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25-ORD-056

March 3, 2025

In re: Phillip Wines/Eastern Kentucky Correctional Complex

Summary: The Eastern Kentucky Correctional Complex (“the Complex”) did not violate the Open Records Act (“the Act”) when it did not provide records that it does not possess.

Open Records Decision

Inmate Phillip Wines (“Appellant”) submitted a request to the Complex seeking U.S. Food and Drug Administration “approval or warnings” related to “the on[-]label use for all” his medications. In response, the Complex stated that it does not possess any responsive records. This appeal followed.

On appeal, the Complex maintains that it does not possess records containing FDA “approval or warnings,” and that when it receives medication, “documentation listing the potential side effects” is not included. 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* case that the agency does possess the records. *See Bowling*, 172 S.W.3d at 341. If the requester establishes a *prima facie* case that the 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). To support a claim that the agency possesses responsive records it did not provide, the Appellant must produce some evidence that calls into doubt the adequacy of the agency’s search. *See, e.g.*, 95-ORD-96.

Here, the Appellant asserts that federal regulations require drug manufacturers to “provide ‘medication guides’” and to place approval labels on prescription medications. But those assertions, even if accurate, relate only to required actions of third parties. They do not establish a *prima facie* case that the

Complex currently possesses those records. Thus, the Appellant has not made a *prima facie* case that the Complex possesses the requested “approval or warnings” related to his medication. Therefore, the Complex did not violate the Act when it did not provide them.¹

A party aggrieved by this decision may appeal it by initiating an action in the appropriate circuit court under KRS 61.880(5) and KRS 61.882 within 30 days from the date of this decision. Under 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/ Zachary M. Zimmerer
Zachary M. Zimmerer
Assistant Attorney General

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Distributed to:

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¹ Because the Appellant has not made a *prima facie* case that the Complex possesses any responsive records, it is not necessary to address its alternative argument that, even if the Complex did possess the records, they would be exempt under KRS 197.025(2), which is incorporated into the Act by KRS 61.878(1)(l).