



FINAL DETERMINATION

IN THE MATTER OF

**JANINE MARTIN AND THE LAW
OFFICE OF MICHAEL J. D'ANIELLO,
Requester**

v.

**MONTGOMERY COUNTY,
Respondent**

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Docket No: AP 2022-1414

INTRODUCTION

Janine Martin, Esq., on behalf of the Law Office of Michael J. D'Aniello (collectively "Requester"), submitted a request ("Request") to Montgomery County ("County") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq.*, seeking records related to the County Board of Health's Investigation into an alleged hepatitis A outbreak at a restaurant. The County partially denied the Request, arguing, among other things, that the records relate to a noncriminal investigation and are confidential under the Disease Prevention and Control Law ("DPCL"). The Requester appealed to the Office of Open Records ("OOR"). For the reasons set forth in this Final Determination, the appeal is **denied**, and the County is not required to take any further action.

FACTUAL BACKGROUND

On May 19, 2022, the Request was filed, seeking:

All documents relating to the Montgomery County Public Health Office's investigation of the hepatitis A outbreak linked to Gino's Restaurant and the related

inspection of Gino's Restaurant in January 2022, including, but not limited to, the Pennsylvania Department of Health's report and findings, the County Department of Health's report and findings, witness statements, summaries or notes of witness interviews, laboratory tests and results, list of suppliers and any statements or summaries of conversations with suppliers, and all documents exchanged between Gino's Restaurant (including agents for the restaurant and its owners) and Montgomery County.

On May 26, 2022, the County partially denied the Request, by providing access to inspection records on County Health Inspections public website and arguing that the remaining records relate to a noncriminal investigation, 65 P.S. § 67.708(b)(17), the records contain individually identifiable health information, 65 P.S. § 67.708(b)(5), and that the records are confidential under the DPCL, 35 P.S. §§ 521.1-521.21. The County granted access to records concerning "Food Establishment Inspection Reports" by directing the Requester to the County's website.¹

On June 10, 2022, the Requester appealed to the OOR, challenging the partial denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the County to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On June 23, 2022, the County submitted a position statement reiterating its grounds for denial. In support of its position, the County submitted the attestations of Christina Miller, the County's Administrator for the Office of Public Health ("OPH"), and Joshua Stein, Esq., the County Solicitor.

On June 23, 2022, the Requester submitted a statement in further support of the appeal, arguing that the County has not carried its burden of proving any of the asserted exemptions. More specifically, the Requester argues that the Public Health Code does not expressly authorize the

¹ See <https://pa.healthinspections.us/montgomery/#home> (last accessed August 18, 2022). Section 704 of the RTKL provides that "an agency may make its records available through any publicly accessible electronic means." 65 P.S. § 67.704(a).

County to conduct investigations, as compared to authorizing it to conduct inspections. The Requester further argues that any private health information can be redacted in accordance with Section 706 of the RTKL and that no evidence has been presented to demonstrate that the withheld documents are protected by the DPCL. Finally, the Requester argues that because individuals died and were sickened as a result of the alleged hepatitis A outbreak at the restaurant, there is a strong public policy in favor of disclosure, especially in light of the restaurant owner's vehement denial that the outbreak was related to their restaurant. The Requester notes that the RTKL provides agencies with the discretion to release records even when an exemption may apply.

LEGAL ANALYSIS

“The objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government.” *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law is “designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions.” *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff'd* 75 A.3d 453 (Pa. 2013).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the request” and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing is discretionary and non-appealable. *Id.* Here, neither party requested a hearing.

The County is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in the possession of a local agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.” 65 P.S. § 67.708(a)(1). Preponderance of the evidence has been defined as “such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

The County argues that, other than the records available on the County website, the remaining records sought are confidential under the DPCL. The County argues that the Office of Public Health is the Department, under the supervision of the County Board of the Department of Health, that is subject to the “guidance and supervision under the Commonwealth’s Department of Health” related to the County’s responsibilities under the DPCL. The County asserts that reports of diseases and any record related to diseases reported under the DPCL are expressly confidential pursuant to 35 P.S. §521.15, and that OOR has consistently found that records, “including reports,

notes, e-mails, and memorandums involving an outbreak of disease are protected under the DPCL and that the RTKL does not apply.”

Section 15 of the DPCL provides:

(a) Except as provided under section 15.1, State and local health authorities may not disclose reports of disease, 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 communicable disease.

(b) State and local health authorities may permit the use of data contained in disease reports and other records, maintained pursuant to this act, or any regulation, for research purposes, subject to strict supervision by health authorities to insure that the use of the reports is limited to the specific research purposes.

35 P.S. § 521.15. Thus, records maintained by state or local health departments pursuant to the DPCL are confidential and may not be disclosed, except in extremely limited circumstances, i.e.

(1) where local or state health authorities determine such information is necessary to carry out the purposes of DPCL, or (2) when permitted by state or local health authorities for research purposes.

Id.; *see also* 28 Pa. Code § 27.5a.

In support of the County’s argument, Ms. Miller attests that in the capacity of the Administrator of the OPH, she is familiar with the records of the agency. Ms. Miller further attests the following:

4. The Office of Public Health has conducted an official investigation of Gino’s Ristorante in West Norriton Township as a part of the OPH’s statutory duties under the Disease Prevention and Control Law of 1955 (“DPCL”), 35 P.S. §§ 521.1 *et seq.*

5. Other than the Records made available online, the remaining records requested are confidential under the Disease Prevention and Control Law of 1955 (“DPCL”), 35 P.S. §§ 521.1 *et seq.*, and related regulations, 71 P.S. §§ 532(a)-(b).

6. The DPCL mandates that all communicable and non-communicable diseases be reported to Pennsylvania's Department of Health[("DOH")]. 35 P.S. § 521.4.

7. In order to protect the health of the public, the Department of Health 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.

8. Under Section 521.3(a) of the Disease Prevention and Control Law, local boards and departments of health are primarily responsible for the prevention and control of communicable and non-communicable disease, subject to guidance and supervision under the Department of Health. 35 P.S. § 521.3(a).

9. Montgomery County's Office of Public Health is the Department, under the supervision of the Pennsylvania Board of the Department of Health, that is subject to the guidance and supervision under the Commonwealth's Department of Health. *Id.*

10. Reports of diseases and any records related to diseases reported under the DPCL are expressly confidential by statute. 35 P.S. § 521.15.

11. Based upon the above-described search of OPH's files and inquiries with relevant OPH personnel, I have made the determination that the records requested are not public records, are confidential, and that the DPCL prevents the County from disclosing the reports maintained while investigating reportable diseases.

In further support of the County's argument, Attorney Stein corroborates Ms. Miller's attestation regarding the fact that OPH is under the supervision of the Board of the Department of Health and is subject to the guidance and supervision of the Pennsylvania DOH. Attorney Stein further attests "upon information and belief, the [OPH] conducted an official investigation as a result of the allegations of a Hepatitis A outbreak at Gino's Restaurant[]" and that based on a search of agency files and inquiries with County personnel, he "made the determination that the records requested are not public records, are confidential, and that the DPCL and the criminal penalties² related to the violation of the confidentiality provisions of the DPCL prevent the County

² "Any person who violates any of the provisions of this act or any regulation shall, for each offense, upon conviction thereof in a summary proceeding before any magistrate, alderman or justice of the peace in the county wherein the offense was committed, be sentenced to pay a fine of not less than twenty-five dollars (\$25) and not more than three hundred dollars (\$300), together with costs, and in default of payment of the fine and costs, to be imprisoned in the county jail for a period not to exceed thirty (30) days." 35 P.S. § 521.20(a).

from disclosing the requested records maintained while investigating reportable diseases.” Stein attestation, ¶¶ 8-16. Under the RTKL, a statement made under the penalty of perjury is competent evidence to sustain an agency’s burden of proof. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010).

Under Section 521.3(a) of the DPCL, local boards and departments of health are primarily responsible for the prevention and control of communicable and non-communicable disease, subject to guidance and supervision under the Department. 35 P.S. § 521.3(a). “Local boards or departments of health shall make reports of the diseases reported to them to the department at such times and in such manner as shall be provided for by regulation.” 35 P.S. § 521.4. In addition, Chapter 3 of the County Public Health Code, “Communicable and Noncommunicable Diseases,” incorporates the confidentiality provisions of the DPCL, along with the general reporting requirements and it also provides specific reporting procedures in the event of a report of a Hepatitis A outbreak.³ Ch. 3, Sec. 3-6 of Code also sets forth the confidentiality procedures that must be followed by the Department and they include, the following:

- a. All information procured by or made available to the Department staff, both professional and clerical, shall be used by such personnel only in accordance with this Chapter; and
- b. Employees of the Department and all persons dealing with the Department in connection with these programs shall be informed of the policy concerning confidential information. *Id.*

The OOR has previously interpreted the confidentiality provision of the DPCL broadly. *Walter v. Pa. Dep’t of Health*, OOR Dkt. AP 2022-1553, 2022 PA O.O.R.D. LEXIS 1912 (finding that the forms used to report Neonatal Abstinence Syndrome statistics is confidential under the

³ See <https://www.montcopa.org/DocumentCenter/View/877/Chapter-3-Communicable-and-Noncommunicable-Diseases?bidId=> (last accessed August 18, 2022).

DPCL); *Donnelly v. Pa. Dep't of Health*, OOR Dkt. AP 2020-1369, 2020 PA O.O.R.D. LEXIS 2963; *see also Ciavaglia v. Bucks County*, 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 which discuss how to coordinate public health activities between the Department and local health authorities were confidential under the DPCL).

The DPCL expressly assigns the responsibility for disease prevention and control to local boards and departments of health. *See* 65 P.S. § 521.3(a) (“Local boards and departments of health shall be primarily responsible for the prevention and control of communicable and non-communicable disease, including disease control in public and private schools, in accordance with the regulations of the board and subject to the supervision and guidance of the department.”). The County Public Health Code sets forth the responsibilities, obligations and procedures that must be followed by the County Department of Health and carried out by the OPH in order to execute the authority delegated by the PA DOH under the DPCL. The Request seeks various categories of records that are all related to the action taken by and materials gathered as a result of the County’s OPH response to reports of Hepatitis A cases allegedly contracted at a specific restaurant. Based on a review of the record and the evidence submitted by the County, the records sought are “reports of disease, 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” related to the Hepatitis A outbreak and, thus are confidential under the DPCL. *See* 35 P.S. § 521.15; Montgomery County Public Health Code Ch. 3, Sec. 3-6; 65 P.S. § 67.305(a)(3).

Finally, the Requester asserts that a strong public policy exists in favor of disclosure of the requested records because the County has reported that three individuals died from the Hepatitis

A outbreak and many others were sickened, while Gino's Restaurant denies involvement. The Requester further asserts that it is against public policy for the owners of Gino's to be privy to the information obtained by the County, when the families of those that died are unable to obtain information that could counter Gino's statements. Therefore, the Requester argues, the County should exercise its discretion to grant access to the records.

The DPCL contains broad discretionary language meaning that it allows but does not necessarily require the County to withhold records. An agency generally has the discretion to release otherwise nonpublic records. *See* 65 P.S. § 67.506(c) and 35 P.S. § 521.15. Based on any number of factors, an agency may release otherwise nonpublic or deidentified records in the public interest. 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 or to provide the families of the deceased with the information that may be helpful in their quest for the truth, the OOR is without authority to order the County 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 590.⁴ In addition, a requester's identity or motivation for making a request is not relevant to determining whether a record is accessible to the public under the RTKL. *Padgett v. Pa. State Police*, 73 A.3d 644, 647 (Pa. Commw. Ct. 2013).

CONCLUSION

⁴ Notably, the Requester states that Gino's Restaurant has sued the County and, "as such, all of this information will become public record." However, such an assertion does not mean that the records sought are public records under the RTKL. In addition, because we have determined that the records are confidential under the DPCL, it is not necessary to address the County's alternative grounds for withholding.

For the foregoing reasons, the appeal is **denied**, and the County 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 Montgomery County Court of Common Pleas. 65 P.S. § 67.1302(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond as per Section 1303 of the RTKL. 65 P.S. § 67.1303. 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.⁵ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: August 24, 2022

/s/ Kelly C. Isenberg

SENIOR APPEALS OFFICER
KELLY C. ISENBERG, ESQ.

Sent to: Janine Martin, Esq. (via email only);
Joshua Stein, Esq. (via email only);
Lauren Raikowski (via email only)

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