



**FINAL DETERMINATION**

**IN THE MATTER OF**

**PAUL SEWELL,  
Requester**

**v.**

**LACKAWANNA COUNTY,  
Respondent**

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**Docket No: AP 2022-2619**

On October 25, 2022, Paul Sewell (“Requester”), an inmate at Lackawanna County Prison, submitted a request (“Request”) to Lackawanna County (“County”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking:

How many grievances have been filed by inmate[s] at the Lackawanna County Prison on “Wellpath” (L.C.P. Health Care Provider) between the time [of] January 1, 2021 and October 1, 2022.

On November 1, 2022, the County denied the Request, stating that the information requested is not tracked and that the County shall not “be required to create a record which does currently exist or to compile, maintain, format or organize a record in a manner in which the agency does not currently compile, maintain, format or organize the record.” 65 P.S. § 67.705.

On November 18, 2022, the Requester filed an appeal with the Office of Open Records (“OOR”), challenging the 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 November 28, 2022, the County submitted an attestation made subject to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsification to authorities, of Traci Harte, the Open Records Officer for the County. The attestation asserts that the County does not maintain or compile the information in the manner requested because the information is not tracked.

On December 2, 2022, the Requester submitted a Grievance Form filed by the Requester on August 15, 2022.

### **LEGAL ANALYSIS**

The County is a local agency subject to the RTKL. 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. As an agency subject to the RTKL, the County is required to demonstrate, “by a preponderance of the evidence,” that records are exempt from public access. 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)). 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).

The County argues that it does not maintain or compile the records requested in the manner requested and that, under Section 705 of the RTKL, the County is not required to create a record which does not currently exist or to compile, maintain, format or organize a record in a manner in which it does not currently compile, maintain, format or organize the record. 65 P.S. § 67.705. In support of its argument, the Harte Attestation states:

I attest that on November 1, 2022, I placed my response to Mr. Sewell in the mail, after speaking with the Warden of the Lackawanna County Prison, and denied Mr. Sewell's request, as there were no responsive documents. I attest that in my response I cited Section 705 of the Pennsylvania Right-to-Know law[,] which states that "an agency shall not be required to create a record which does not currently exist or to compile, maintain, format or organize a record in a manner in which the agency does not currently compile, maintain, format or organize the record."

I attest that the Warden has stated that the information requested is not tracked, of which I wrote in my response letter to Mr. Sewell. Since that information is not tracked, there is no form, chart, etc[.], that I could provide to the request[e]r.

Under the RTKL, a sworn 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. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any evidence that the County acted in bad faith or that the requested 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)).

Section 705 of the RTKL states that, when responding to a request, "an agency shall not be required to create a record which does not currently exist or to compile, maintain, format or organize a record in a manner in which the agency does not currently compile, maintain, format or organize the record." 65 P.S. § 67.705. "An agency need only provide the information in the manner in which it currently exists." *Commonwealth v. Cole*, 52 A.3d 541, 547 (Pa. Commw. Ct. 2012). The OOR has held that "where an agency does not maintain a list specified by a requester, the agency is not required to create such a list." *See Bush v. Carrol Twp.*, OOR Dkt. AP 2019-1721, 2019 PA O.O.R.D. LEXIS 1783 (denying a request for a list of specific information where no such list exists); *Beaver County Times v. Beaver County*, OOR Dkt. AP 2014-1161, 2014 PA

O.O.R.D. LEXIS 1041; *Miller v. Twp. of O'Hara*, OOR Dkt. AP 2012-1435, 2012 PA O.O.R.D. LEXIS 1224.

In this case, the County argues that the information sought by the Requester is not tracked and as a result, the information cannot be provided to the Requester. The Requester argues that the grievances are legal documents and are maintained for legal actions. The Requester submitted a copy of a grievance, which revealed that each grievance is given a grievance number; however, the Requester has requested the number of grievances filed against Wellpath, not copies of the actual grievances. Although the Requester argues the grievances exist, the Requester has not submitted evidence to dispute the County's position that it does not track the requested information – the number of grievances filed by a particular inmate. The OOR has no authority to determine whether records should exist or how the records should be compiled in a way that certain information can be extracted, only whether the County possesses the records. Accordingly, the County has proven that it does not have the requested information and that providing the requested information would require the creation of records, which is not required under the RTKL. *See Hodges*, 29 A.3d at 1192; *Hays v. Pa. State Police*, OOR Dkt. AP 2015-0193, 2015 PA O.O.R.D. LEXIS 294.

### CONCLUSION

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 or petition for review to the Lackawanna 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 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.<sup>1</sup> 65

P.S. § 67.1303. This Final Determination shall be placed on the website at:

<http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: December 7, 2022**

*/s/ Bandy L. Jarosz*

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Bandy L. Jarosz, Esq.  
APPEALS OFFICER

Sent to: Paul Sewell, 2010/0234 (via First Class Mail)  
Traci K. Harte (via email only)

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<sup>1</sup> *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).