



Wendy Braund, Sharon Watkins, Laura Fassbender, Danielle Pierre, to/from any/all of the following: Susan Coffin, David Rubin, Jeffrey Pennington, Shaun Armstrong Jenkins, Tara Piechowicz, Allison Jones, Meg Snead. I am asking [for] records containing: 1. Any/all communications about School testing program, including purpose, implementation, data collection, data storage, STRAC APP, and using the data collected by schools['] genomic surveillance/genomic sequencing. 2. Any/all communications about the White House Coronavirus Task Force having an interest in school surveillance data and/or school testing program.

On April 14, 2022, the Department invoked thirty-day extensions of time to respond to the first two Requests. *See* 65 P.S. § 67.902. On April 22, 2022, the third Request was filed, seeking:

[3] On August 24th, 2021, Sherri Smith reached out to Peter Blank about scheduling a meeting with Mark Hoffman of the Bucks County IU, in an email thread with the subject line: Bucks County. Please provide that email thread in it[]s entirety. It spans several days. Please include the names of every recipient and sender. These emails were about scheduling a meeting and subject to redaction.

On April 29, 2022, the Department invoked a thirty-day extension of time to respond to the third Request. *See* 65 P.S. § 67.902. On May 16, 2022, the Department notified the Requester that a response to the first Request was taking longer than expected and requested an additional extension. However, the Requester responded that she was unable to grant an additional extension;¹ accordingly, when the Department did not issue a final response to the first Request on that date, it was deemed denied. *See* 65 P.S. § 67.902(b)(2).

On the same day, the Department partially denied the second Request, noting that some responsive information is available on its website, 65 P.S. § 67.704, arguing that records contain personal identification information and individually identifiable health information, 65 P.S. §§

¹ The Requester noted that she could not grant the Department an additional extension to respond. However, Section 902(b)(2) does authorize such additional extensions; while some appeals filed by the Requester have been dismissed as untimely, in those cases, the responding agency requested an additional extension on the day a response was due. *See* 65 P.S. § 67.902(b)(2); *Brock v. Bucks Cnty.*, OOR Dkt. AP 2022-0139, 2022 PA O.O.R.D. LEXIS 765; *Brock v. Bucks Cnty.*, OOR Dkt. AP 2022-0092, 2022 PA O.O.R.D. LEXIS 767. In those cases, when the Requester did not agree to an additional extension until the day *after* the response was due, the requests had already been deemed denied by operation of law. *See id.*

67.708(b)(5) and 708(b)(6)(i)(A), are related to noncriminal investigations, 65 P.S. § 67.708(b)(17), are internal, predecisional, and deliberative, 65 P.S. § 67.708(b)(10)(i)(A), are protected by the attorney-client privilege and/or the attorney-work product doctrine, and/or are confidential under the Disease Prevention and Control Law of 1955 (“DPCL”), 35 P.S. § 512.15, *et seq.*, and related regulations, 28 Pa. Code § 27.3. On May 31, 2022, the Department denied the third Request for the previously asserted reasons, also arguing that disclosure of responsive records would be likely to threaten personal security, 65 P.S. § 67.708(b)(1)(ii).

On June 3, 2022, the Requester appealed to the OOR, challenging the denials and stating grounds for disclosure.² The OOR invited the parties to supplement the record and directed the Department to notify third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

On June 24, 2022, the Department submitted position statements and attestations made under the penalty of unsworn verification by Dr. Sharon Watkins, the Director of the Department’s Bureau of Epidemiology, and by Danica Hoppes, the Department’s Open Records Officer. The Department provided some records responsive to the first Request redacted of internal, predecisional, and deliberative content, 65 P.S. § 67.708(b)(10)(i)(A), information protected by the constitutional right to privacy, and information, the disclosure of which would threaten personal or computer security, 65 P.S. §§ 67.708(b)(1)(ii), 708(b)(4).

² The Requester filed three separate appeals, which were docketed at OOR Dkts. AP 2022-1335, 2022-1337, and 2022-1344. The appeal docketed at OOR Dkt. AP 2022-1335 includes the Department’s responses to both the first and the second Requests. Because they involve the same parties and issues, the appeals are hereby consolidated at OOR Dkt. AP 2022-1335. *See* 65 P.S. § 67.1102(b)(3) (stating that “the appeals officer shall rule on procedural matters on the basis of justice, fairness and the expeditious resolution of the dispute”). The Requester provided the OOR with additional time to issue a final determination in this matter. *See* 65 P.S. § 67.1101(b)(1).

LEGAL ANALYSIS

1. The appeal is moot in part

On appeal, the Department has provided some redacted records responsive to the first Request. Therefore, insofar as it seeks those records, the appeal is dismissed as moot.³ *See Kutztown Univ. of Pa. v. Bollinger*, 2019 Pa. Commw. Unpub. LEXIS 521, *6 (holding that an appeal is properly dismissed as moot where no controversy remains).

2. The Department has conducted a good faith search for records

The Requester questions whether the Department conducted a good faith search for records responsive to the second Request. In response to a request for records, an agency is required to “make a good faith effort to determine if ... the agency has possession, custody or control of the record.” 65 P.S. § 67.901. While the RTKL does not define the term “good faith effort” as used in Section 901 of the RTKL, in *Uniontown Newspapers, Inc. v. Pennsylvania Department of Corrections*, the Commonwealth Court stated:

As part of a good faith search, the open records officer has a duty to advise all custodians of potentially responsive records about the request, and to obtain all potentially responsive records from those in possession... When records are not in an agency’s physical possession, an open records officer has a duty to contact agents within its control, including third-party contractors... After obtaining potentially responsive records, an agency has the duty to review the records and assess their public nature under ... the RTKL.

185 A.3d 1161, 1171-72 (Pa. Commw. Ct. 2018) (citations omitted); *aff’d*, 243 A.3d 19 (Pa. 2020). *See also Mollick v. Twp. of Worcester*, 32 A.3d 859, 875 (Pa. Commw. Ct. 2011); *In Re Silberstein*, 11 A.3d 629, 634 (Pa. Commw. Ct. 2011).

Here, Ms. Hoppes describes her search:

5. I initiated a comprehensive search for responsive records in the Department’s possession or control by circulating the [R]equest to the Department personnel identified in the [R]equest.

³ The Requester clarified that she does not challenge the redactions made by the Department to these records.

6. On April 8, 2022, I emailed the [R]equest in its entirety [] to relevant, current Department personnel, *i.e.*, Dr. Sharon Watkins, Dr. Wendy Braund and Danielle Pierre, and included the following instructions:

RTKL-COV-038-2022

Rec'd 04/08/2022

Due 04/15/2022

If you have records pertaining to this request, please IMMEDIATELY PROVIDE THEM by clicking on the hyperlink below to add the documents under the folder labeled "Responsive Docs":

Q:\Exec\Legal\Right to Know\Right to Know Requests 2022\COV\DOH-RTKL-COV-038-2022\Responsive Docs

and then reply to myself and Anna LaMano to advise that documents have been added. If you have issues accessing the "Responsive Docs" folder, please advise me immediately. Please understand that provided records will be reviewed by legal counsel and may be withheld or redacted.

If you do not have records pertaining to this request, please also let Anna and I know and advise if you believe someone else might have records responsive to this request.

If you require additional time to access the records, please IMMEDIATELY let me know and I will take care of requesting an extension. Even with an extension, we will need the records no later than 20 days after the original due date.

Thank you!

7. Further, I obtained the email inbox of Sarah Boateng and personally searched this email inbox for responsive records.
8. The email inboxes of former employees Michael Huff and Laura Fassbender are no longer available as of their respective dates of separation. Laura Fassbender separated from Commonwealth employment on February 12, 2021 and her email inbox was not retained. It is my understanding that Michael Huff separated from the Commonwealth at some point prior to Laura Fassbender, and that his email inbox was not retained.
9. Because of the multiple search terms and recipients, and after receiving several follow-up questions from current personnel named in the response, our office scheduled a meeting with the custodians of potentially responsive records to discuss effective search methods. We followed up by providing additional guidance to potential custodians of records via email on April 26, 2022.
10. I received feedback from that the guidance had been useful in searching for potentially responsive records.

11. As a result of the above-described searches, potentially responsive records were uploaded using the hyperlink I had provided, which was connected to a designated electronic file that I created and maintained for the [R]equest.

Ms. Hoppes describes in detail her search for responsive records, which included inquiries, correspondence, and meetings with custodians of potentially responsive records, as well as searches of the inbox of the only former employee identified in the Request whose inbox was accessible. *See Breslin v. Dickinson Twp.*, 68 A.3d 49, 55 (Pa. Commw. Ct. 2013), *petition for allowance of appeal denied*, 80 A.3d 779 (Pa. 2013) (holding that agencies are not required to seek requested documents from former employees).

Under the RTKL, an affidavit or statement made under penalty of perjury may serve as sufficient evidentiary support. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Off. of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any evidence that the Department has acted in bad faith, “the averments in the [attestation] should be accepted as true.” *McGowan v. Pa. Dep’t of Envtl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Off. of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)). As Ms. Hoppes describes in detail a search reasonably calculated to locate responsive records, the OOR concludes that the Department has met its burden of proving that it conducted a good faith search in response to the second Request. *See* 65 P.S. § 67.901.

3. All withheld records are exempt under the DPCL

The Department argues that responsive records that were withheld are confidential under the DPCL. The DPCL mandates that all communicable and non-communicable diseases be reported to the Department. 35 P.S. § 521.4. In order to protect the health of the public, the Department is required to implement necessary control measures on receipt of any report of a communicable or non-communicable disease. *See* 35 P.S. § 521.5.

The Department asserts that, with a few exceptions, it is strictly prohibited from releasing any information it acquires while performing its duties under the DPCL, and the improper disclosure of information made confidential under the DPCL is a summary offense. 35 P.S. § 521.20. The DPCL contains a confidentiality provision which the OOR has previously interpreted broadly. *See, e.g., Brock v. Pa. Dep't of Health*, OOR Dkt. AP 2022-0747, 2022 PA O.O.R.D. LEXIS 1532 (denying a similar request); *Ciavaglia v. Bucks Cnty.*, OOR Dkt. AP 2020-0761, 2020 PA O.O.R.D. LEXIS 1528 (finding local health department reports and records that show COVID-19 related deaths confidential under the DPCL); *Pattani v. Pa. Dep't of Health*, OOR Dkt. AP 2020-0995, 2020 PA O.O.R.D. LEXIS 2672 (finding communications that discuss how to coordinate public health activities between the Department and local health authorities were confidential under the DPCL). Section 15 of the DPCL provides:

(a) Except as provided under section 15.1, State and local health authorities may not disclose reports of diseases, any records maintained as a result of any action taken in consequence of such reports, or any other records maintained pursuant to this act or any regulations, to any person who is not a member of the department or of a local board or department of health, except as follows:

- (1) Where necessary to carry out the purposes of this act.
- (2) Where necessary to inform the public of the risk of a communicable disease.

35 P.S. § 521.15; *see also* 28 Pa. Code § 27.5a.

Dr. Watkins affirms that the Department, in accordance with its regulations, is engaged in an epidemiological investigation and working to effectively manage and prevent the spread of COVID-19, a communicable disease. More specifically, she attests as follows:

2. The Bureau's purpose is to assist in meeting the Department's assigned statutory obligations pursuant to the [DCPL] and, subject to the confidentiality provision therein, 35 P.S. § 512.15, is responsible for carrying out a multi-faceted program that: (1) conducts surveillance for diseases and conditions of public health significance; (2) conducts or directs investigations to determine the cause of disease and injury; (3) provides consultation to health professionals

and the public; and (4) makes science-based recommendations on disease control and prevention.

3. The role of the Bureau is to:
 - Understand disease patterns and at-risk populations
 - Identify unusual patterns of illness and injury in the Commonwealth
 - Identify causative factors for disease and injury
 - Investigate emergent public health problems
 - Develop recommendations, control measures, and preventative procedures for illness and injury
 - Evaluate the success of public health interventions and programs in reducing disease and injury incidence.
4. Pursuant to the authority given to the Department by the DPCL, the Bureau provides guidance and support to county and municipal health departments, and to other bureaus within the Department regarding communicable and non-communicable diseases, prevention and control measures, and injury prevention.
5. The Bureau directly conducts or indirectly supervises hundreds of disease outbreak investigations per year.
6. I have reviewed the [Requests].
7. I have reviewed the records gathered in response to the [Requests], which were ultimately withheld.
8. The withheld records directly implicate the Department's epidemiological investigation regarding COVID-19, a disease or condition reportable under the Communicable and Non-communicable Diseases Regulations promulgated pursuant to the DPCL. *See* 35 P.S. §§ 521.2(k) (definition of "reportable disease"), 521.3 (relating to responsibility for disease prevention and control), 521.4 (reports) and 521.5 (control measures).
9. The withheld records consist of emails between Department officials and emails between Department officials and officials from the Pennsylvania Department of Education, regarding an aspect of the Department's COVID-19 response and the Bucks County Intermediate Unit. The withheld records pertain to school guidance about specific control measures developed in response to COVID-19 and contemplate potential courses of action.
10. The individuals and agencies implicated in th[ese] [R]equest[s] participate in formulating and/or implementing Departmental disease prevention and control measures within Commonwealth school districts; they are integral to the ongoing response to the COVID-19 pandemic (a reportable communicable disease under the DPCL), specifically the aspect of the pandemic response

involving the Department's coordination with school districts throughout the Commonwealth.

11. The withheld records were created and are maintained pursuant to the DPCL as they relate to a component of the Department's statutorily-mandated disease prevention and control activities. Disease prevention and control activities include determinations as to whether schools throughout the Commonwealth should allow/require in-person instruction, require masks, the circumstances under which masking is required, the need for social distancing and the like.
12. As such, the withheld records document actions taken in response to reports of COVID-19.
13. The release of the withheld records or any redacted portion of records provided is neither necessary to carry out the purposes of the DPCL, nor does the Department consider it necessary to inform the public of the risk of a communicable disease.

Though paragraphs 1-6 of Dr. Watkins' attestation regarding the first Request are identical to her other attestations, subsequent paragraphs of her attestation differ slightly:

9. Specifically, the withheld records consist of emails between members of the Department's Bureau of Epidemiology, including myself in my capacity as State Epidemiologist and Director of the Bureau, members of the Department's Executive Offices, including the Acting Secretary of Health, Executive Deputy Secretary, Policy Director, and Director of Communications, and members of the Office of Legal Counsel, including the Department's Chief Counsel and Deputy Chief Counsel.
10. These communications reflect consideration, analysis, planning and deliberation with respect to specific measures intended [to] control the continued spread and effect of COVID-19 pursuant to the Department's charge under the DPCL, and specifically concern various aspects of the Department's COVID-19 K-12 Testing Program for the 2021-2022 academic year, including but not limited to surveillance and control measures such as testing requirements, masking guidance, vaccinations, contact tracing, and quarantine.
11. The withheld records specifically discuss, evaluate, and analyze these disease prevention and control measures and their potential implementation under the DPCL, as well as related ancillary and logistical considerations.

Dr. Watkins attests that the records that were withheld by the Department are communications among government officials and employees that directly relate to the

Department's investigation of COVID-19, and reflect plans, deliberations, analysis, and actions, including testing and guidance provided to the Bucks County Intermediate Unit.

The Requester argues that the Department does not supervise the Bucks County Intermediate Unit, accuses the Department of subverting the authority of the Director of the Bucks County Health Department, and reasons that the emails cannot relate to an epidemiological investigation because many of the senders and recipients have no medical training. However, the OOR has no jurisdiction over such matters.

Under the RTKL, an affidavit or statement made under penalty of perjury may serve as sufficient evidentiary support. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Off. of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any evidence that the Department has acted in bad faith, "the averments in the [attestations] should be accepted as true." *McGowan v. Pa. Dep't of Env'tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)). Because these communications constitute records created by the Department in response to its statutory obligations under the DPCL, the OOR is constrained to hold that the Department is permitted to withhold them. *See* 65 P.S. § 67.708(a)(1); *see also Brock v. Pa. Dep't of Health*, OOR Dkt. AP 2022-0747, 2022 PA O.O.R.D. LEXIS 1532 (finding that Department emails, circulating drafts and discussing plans for responding to COVID-19 were exempt); *Brock v. Pa. Dep't of Health*, OOR Dkt. AP 2021-2830, 2022 PA O.O.R.D. LEXIS 492 (same).

The Requester argues that the Department has provided her with similar records to those requested in the past, and the Department is now being inconsistent in denying her access to these records. The OOR notes that the DPCL contains broad discretionary language, meaning that it

allows but does not necessarily require the Department to withhold records. An agency generally has the discretion to release otherwise nonpublic records when it is in the public interest to do so based on a number of factors. *See* 65 P.S. § 67.506(c) and 35 P.S. § 521.15. However, regardless of how compelling or beneficial to the public a request for information may be, even if that information relates to preventing spread of a disease through testing, vaccination, contact tracing or quarantining, the OOR is without authority to order the Department to exercise its discretion and release these records. *See Pa. Dep't of Pub. Welf. v. Froelich*, 29 A.3d 863 (Pa. Commw. Ct. 2011); *Loro v. Delaware Cnty.*, OOR Dkt. AP 2019-0779, 2019 PA O.O.R.D. LEXIS 590.

CONCLUSION

For the foregoing reasons, the Requester's appeal is **denied in part** and **dismissed as moot in part**, and the Department is not required to take any further action. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Commonwealth Court. 65 P.S. § 67.1301(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond according to court rules as per Section 1303 of the RTKL. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.⁴ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: August 16, 2022

/s/ Blake Eilers
Blake Eilers, Esq.
Appeals Officer

Sent via email to: Megan Brock, Ana LaMano, Esq., Shea Skinner, and Danica Hoppes

⁴ *See Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).