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22-ORD-009

January 7, 2022

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 failed to issue a timely response to a request under the Act.

Open Records Decision

On Saturday, November 27, 2021, Barry King (“Appellant”) submitted a request to the Commission for various records. On Monday, November 29, 2021, the Commission confirmed receipt of the Appellant’s request and claimed it had ten days to respond to the request pursuant to Senate Bill 150 (“2020 SB 150”), which was passed during the 2020 Regular Session of the General Assembly. The Commission claimed that the provisions of 2020 SB 150 were extended until January 15, 2022, due to the passage of House Joint Resolution 1 (“2021 HJR 1”) during the 2021 Extraordinary Session of the General Assembly. On December 7, 2021, having received no further response from the Commission, this appeal followed.

On appeal, the Commission states that it provided the Appellant with seven pages of responsive records on December 9, 2021. The Commission also claims that it had ten calendar days to respond to the Appellant’s request pursuant to 2020 SB 150. Thus, the Commission continues to maintain that it “timely responded to [the Appellant’s] open records request” because December 9, 2021, was the tenth calendar day after receiving the request.

In response to the public health emergency caused by the coronavirus, the General Assembly enacted 2020 SB 150 during the 2020 Regular Session. 2020 SB 150 became law on March 30, 2020, and provided that, notwithstanding the provisions of the Act, “a public agency shall respond to the request to inspect or receive copies of public records within 10 days of its receipt.” 2020 SB 150 § 1(8)(a). 2020 SB 150 expired on June 29, 2021, because, during the 2021 Regular Session, the General Assembly declared that the state of emergency would expire on June 29, 2021. *See* 2021 House Joint Resolution 77. Also during the 2021 Regular Session, the General Assembly passed HB 312, which went into effect on June 29, 2021. 2021 HB 312 amended KRS 61.880(1) to require a public agency to respond to a request to inspect records within five business days. 2021 Ky. Acts ch. 160, § 5. Following the Supreme Court’s decision in *Cameron v. Beshear*, 628 S.W.3d 61, 75 (Ky. 2021), in which the Court held that “the General Assembly establishes the public policy of the Commonwealth,” the Governor called an extraordinary session of the General Assembly to respond to the coronavirus pandemic.

During the 2021 Extraordinary Session, the General Assembly enacted House Joint Resolution 1 (“2021 HJR 1”), which, among other things, revived 2020 SB 150 until January 15, 2022 “to the extent the provisions are not superseded by statute or administrative regulation.” 2021 HJR 1 § 2(1)(c). As noted above, the ten-day deadline provided by 2020 SB 150 was superseded by the passage of 2021 HB 312. *See, e.g.*, 21-ORD-251. Thus, the General Assembly amended KRS 61.880(1) to allow a public agency only five business days to respond to a request to inspect records. 2021 HB 312, which was enacted after 2020 SB 150, establishes the General Assembly’s policy regarding a public agency’s duty to respond to a request to inspect records—a public agency must respond to such requests within five business days. Therefore, the Commission violated the Act when it did not issue its response within five business days.

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 within 30 days from the date of this decision. 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. The Attorney General will accept notice of the complaint emailed to OAGAppeals@ky.gov.

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/s/Matthew Ray
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Distributed to:

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