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21-ORD-078

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In re: Jenny Patten/ Cabinet for Health and Family Services

Summary: The Cabinet for Health and Family Services ("Cabinet") did not violate the Open Records Act ("the Act") when it did not provide records that do not exist in its possession.

Open Records Decision

On March 16 and 18, 2021, Jenny Patten ("Appellant") asked the Cabinet to provide certain records relating to COVID-19 tests and vaccines. In her first request, the Appellant sought "[d]ocuments supporting the state's matrix," according to which 25 positive tests per 100,000 constitutes a "red zone," and "[a]ny documents, policy [or] procedure, emails, indicating the procedure and steps the state took to change reporting" from a White House-recommended standard using 100 positive tests per 100,000. In her second request, the Appellant sought "all studies, and documents proving efficacy, safety testing, effectiveness, and FDA-approval process for all [COVID-19] vaccines being recommended by [the Cabinet] and the state of Kentucky."

In response to the first request, the Cabinet stated that it created a spreadsheet that compares "the two different reporting methods," and that it provided the Appellant with that record, but that it possessed no other records responsive to the request. In response to the second request, the Cabinet stated that it possessed no responsive records because it "does not produce or maintain documentation of clinical studies" or other documents described in the request, which are obtainable "from the CDC, FDA, [and] the Advisory Committee on Immunization Practices." This appeal followed.

Once a public agency states affirmatively that it does not possess any responsive records, the burden shifts to the requester to present a *prima facie*

showing that the requested records do exist. *Bowling v. Lexington-Fayette Urban Cty. Gov't,* 172 S.W.3d 333, 341 (Ky. 2005). A requester may make a *prima facie* showing that responsive records should exist by referencing a statute, regulation, or official policy requiring the public agency to create such a record. *See, e.g.*, 11-ORD-074 (recognizing that a statute requiring a public agency to conduct an "internal review" following the death of a child in its custody was sufficient to presume that records relating to a specific death should exist).

Here, the Appellant claims that the Cabinet is deviating from "White House recommendations" in how it classifies COVID-19 "red-zones." According to the Appellant, the White House classifies a county as a "red zone" when it reports 100 positive cases per 100,000 residents. However, the Cabinet uses the "average daily incidence rate" and considers a county as a "red zone" if it reports 25 positive cases of COVID-19 per 100,000 residents. The Appellant suggests that the Cabinet should not deviate from guidance issued by "the White House" unless it possesses written documentation that explains its deviation, but she does not explain to which White House recommendation she is referring. Assuming there is some deviation, while it may be good policy for the Cabinet to justify its decision in writing, the Act does not require the creation of such material. *See*, *e.g.*, 21-ORD-046 (finding that the Act does not require public agencies to compile certain statistics even if such statistics could be beneficial to the public). Thus, although the Appellant believes such records should exist, that belief does mean that they do exist.

In her second request, the Appellant sought "all studies, and documents proving efficacy, safety testing, effectiveness, and FDA-approval process for all [COVID-19] vaccines being recommended by [the Cabinet] and the state of Kentucky." According to the Appellant, the Cabinet should not recommend any specific COVID-19 vaccine unless it possesses the records that it has consulted to ascertain the safety and efficacy of the vaccine. Although the Appellant's suggestion may be good policy, it is not enough to make a *prima facie* showing that such records exist in the Cabinet's possession. Thus, the Cabinet did not violate the Act.

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.

Daniel Cameron
Attorney General

/s/ James M. Herick

James M. Herrick
Assistant Attorney General

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Distributed to:

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