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21-ORD-224

November 18, 2021

In re: John Yarbrough/Hopkins County Health Department

Summary: The Hopkins County Health Department ("the Department") violated the Open Records Act ("the Act") when it did not cite an applicable exception to deny a request for certain records. However, the Department did not violate the Act when it denied a request for records that were protected under HIPAA or that do not exist in the Department's possession.

Open Records Decision

On September 29, 2021, John Yarbrough ("the Appellant") submitted a request to the Department to inspect certain records related to COVID-19. Upon receiving the Department's timely response, the Appellant submitted a new request on October 7 to clarify the records he sought to inspect. Also, on October 6, 2021, prior to sending his clarified request, the Appellant had sent a different request seeking other records related to COVID-19. The Department denied both of the Appellant's requests, and this appeal followed.

In his first request, the Appellant requested to inspect the Department's records that would support a public statement made by a private entity, the Baptist Health Deaconess ("Baptist Health") in Madisonville.[1] The Appellant also sought records that would show "if any of these 'unvaccinated' patients may actually have been hospitalized from an adverse reaction to a vaccine[.]" Finally, the Appellant sought any record from the Food and Drug Administration ("FDA") "that would show that [the Department] is aware that [the] FDA did not approve the Pfizer vaccine[.]" The Department denied this

[1] Baptist Health had allegedly stated that 41 of 47 patients hospitalized at the time of the statement were unvaccinated against Sars-COV-2.

request, stating that it does not possess the records on which Baptist Health relied in making its public statement, and that the Department does not possess any records that would state whether patients were hospitalized from adverse vaccine reactions. The Department also stated that the FDA has in fact approved the Pfizer vaccine and that it does not possess any records from the FDA to the contrary.

In his second request, the Appellant sought records related to "break through" cases of COVID-19, and whether individuals had been hospitalized for taking Ivermectin or Hydroxychloroquine. Finally, the Appellant sought all "records that show all data [the Department] sent to government agencies regarding [COVID-19]" in August and September. Or, in the alternative, the Appellant requested to inspect "all" of the Director of the Department's emails. The Department denied the Appellant's request for hospitalization records on the same basis as its earlier denial – that it does not possess the hospitalization records of Baptist Health. In response to the Appellant's request for the Director's emails, however, the Department simply stated it would "allow the Attorney General or the local [c]ircuit [c]ourt to determine" the Appellant's "need" for the Director's emails.

The Department denied most of the Appellant's requests by stating that no responsive records exists in the Department's possession. The Department instead directed the Appellant to submit his requests to Baptist Health. 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 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 is able to make a *prima facie* case that the records do or should exist, then the public 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).

Here, the Appellant presents no evidence to support a *prima facie* case that the Department should possess the hospitalization records of Baptist Health. Nor does he present any evidence to support a *prima facie* case that the Department is required to maintain records related to the use of Ivermectin or Hydroxychloroquine. Accordingly, the Department did not violate the Act when it denied the Appellant's request for records that do not exist in the Department's possession.

The Appellant also sought to inspect "all data" sent by the Department in August and September to other public agencies related to COVID-19, or, in the alternative, all of the Director's emails. In making his request for the Director's emails, the Appellant did not specify whether he was seeking every email ever sent or received by the Director, or just those emails sent in August and September. As for the requested data, the Department stated that the only responsive records contained patient information that was provided to the Department from "medical offices." Thus, the Department claimed that the Health Insurance Portability and Accountability Act ("HIPAA") prevented it from providing the records. The Department did not cite any exemption to the Act to support its denial of the Appellant's request for the Director's emails.

In 21-ORD-139 and 21-ORD-183, appeals involving these same parties, the Office found that the Department is a "covered entity" under HIPAA and that it properly denied the Appellant's inspection of similar medical records. Thus, the Department did not violate the Act in denying the Appellant's inspection of these records.

However, whenever a public agency denies a request to inspect records it must cite the applicable exception and provide a brief explanation for how the exception applies to the records withheld. *See* KRS 61.880(1). In response to the Appellant's request for "all" of the Director's emails, the Department simply stated that it would "allow the Attorney General or the local [c]ircuit [c]ourt to determine [the Appellant's] need for all of [the Director's] emails." This is not an appropriate response. Moreover, despite this Office sending notice of the appeal to the Department, the Department has failed to submit any response on appeal. Thus, at no point has the Department provided any explanation for why it is denying the Appellant's request for the Director's emails. Under KRS 61.880(2)(c), the burden is on the public agency to substantiate its denial. The Department has failed to carry that burden, because it has at no point cited an applicable exception or explained why the Appellant's request for the Director's emails was denied. Accordingly, the Department violated 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 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.

Daniel Cameron
Attorney General

/s/Marc Manley
Marc Manley
Assistant Attorney General

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Distributed to:

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