



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

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21-ORD-183

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In re: John Yarbrough/Hopkins County Health Department

Summary: The Hopkins County Health Department (the “Department”) did not violate the Open Records Act (“the Act”) when it denied a request to inspect records that do not exist within its possession or when it denied inspection of records that were prohibited by the Health Insurance Portability and Accountability Act (“HIPAA”).

Open Records Decision

John Yarbrough (“Appellant”) asked the Department for copies of eight different categories of records related to COVID-19. In a timely response, the Department provided him with some responsive records but denied his other requests for varied reasons. Specific to this appeal are the Department’s denials of his requests for the polymerase chain reaction (“PCR”) amplification rates for the COVID-19 tests used to generate the data that the Department collects and publicly reports, as well as his request for details concerning the death of a specific infant and the extent to which COVID-19 was related to the death.

First, the Appellant seeks review of the denial of his request for the PCR amplification rates used in the COVID-19 tests that are reported to the Department. In response, the Department claimed it “do[es] not have a record which would show a ‘PCR Amplification Rate’” of the tests used in compiling its data. As for his second request, the Appellant had previously obtained the Department’s data related to COVID-19 deaths, categorized by age, which reflected the death of one person between the ages of 0 and 20, allegedly an infant. Therefore, the Appellant sought “the record that would show that this

infant died *from* COVID not merely, [*sic*] *with* COVID.” (emphasis original). In response, the Department stated that it never classified an infant as having died “from” COVID-19, but that it had merely reported “that an infant died related to” COVID-19 or that the infant had died with COVID-19 “being present.” As for any records that might provide details related to the infant’s vaccination history or other records relating to the infant’s cause of death, the Department stated that it was “not privy” to those records, indicating that such records do not exist in its possession.

A public agency cannot grant a requester access to a record that does not exist. *Bowling v. Lexington Urban County Government*, 172 S.W.3d 333, 341 (Ky. 2005). Once a public agency states affirmatively that it does not possess responsive records, the burden shifts to the requester to present a *prima facie* case that the requested records do exist in the agency’s possession. *Id.* at 341. If the requester can make 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 Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 848 n.3 (Ky. 2013) (citing *Bowling*, 172 S.W.3d at 341).

Because the Department affirmatively stated that it did not “have a record which would show a ‘PCR Amplification Rate’” the burden shifts to the Appellant to make a *prima facie* case. To make his *prima facie* case, the Appellant recites a series of current COVID-19 related controversies he believes are affecting the nation. Specifically, the Appellant asserts that “[s]ince the PCR is the gold standard for testing [COVID-19], most of [the Department]’s 4,500+ COVID-19 ‘cases’ are likely positive PCR tests.” The Appellant also claims that “each PCR test uses a specific ‘amplification’[.]” Although he presents policy suggestions for why the Department may want to consider collecting this information, the Appellant cites no authority that requires the Department to maintain records reflecting the PCR amplification rates of the tests it collects and complies. And the Appellant provides no evidence that the Department should possess records demonstrating that COVID-19 was the cause of an infant’s death, as the Department agrees with the Appellant that the infant’s death was not caused by COVID-19. On this record, this Office cannot find that the Appellant has made a *prima facie* case that the Department should possess the records he seeks, or that such records ever existed. Therefore, the Department did not violate the Act when it denied

the Appellant's requests for records that do not exist in the Department's possession.¹

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/Matthew Ray
Matthew Ray
Assistant Attorney General

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Distributed to:

John Yarbrough
Denise Beach
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¹ The Appellant also sought records relating to the comorbidities associated with the COVID-19 deaths that have been reported by the Department. The Department denied this request under the Health Insurance Portability and Accountability Act ("HIPAA"), which is incorporated into the Act under KRS 61.878(1)(k). In his appeal to this Office, the Appellant does not appear to be seeking review of the Department's denial of this request, because he does not mention it or present any argument as to why HIPAA does not apply to deny inspection of such records. This Office notes, however, that in 21-ORD-139, an appeal involving these same parties, this Office affirmed the Department's reliance on HIPAA to deny inspection of records containing the dates of death for the individuals contained in the data. This Office found that covered entities such as the Department "are prohibited from releasing the 'individually identifiable health information' of individuals, and such information includes 'past, present, or future' health conditions that 'identifies the individual' or if 'there is a reasonable basis to believe the information can be used to identify the individual.' 45 CFR § 160.103." 21-ORD-139. The same is true of comorbidity information of specific individuals, because there is a reasonable basis to believe that such information could be used to identify the decedents.