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20-ORD-154

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In re: Jenny Lewis-Patten/Office of the Governor

Summary: The Office of the Governor ("Governor's Office") did not violate the Open Records Act ("the Act") when it denied a request for records that do not exist.

Open Records Decision

On July 24, 2020, Jenny Lewis-Patten ("Appellant") submitted a request to the Governor's Office to inspect the "scientific data and reports" that the Governor said he relied upon in issuing an executive order mandating the Commonwealth's citizens to wear masks. In a similar request on August 7, 2020, Appellant sought "scientific data, correspondence, and records proving the validity" of a statement the Governor allegedly made in a public service announcement related to the coronavirus. In timely responses to both requests, the Governor's Office stated that it conducted a diligent search but was unable to locate any records responsive to either request. This Office has consolidated both appeals, and renders this decision.

The Act only regulates access to records that are "prepared, owned, used, in the possession of or retained by a public agency." KRS 61.870(2). A public agency cannot provide a requester with access to nonexistent records nor is a public agency required to "prove a negative" to refute a claim that certain records exist. *See Bowling v. Lexington-Fayette Urban Cnty. Gov't*, 172 S.W.3d 333, 341 (Ky. 2005) ("The unfettered possibility of fishing expeditions for hoped-for but nonexistent records would place an undue burden on public agencies."). However, under KRS 61.880(1), a public agency that denies a request to inspect records must "include a statement of the specific exception authorizing

the withholding of the record and a brief explanation of how the exception applies to the record withheld." Thus, a public agency discharges its obligation to explain its denial when it clearly states that no responsive records exist. *See, e.g.,* 13-ORD-052.

Once a public agency states affirmatively that it does not possess any responsive records, then the burden shifts to the requester to make a *prima facie* showing that the requested records do exist. *Bowling*, 172 S.W.3d at 341. If the requester makes a *prima facie* showing that records 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). Here, Appellant asserts that the requested records should exist because the Governor indicated that scientific data supports his public statements. Such public statements, however, do not establish a *prima facie* case that the Governor's Office is currently in possession of any responsive scientific studies supporting the Governor's statements. There is nothing to indicate that the Governor's Office has conducted its own scientific studies, or that the Commonwealth has expended public funds to produce scientific reports related to the coronavirus and that may justify his unilateral mandates. Perhaps the Governor's Office is aware of scientific data available in the public domain on which the Governor has relied, but there is no evidence in this record that the Governor's Office actually possesses any such records. Accordingly, the Governor's Office did not violate the Act in denying both of Appellant's requests.

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.

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/s/Marc Manley
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Assistant Attorney General

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Distributed to:
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