



FINAL DETERMINATION

IN THE MATTER OF

**JOHN KOSTELAC,
Requester**

v.

**ALLEGHENY COUNTY
HEALTH DEPARTMENT,
Respondent**

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Docket No.: AP 2022-1724

INTRODUCTION

John Kostelac (“Requester”) submitted a request (“Request”) to the Allegheny County Health Department (“Department” or “ACHD”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking records relating to lead poisoning testing results. The Department denied the Request, arguing that some records do not exist and that other records are exempt under state and federal health laws. 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 Department is not required to take any additional action.

FACTUAL BACKGROUND

On June 29, 2022, the Request was filed, seeking:

1. A copy of records for the years 2015 through 2021 made by ACHD inspectors on all residential rental units within the boundaries of the City of Pittsburgh wherein a child under the age of 6 years was reported to having [sic] blood lead levels of 5 pg/dl or more.

2. A paper copy of records as to the number of years the blood lead infected child resided in the reported lead hazard address and describing the type of lead hazard in the residential rental unit. I.E. dust, cracking peeling paint, lead water pipes etc.
3. Paper copy of ACHD inspection records of single family owner occupied non-rental residential structures in the City of Pittsburgh during 2015-through 2021 occupied by a child of less than 6 years of age and had a blood lead level of 5pg/dl or more.
4. Paper copy of ACDH [sic] inspectors stating the Race of the blood lead infected child under the age of 6 yrs for the years of 2015 through 2021.
5. A paper copy of the ACHD 2019 report describing the number and type of homes (single-family owner-occupied vs. residential rental units) that were inspected that indicated 87% of the homes inspected following the identification of a child with an elevated blood lead level over 5 pg/dl having lead-based paint and lead level dust hazards.
6. A paper copy of the inspection records of ACHD inspectors from 2015 through 2021 of all non-residential rental properties.

On July 14, 2022, following a thirty-day extension, 65 P.S. § 67.902(b), the Department denied the Request, arguing that it does not possess records responsive to Items 5 and 6, and that the information sought in Items 1-4 is exempt under the Disease Prevention and Control Law of 1955 (the “DPCL”), 35 P.S. § 521.1 *et seq.*

On July 25, 2022, the Requester appealed to the OOR, challenging the Department’s response and providing reasons for disclosure.¹ 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 August 10, 2022, the Department notified the OOR that it had not received notice of the appeal because the email address used was incorrect. The same day, the OOR reopened the record for submissions and notified the parties of the issue.

¹ The Requester granted the OOR additional time to issue this Final Determination. *See* 65 P.S. § 67.1101(b)(1).

On August 19, 2022, the Requester submitted a statement arguing that the appeal had identified the correct open records officer and asked that the OOR not grant the Department any extension.²

On August 22, 2022, the Department submitted a position statement arguing that disclosure is prohibited by the DPCL because the Department is mandated to investigate the outbreak of “reportable diseases,” and lead poisoning is defined as a reportable disease under the regulations of the Pennsylvania Department of Health. 27 Pa. Code §§ 27.21a-27.22. The Department also argues that the inspection reports sought contain information protected by the federal Health Insurance Portability Accountability Act (“HIPAA”). 45 C.F.R. § 164.502(a). In support of these arguments, the Department submitted the verification of Elizabeth Rubenstein, Esq., the Right to Know Officer for the Department, who attests that she determined the documents were exempt under the DPCL and HIPAA. The Department additionally submitted the verification of Brian Kelly, an Environmental Health Administrator for the Department, who attests that no responsive reports exist because the Department does not inspect non-residential properties, and the referenced 2019 report was presented at a meeting for the Lead Safe Allegheny Coalition and not based on the Department’s data.

On August 31, 2022, the Requester submitted a response reiterating his argument that the Department had been properly notified of the appeal and argued that HIPPA would not apply because the Request does not seek personal information, and that the DPCL applies to communicable disease reporting, not to lead poisoning.

² Because the OOR determined that the Department had not received the initial appeal, the OOR determined that the Department’s filing should be accepted into evidence. *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 same day, the Department submitted a brief statement noting that the deadline for submissions had passed and clarifying that the initial address contacted by the OOR was a resource account which was not monitored for incoming mail.³

On September 23, 2022, the Requester submitted a statement reiterating his argument that the Department had attempted to deceive him regarding the identity of their Open Records Officer,⁴ and argued that the Department knew or should have known about the responsive report and stressed that he was not seeking the personal data of any individuals.

The same day, the Department filed a short statement noting that HIPAA applies to demographic and address information, both of which are sought by the Request.

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

³ On September 16, 2022, the Requester sought an opportunity to file again, arguing that he had been unable to make a full response due to various health and technical issues. The OOR granted this request over the objections of the Department.

⁴ The Requester did not submit any evidence demonstrating that any bad-faith action occurred, and the OOR is unable to discern any support for these claims in the record. Therefore, the OOR will not consider these allegations. *Commonwealth v. Donahue*, 98 A.3d 1223, 1238 (Pa. 2014) (agencies are presumed to act in good faith and in accordance with the law unless contrary evidence is presented).

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 Department 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 to be 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 to respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemption(s). *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). 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)). Likewise, “[t]he burden of proving a record does not exist ... is placed on the agency responding to the right-to-know request.” *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

1. The Department has demonstrated that some responsive reports do not exist

Items 5 and 6 of the Request seek copies of non-residential lead inspections and a copy of a report showing that 87% of inspected homes contained children who tested positive for elevated lead levels in their blood. The Department denied these Items of the Request, arguing that no responsive reports exist. In support of this argument, the Department submitted the verification of Mr. Kelly, who attests that:

5. I provided Ms. Rubenstein with information on all housing inspections made pursuant to elevated lead blood level reports and where to find that information.

6. I also informed her that no 2019 report “describing the number and type of homes (single-family, owner-occupied vs. residential rental units) that were inspected that indicated 87% of the homes inspected following the identification of a child with an elevated blood lead level over 5 pg/dl [sic] having lead-based paint and lead level dust hazards” existed. This number was presented at a meeting for the Lead Safe Allegheny Coalition. I did not provide any notes or Power Point Presentations during such meeting.

7. Regarding any inspections performed at “non-residential rental properties,” [the Housing and Community Environment Program] has not inspected any “non-residential” properties. Therefore, no records exist.

8. Based upon the above-described search of the [the Housing and Community Environment Program] files and inquiries with relevant Department personnel, I have made the determination that certain records requested are not within the [Department’s] possession, custody, or control and do not exist.

Under the RTKL, an affidavit or statement made under penalty of perjury may serve as sufficient evidentiary support to establish the nonexistence of records. *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). In the absence of any evidence that the Department has acted in bad faith or that responsive records exist, “the averments in the [attestation] 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)).

Here, the Department has submitted evidence from a technician in the bureau responsible for making the responsive reports, who attests that none of the inspections or reports sought in Items 5 or 6 of the Request exist because the Department did not create them. Because the Department has demonstrated that it has never created the responsive records sought by Items 5 and 6 of the Request, it has shown that no responsive records exist, and the Request must be denied as to those Items. *See Campbell v. Pa. Interscholastic Athletic Assoc.*, 268 A.3d 502 (Pa. Commw. Ct. 2021) *cert granted on other grounds*, 2022 Pa. LEXIS 889 (Pa. 2022); *Hodges*, 29 A.3d at 1192.

2. Lead poisoning reports and investigations are exempt under the DPCL

The Department argues that the responsive reports are exempt under the DPCL, which mandates that all communicable and non-communicable diseases be reported to the Pennsylvania Department of Health. 35 P.S. § 521.4. 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.

Under the DPCL, local boards and departments are primarily responsible for the prevention and control of non-communicable diseases. 35 P.S. § 521.3. The Pennsylvania Department of Health has promulgated regulations, to which the Department is subject, regarding communicable and non-communicable diseases, including lead poisoning, under Title 28, Chapter 27 of the Pennsylvania Code. In accordance with those regulations, the Department receives reports of lead poisoning for children under the age of 16 pursuant to the DPCL. 28 Pa. Code § 27.34; *see also* 28 Pa. Code § 27.21a(b)(1) (requiring health care practitioners to report lead poisoning within 24 hours).

The DPCL contains a confidentiality provision, which the OOR has previously interpreted broadly. *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 Pennsylvania Department of Health 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.⁵

Items 1-4 of the Request seek:

1. A copy of records for the years 2015 through 2021 made by ACHD inspectors on all residential rental units within the boundaries of the City of Pittsburgh wherein a child under the age of 6 years was reported to having [sic] blood lead levels of 5 pg/dl or more.
2. A paper copy of records as to the number of years the blood lead infected child resided in the reported lead hazard address and describing the type of lead hazard in the residential rental unit. I.E. dust, cracking peeling paint, lead water pipes etc.
3. Paper copy of ACHD inspection records of single family owner occupied non-rental residential structures in the City of Pittsburgh during 2015-through 2021 occupied by a child of less than 6 years of age and had a blood lead level of 5pg/dl or more.

⁵ The Requester argues, in part, that the appeal should be granted because lead poisoning is not a “disease”, or at least not a communicable disease. Lead poisoning is classified as a “disease, infection [or] condition” under 28 Pa. Code § 27.22 and is therefore reported to the Pennsylvania Department of Health and classified as confidential pursuant to both the DPCL and the associated regulation. The OOR has no authority to dispute the validity of the regulation or its classification in this matter.

4. Paper copy of ACDH [sic] inspectors stating the Race of the blood lead infected child under the age of 6 yrs for the years of 2015 through 2021.

Each Item of the Request explicitly seeks records generated by the Department's inspectors while they investigate records of lead poisoning. *See Pa. Game Comm'n v. Fennell*, 149 A.3d 101 (Pa. Commw. Ct. 2016) (holding that the OOR must consider uncontradicted statements in the appeal materials when determining whether an exemption applies). The OOR has previously found that reports of lead poisoning, as well as information contained within those reports, are exempt pursuant to the DPCL. *See Ruderman v. City of Phila. Dep't of Health*, OOR Dkt. AP 2016-1259, 2016 PA O.O.R.D. LEXIS 1386; *Young and USA Today v. Pa. Dep't of Health*, OOR Dkt. AP 2011-1040, 2011 PA O.O.R.D. LEXIS 677. 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 was permitted to withhold those records.⁶

The OOR notes that the RTKL is not a confidentiality statute meaning it allows but does not require an agency to withhold records. An agency generally has the discretion to release otherwise nonpublic records. See 65 P.S. § 67.506(c). Based on any number of factors, an agency may release otherwise nonpublic or deidentified records in the public interest. Additionally, the DPCL gives the Department broad discretion to release records:

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

Such openness builds trust and confidence in the agency's process and procedure. However, regardless of how compelling a request for information may be to the public interests, even the

⁶ The Requester argues that he is not seeking the sections of reports containing personally identifiable medical information; however, Items 1-4 of the Request seek the reports in their entirety. Furthermore, the DPCL contains no provision requiring redaction of exempt information, because it makes the entire report exempt.

impacts of lead poisoning on children, the OOR is without authority to order the Department to exercise its discretion and release the records under the DPCL. *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**, 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 Allegheny County Court of Common Pleas. 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.⁷ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: October 12, 2022

/s/ Jordan C. Davis

Jordan C. Davis, Esq.
Appeals Officer

Sent to: John Kostelac (via email only);
Brendan Turley, Esq. (via email only)

⁷ *See Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).