with the Corporation.

Accordingly, the Corporation did not violate the Act when it could not fulfill the Appellant's request.

A party aggrieved by this decision may appeal it by initiating an action in the appropriate circuit court under KRS 61.880(5) and KRS 61.882 within 30 days from

the date of this decision. Under 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. The Attorney General will accept notice of the complaint emailed to OAGAppeals@ky.gov.

Russell Coleman
Attorney General

/s/ Zachary M. Zimmerer
Zachary M. Zimmerer
Assistant Attorney General

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Distributed to:

David McAnally
Ashleigh Bailey, Chief Legal Officer
KHRGC Open Records