



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

DANIEL CAMERON
ATTORNEY GENERAL

CAPITOL BUILDING, SUITE 118
700 CAPITAL AVENUE
FRANKFORT, KENTUCKY 40601
(502) 696-5300
FAX: (502) 564-2894

21-ORD-094

May 19, 2021

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 disclose test results that were confidential under KRS 333.130 or produce records that do not exist.

Open Records Decision

Jenny Patten (“Appellant”) submitted to the Cabinet two requests for copies of records. In her first request, she asked the Cabinet to provide “documents showing how many [of the] PCR tests¹ [in Kentucky] have been conducted by Labcorp.” The Cabinet responded that it “does not keep a running tally of the number of reports submitted by each diagnostic laboratory” and therefore no responsive record exists. However, to the extent that that information could be gleaned from the actual test reports, the Cabinet asserted that those reports are confidential under KRS 333.130 and therefore exempt from disclosure under KRS 61.878(1)(l) and 61.878(1)(a).

Additionally, the Appellant requested “documents/receipts showing how much each PCR test is costing the state [including] all costs associated (testing [and] processing).” The Cabinet responded that it had already provided the Appellant a copy of its contract with Gravity Diagnostics, which specified “the amount of money the state will pay for each test[.]” The Cabinet also provided “a document displaying all payments to Laboratory Corporation of America Holdings for the requested timeframe.” To the extent that the Appellant was

¹ In the context of prior requests and appeals by the Appellant, “PCR tests” appears to refer to polymerase chain reaction testing for Covid-19.

requesting the Cabinet to compile additional information or to create a record, the Cabinet asserted that it was not required to do so.

For her second and similar request, the Appellant sought “all reports, and emails regarding” Covid-19 positive tests in Kentucky from Labcorp between May 30, 2020 and February 23, 2021. She also sought all contracts and “receipts” from Labcorp during the same period. The Cabinet provided responsive contracts and receipts. But the Cabinet denied the Appellant’s request for reports or emails regarding Covid-19 test positivity under KRS 333.130 and KRS 61.878(1)(a). The Appellant now challenges the Cabinet’s disposition of her requests.²

The Cabinet denied the Appellant’s request for copies of all positive test reports, and emails regarding those positive test reports, under KRS 333.130. Under that statute, “[t]he cabinet may require reporting by medical laboratories of selected test results for the protection of the public health.” However, those reports are “deemed confidential and not subject to public inspection.”³ *Id.* Because the test reports are confidential, the Cabinet did not violate the Act when it denied the Appellant’s request for these records.⁴

Regarding the Appellant’s request for contracts and receipts related to the cost of testing, the Cabinet has already provided the Appellant with records stating the amount paid by the Commonwealth for each Covid-19 PCR test. Among those records are the contracts that it has executed with testing

² When she brought her first appeal, the Appellant provided this Office with a copy of her original request and the Cabinet’s original response, as required under KRS 61.880(2). When she brought her second appeal, the Appellant provided a copy of the Cabinet’s second denial, but mistakenly provided a copy of her first request instead of the second. The Cabinet therefore claims that this Office does not have jurisdiction to adjudicate the Appellant’s second appeal, because she failed to provide a copy of her second request. But the Cabinet restated the Appellant’s second request in its second response. Therefore, this Office possesses all the information necessary to adjudicate this appeal.

³ In 21-ORD-047, the Appellant sought these same test results, although she did not state so in the most specific of terms. The Cabinet claimed that the Appellant’s request was not specific enough, and that the request was simply an “any-and-all” type of request that this Office has traditionally found that agencies need not honor. In that appeal, however, the Cabinet did not claim that KRS 333.130 would apply to the Appellant’s request because it claimed that it did not know what the Appellant sought.

⁴ Because KRS 333.130 is dispositive, it is unnecessary to consider KRS 61.878(1)(a).

providers and “a document displaying all payments” to Labcorp.⁵ However, the Cabinet states that if the Appellant is requesting a record that includes all costs associated with testing, including the salaries of public employees who process the data, the Cabinet is unable to comply with the request because it possesses no such record. Once a public agency states affirmatively that a record does not exist, the burden shifts to the requester to present a *prima facie* case that the requested record does exist. *Bowling v. Lexington-Fayette Urban Cty. Gov’t*, 172 S.W.3d 333, 341 (Ky. 2005). Because the Appellant has not made a *prima facie* case that the Cabinet should possess records relating to the cost of testing other than contracts and receipts for that service, the Cabinet did not violate the Act when it denied that portion of the Appellant’s request.

Finally, the Appellant requested records demonstrating how many positive test results had been reported by Labcorp. Initially, the Cabinet denied the request because it did not possess a record containing the statistical data of positive tests reported by each laboratory. The Cabinet explained that to provide such information would have required it to audit all of the positive reports issued by all laboratories. However, the Cabinet has since provided this information to the Appellant. Therefore, any claims arising out of the Cabinet’s initial denial of this portion of the Appellant’s request is now moot.

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/Marc Manley
Marc Manley
Assistant Attorney General

⁵ The record is an itemized list of payments made to Labcorp ranging from 2018 until 2021 showing that a total of \$1,793,145.95 had been paid for testing. It is not clear why dates from 2018 were included, and there were no itemized payments in 2019.

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Distributed to:

Ms. Jenny Patten
Peyton Sands, Esq.