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21-ORD-201

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In re: Barry King/Kentucky Horse Racing Commission

Summary: The Kentucky Horse Racing Commission ("the Commission") violated the Open Records Act ("the Act") when it entirely withheld records under KRS 61.878(1)(h) instead of separating exempt information from nonexempt information and providing the latter, as required under KRS 61.878(4). The Commission further violated the Act when it initially failed to establish that it did not possess a requested record.

Open Records Decision

On September 7, 2021, Barry King ("Appellant") requested records from the Commission relating to Ellis Park Racing dated September 4, 2021, including the official test barn report, sample shipment list, and "Red Sample Randomizer."[1] In a timely response, the Commission denied the request for the test barn report and sample shipment list under KRS 61.878(1)(h). The Commission explained that there was "an ongoing administrative investigation regarding at least one (1) sample from that day of racing" and that disclosing those documents "could harm the [Commission's] ability to provide at least one (1) licensee with a full and fair investigation." Specifically, the Commission stated that disclosure of the records could cause "interference with the [Commission's] ability to interview witnesses and obtain uncorrupted and unbiased information from them." Additionally, the Commission did not provide the requested Red Sample Randomizer test results and failed to explain why. This appeal followed.

[1] The "Red Sample Randomizer" is a type of test conducted by a specific Commission-designated laboratory to screen for prohibited substances. *See* 21-ORD-185.

KRS 61.878(1)(h) exempts from inspection "[r]ecords of law enforcement agencies or agencies involved in administrative adjudication that were compiled in the process of detecting and investigating statutory or regulatory violations if the disclosure of the information would harm the agency by revealing the identity of informants not otherwise known or by premature release of information to be used in a prospective law enforcement action or administrative adjudication." The Commission is an "agenc[y] involved in administrative adjudication" within the meaning of KRS 61.878(1)(h). *See* KRS 230.320(3)-(5) (authorizing the Commission to conduct administrative hearings concerning penalties against licensees). Furthermore, the records requested by the Appellant were "compiled in the process of detecting . . . regulatory violations." *See generally* 810 KAR 8:010 (listing prohibited substances in race horses and providing for drug testing in laboratories chosen by the Commission).

Although the Commission is an administrative agency investigating potential regulatory violations, it must also prove that "premature release of information to be used in a prospective . . . administrative adjudication" would harm the Commission. KRS 61.878(1)(h). To meet its burden of proof, the Commission must establish that "because of the record's content, its release poses a concrete risk of harm to the agency in the prospective action. A concrete risk, by definition, must be something more than a hypothetical or speculative concern." *City of Ft. Thomas v. Cincinnati Enquirer,* 406 S.W.3d 842, 851 (Ky. 2013).

On appeal, the Commission explains that on or about September 9, 2021, it received notification from its primary testing laboratory that one sample from the date in question had tested as "preliminary positive" for a restricted or prohibited substance. This preliminary positive result required the laboratory to perform additional testing to confirm the results, which was ongoing at the time the Commission responded to the Appellant's request.

The Commission states three reasons why the test barn report and sample shipment list would harm its investigation. First, the Commission argues that "[t]o ensure unbiased results, it is imperative that [the Commission's] primary laboratory . . . must not know the identity of the people and horses related to samples that are undergoing testing," and that the "disclosure of documents that could reveal the names of horses or trainers involved in a preliminary positive could taint [the laboratory's] confirmation results." But the Commission does not explain how the laboratory's knowledge

of a horse's or trainer's name could purportedly "taint" the results of what should be an objective scientific test.

Next, the Commission argues that under 810 KAR 8:010 § 11(3) an owner or trainer may request an unbiased split laboratory confirmation of a confirmed medication positive, and that "disclosure of documents that could reveal horses' or trainers' names could compromise the split laboratory's results." Again, however, the Commission fails to explain how knowledge of those names could bias the results of this test.

Finally, the Commission argues that the release of "documents naming a trainer or a horse involved in a preliminary positive" could prevent the Commission from obtaining "unbiased testimony from non-laboratory witnesses" because a "witness may be more truthful or forthcoming in his or her responses to the [Commission's] questions if he or she is unaware that a particular trainer or horse may be implicated by his or her answers." This claim identifies a concrete risk of harm to an investigation that is not speculative, because the testimony of witnesses is different in kind than the results of a presumably objective chemical analysis.

Although the Commission correctly relied on KRS 61.878(1)(h) to exempt from public inspection the test barn report and sample shipment list with respect to its pending investigation, the inquiry does not end there. That is because KRS 61.878(4) requires an agency to redact any exempt material from a record and produce the remainder of the record. Therefore, because the names of any persons or horses could bias witness testimony while the investigation is ongoing, the Commission may redact such information from the requested records. The Commission, however, violated the Act when it withheld the test barn report and sample shipment list in their entirety instead of producing the records with names redacted.

As for the Red Sample Randomizer result requested by the Appellant, the Commission states on appeal that it does not possess that record. When a public agency states affirmatively that it does not possess records responsive to a 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). If the requester establishes a *prima facie* case that records do or should exist, "then the agency may also be called upon to prove that its search was adequate." *City of Ft. Thomas v. Cincinnati Enquirer,* 406 S.W.3d 842, 848 n.3 (Ky. 2013) (citing *Bowling,* 172 S.W.3d at 341).

Given that the Commission denied the Appellant's request for other records because an investigation was ongoing, and a positive test result would be necessary to take disciplinary action, *see e.g.*, 810 KAR 8:030,the Appellant has established a *prima facie* case that the Commission could possess the Red Sample Randomizer test result for September 4, 2021. But on appeal, the Commission explains more fully the instances in which it would receive such tests from the laboratory. According to the Commission, a "preliminary positive test," which is a different test from the Red Sample Randomizer, was issued in connection with a specific race on September 4, 2021. The Appellant submitted his request to inspect the Red Sample Randomizer test on September 9, 2021. However, the Commission only receives a copy of the Red Sample Randomizer if it is a confirmed positive test that is disputed by the licensee. At the time the Appellant submitted his request, the Commission had not received a confirmed positive test result that had been disputed. And while the appeal has been pending, the Commission's Stewards "informed the trainer with the preliminary positive that, after additional investigation, [the laboratory] had cleared the horse's post-race sample. Neither the trainer nor the owner initiated a dispute at any time." As a result, the Commission never received a copy of the test result.[2] Accordingly, the Commission has adequately explained why it does not possess the requested Red Sample Randomizer test result. The Commission therefore did not violate the Act when it did not produce for inspection a record that does not exist in its possession.

In sum, the Commission violated the Act when it withheld the test barn report and sample shipment list in their entirety instead of redacting the exempt material pursuant to KRS 61.878(4). The Commission further violated the Act when it failed to notify the Appellant that a record did not exist in its possession, but it has met its burden on appeal that the requested record does not exist.

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

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[2] This change in circumstances calls into question whether the investigation remains ongoing, or whether the Commission has taken final action in closing the investigation in the absence of a confirmed positive test result. If, while this appeal was pending, the Commission has taken final action in closing the investigation, it could no longer claim any harm would come to its investigation such that KRS 61.878(1)(h) continues to apply to the requested records.

in circuit court, but shall not be named as a party in that action or in any subsequent proceedings.

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