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25-ORD-021

January 28, 2025

In re: Tiffany Aikin/Office of Medical Cannabis

Summary: The Office of Medical Cannabis ("the Agency") did not violate the Open Records Act ("the Act") when it did not provide a copy of a record that does not exist.

Open Records Decision

On December 6, 2024, Tiffany Aikin ("the Appellant") submitted a request to the Agency, stating as follows: "For each applicant of each application accepted into the medical cannabis lotteries for tier one, tier two, and tier three cultivator licenses, processor licenses, and dispensary licenses, the following information is requested: For each accepted application, the business entity legal name, if applicant is a business, or the individual name, if the applicant applied as an individual, along with the applicant mailing address. Matched with the business entity or individual applicant, the contact person for the application and their full contact information, including at the minimum name, mailing address, email address, and phone number." The Appellant further requested "that the information be conveyed electronically/digitally in excel/csv file format [and] sent via email."

In a timely response, the Agency provided two records. First, the Agency provided a list of all applications for dispensary licenses in Regions 3-11, redacting Regions 1 and 2 as "preliminary" under KRS 61.878(1)(i) and (j) because the list was not yet final as to those regions. Second, the Agency provided a list of all applications for cultivator and processor licenses. The Agency advised the Appellant "that the records being produced are for all applicants [and] are not limited to those applicants whose applications were accepted for the license lotteries." Additionally, the Agency noted "that the records being produced do not contain all the information [the Appellant] requested," but "[t]his is the only format in which [the Agency] creates and maintains a record responsive to [her] request." The Agency further noted the Act does not require a public agency to compile information to conform to a request. Lastly, the Agency stated that, "to the extent" the Appellant might be requesting copies of the actual license applications that had been accepted for the lotteries, the

request was "unduly burdensome" because it would require the Agency "to pull and redact" between 150,000 and 750,000 pages of documents, which would take "thousands of hours."

In reply, the Appellant clarified that she was "not requesting the full the [*sic*] application(s)," but was "requesting information that the [Agency] would absolutely have collated with the information already provided as communication occurred through both email and mailing address of the application's contact person." She stated she wanted information as to "[w]hich applications were accepted into the lottery versus not." The Agency responded by reiterating that it "does not maintain any records aside from the full application that contain the specific information sought in [the] request." However, the Agency provided copies of "the eligible applicant files for the lotteries held" in October, November, and December 2024, consisting of "seventeen (17) documents representing one (1) for each lottery drawing that includes the eligible applicant name, application number, and the city and county of the applicants' proposed business location." The Agency further provided a copy of "a record that includes the primary contact information for license selectees across all medical cannabis business categories." This appeal followed.

The Appellant complains that the Agency has not provided, as she asked, a database containing all the specific information she identified in her request. The Agency, however, denies that any such database exists and correctly states the Act does not require the agency to create or compile one. *See, e.g.,* 23-ORD-261; 16-ORD-052. Once a public agency states affirmatively that no further records exist, the burden shifts to the requester to present a *prima facie* case that additional records do exist. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov't,* 172 S.W.3d 333, 341 (Ky. 2005). Here, the Appellant claims it is "unlikely that the [Agency] does not have a database record that has all of the information requested already included." Beyond this assertion, however, she offers no evidence of its existence. A requester's bare assertion that an agency possesses a requested record is insufficient to establish a *prima facie* case that the agency, in fact, possesses it. *See, e.g.,* 22-ORD-040. Rather, to present a *prima facie* case that the agency possesses or should possess the requested record, the requester must provide some statute, regulation, or factual support for this contention. *See, e.g.,* 21-ORD-177; 11-ORD-074. As the Appellant has provided only a bare assertion, she has not presented a *prima facie* case that a database containing all of the requested information exists. Accordingly, the Agency did not violate the Act when it did not provide such a database.

A party aggrieved by this decision may appeal it by initiating an 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.

Russell Coleman
Attorney General

/s/ James M. Herrick
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