



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:
	:
MIN XIAN AND SPOTLIGHT PA,	:
Requester	:
	:
v.	:
	:
	:
PENNSYLVANIA STATE POLICE,	:
Respondent	:

Docket No: AP 2022-2545

FACTUAL BACKGROUND

On September 21, 2022, Min Xian and Spotlight PA (collectively “Requester”) submitted a request (“Request”) to the Pennsylvania State Police (“PSP”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, stating:

Under the Pennsylvania Right-to-Know Law (65 P.S. §§ 67.101-67.3104), I am requesting an electronic copy of the following public records: A breakdown of the total amount of reimbursement to the Pennsylvania State Police by Penn State University for its officers’ work at home football games in 2021 and the total hours worked by PSP officers at these games by dates of work provided, costs accrued each day, and numbers of officers worked each day. If the agency would deny any part of this request, please state the specific statute you believe exempts the information from disclosure. If access to the records I’m requesting will take more than five business days, producing these records will cost anything, or if the agency cannot provide them in an electronic format, please contact me via either email or phone.

On October 28, 2022, following a thirty-day extension during which to respond, 65 P.S. § 67.902(b), the PSP denied the Request in part, arguing that the records only identify the badge

numbers of members who worked during a particular pay period and the cost attributed for their services for the total hours worked within that pay period. The PSP indicated it does not have any records within its possession, custody, or control to identify individual hours worked or when or in what pay period those hours occurred.

On November 7, 2022, the Requester appealed to 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 PSP to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On December 6, 2022, the PSP submitted a position statement indicating that it provided a response to the Request’s call for reimbursement and total hours worked and claiming that it only has aggregate data, which it claims is not responsive because its records are not broken down by dates of work, costs accrued each day, or numbers of officers worked each day. In support of its position, the PSP submitted the verification, made pursuant to 18 Pa. C.S. § 4904, relating to unsworn falsification to authorities, of its Agency Open Records Officer (“AORO”), William Rozier (“Rozier”). On December 12, 2022, the Requester filed a submission, contending the PSP should send the records it has in its possession. The Requester rejects the PSP’s argument that the records are not responsive, argues the Request was specific in scope to enable the PSP to identify responsive records, and alleges the PSP only has to draw the information from a database and this is not creating a record under the RTKL.¹

¹ The Requester’s December 12, 2022 submission was received after the record closed; however, to develop the record, the submission was considered. *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”).

On December 19, 2022, the OOR requested an extension to issue a Final Determination and suggest mediation. The Requester agree to extend the Final Determination due date to January 3, 2023, but did not agree to mediation.

LEGAL ANALYSIS

The PSP is a Commonwealth agency subject to the RTKL. 65 P.S. § 67.301. Records in the possession of a Commonwealth 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 PSP 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)).

Under 65 P.S. § 67.705, “[w]hen responding to a request of access, an agency shall not be required to create a record which does not currently exist or to compile, maintain, format, or organize the public record in a manner in which the agency does not currently compile, maintain, format or organize the record.” Pursuant to Section 705, an agency is not required to conduct research or create or format a record in a manner specified by a requester and need only provide the information in the manner in which it currently exists. *Id.*; *see Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010); *see also Commonwealth v. Cole*, 52 A.3d 541 (Pa. Commw. Ct. 2012); *Gingrich v. Pa. Game Comm’n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38, (Pa. Commw. Ct. 2012). “An agency need only provide the information in the manner in which it currently exists.” *Id.* at 547. An agency is not required to

create the requested information; “the information ... must simply be provided to requestors in the same format that it would be available to agency personnel.” *Id.* at 549 n.12. The PSP, in its response and in the Rozier verification, asserts the breakdown sought in the Request does not exist.

The Rozier verification indicates:

7. The PSP [RTKL] Section has access to various PSP and Commonwealth databases. In this case, I determined the information sought was financial. Accordingly, the RTKL Section contacted the PSP Bureau of Staff Services, Fiscal Division (BSS Fiscal) to request a comprehensive search for responsive records be conducted.
8. As a result of this search, BSS Fiscal was unable to identify a record that contained the information requested organized or presented in the manner requested. However, BSS Fiscal returned records containing responsive information. More specifically, BSS Fiscal Division Director William Box provided a “Payroll Posting Detail” identifying the assignment detail, personnel position identifier and amount reimbursed by pay period. BSS Fiscal also provided the amount of time worked over the duration of the detail. BSS Fiscal further related the breakdown of records sought in this [R]equest was not maintained.
9. Following my examination of BSS Fiscal’s response, I determined the record was not responsive to the instant [R]equest but did contain responsive information. Accordingly, the RTKL Section provided the total amount reimbursed to the PSP by Pennsylvania State University for its officers’ work at home football games in 2021 and the total hours worked. Based upon the content of this record, I determined it was not responsive to the instant [R]equest because it did not identify the information requested.
10. Accordingly, I determined the PSP did not have a record within its possession, custody or control that was responsive to the instant [R]equest.

Under the RTKL, a sworn statement or attestation is generally 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*, 992 A.2d at 909. In the absence of any competent evidence that the PSP acted in bad faith, “the averments in [the statement] 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)).

The PSP further explains the custodian of the responsive information, the PSP's BSS Fiscal, does not maintain a record breaking down information as sought in the Request. The PSP further clarified that the BSS Fiscal records are comprised of information aggregated by pay period, as opposed to specific days within those pay periods, and because the records are not maintained in the manner sought in the Request, the PSP would have to create a new record to breakdown the information as requested. Here, the fact that the PSP records are aggregated by pay period is uncontested. The question becomes whether the PSP records, as they exist, should be released in response to the Request.

The Request seeks data housed in the PSP's BSS Fiscal records that are aggregated by pay period. As stated above, the RTKL states that an agency is not required to create or compile a record which does not currently exist. 65 P.S. § 67.705. However, the Commonwealth Court has held that providing information from an agency database does not constitute the creation of a record. *Commw. v. Cole*, 52 A.3d 541, 549 (Pa. Commw. Ct. 2012) (“[D]rawing information from a database does not constitute creating a record under the [RTKL]”). “To hold otherwise would encourage an agency to avoid disclosing public records by putting information into electronic databases.” *Id.* “An agency is not required to create a list or spreadsheet containing the requested information; however, “the information...must simply be provided to requestors in the same format that it would be available to agency personnel.” *Id.* at 549, n.12.

The PSP clarified that the breakdown sought by the Requester is not maintained in the BSS Fiscal records because the records contain aggregated data by pay period and not specific days within the pay period. The PSP explains that the PSP records would not be responsive to the Request because the Requester could not extract the days of work provided, costs accrued each day, or number of hours worked each day. The Requester indicates that, “[a]s a [R]equester, I am

not required to know how PSP tracks, manages or stores information” and “[t]he RTKL does not require requesters to have specialized knowledge of an agency’s records practices, it only requires them to provide enough information for agencies to locate responsive information.” The Requester seeks access to the records identified by the PSP, contending the attestation illustrates the PSP’s ability to pull the information responsive to the Request and arguing that pulling the responsive information from its existing database is not the creation of a record.

In *Cole*, the request sought various data, in an electronic format, that was provided to the Department of Environmental Protection (“DEP”) in rebate applications. Before the OOR, DEP acknowledged that it possessed the raw data, but argued that it would have to manipulate this data in order to provide it to a requester, and that DEP could not be compelled to create a record from an electronic database. The OOR granted the appeal. Before the Commonwealth Court, DEP argued that “it cannot be compelled to troll through raw data and organize it in the manner preferred by the requester.” In rejecting the DEP’s argument that it did not have to provide the data, the Commonwealth Court held:

Requiring the [DEP] to provide these “records” does not violate Section 705 of the [RTKL], which excuses an agency from creating a new record or reorganizing existing records. An agency need only provide the information in the manner in which it currently exists...

[The requester] did not request the creation of a record or a unique format. She requested the [DEP]’s Sunshine Program information and noted that she believed it would be easiest, for all those involved, if the information was provided electronically. The [DEP] must provide [the requester] this information but only in the format in which it is available.

Id. at 547-48.

As noted in *Cole*, the Commonwealth Court in *Gingrich*, 1254 C.D. 2011, found that drawing information from a database does not constitute creating a record under the RTKL. The Court explained:

In *Gingrich*, a requester sought information relating to Pennsylvania's annual deer harvest, habitat programs, and related financial information. The requester sought information contained in the Game Commission's database and suggested possible formats for the Game Commission to produce that information. The Game Commission denied the request on the grounds that it did not have to create a record and the information sought did not exist in the formats identified by the requester. This Court held that suggesting a possible format in which to present the requested information was not an improper request to create a record. Specifically, we held that an agency can be required to draw information from a database, although the information must be drawn in formats available to the agency. In short, to the extent requested information exists in a database, it must be provided; an agency cannot claim otherwise under Section 705 of the Right-to-Know Law.

Cole, 52 A.3d at 548.

Subsequently, in *Unger v. Pa. Dep't of Labor & Indus.*, OOR Dkt. AP 2020-0940, 2020 PA O.O.R.D. LEXIS 2410, a list of the locations in Huntingdon County that have propane tanks with more than 2,000 gallons was sought, and the Department of Labor & Industry proved that it did not possess a responsive list. However, while the requested information existed in a Department transactional database, not a reporting database, the Department argued that, under Section 705 of the RTKL, it was not required to take the multiple and complex steps necessary to extract the data and create the requested list. *Unger*, 2020 PA O.O.R.D. LEXIS 2410, *7, 11. The Department's evidence demonstrated that the information could be compiled by extracting the relevant data elements; however, the Department's evidence also detailed the steps necessary to extract the relevant data, as well as the difficulties that it would encounter to perform the extraction and compilation. Relying on *Cole*, the OOR concluded the following:

Mr. Kegg's attestation demonstrates that the Department does not currently possess a list of the requested information; however, the Department's evidence also indicates that its database contains the locations of storage tanks in Huntingdon County with the capacity of over 2,000 gallons. While the Department has credibly attested to the difficulties in obtaining the requested information from the database, the Commonwealth Court has repeatedly stressed that information in an agency database is subject to public access. *See, e.g., Feldman v. Pa. Comm'n on Crime & Delinquency*, 2018 A.3d 167, 173-4 (Pa. Commw. Ct. 2019) (discussing an agency's obligation to provide information in its database); *Uniontown*

Newspapers, Inc. v. Pa. Dep't of Corr., 185 A.3d 1161 (Pa. Commw. Ct. 2018) (“DOC has the duty to obtain information corresponding to inmate medications in the form in which Pharmacy Contractor maintains it.... Pulling information from a database is not creating a record”) (citing *Cole, supra*). The Court has not made any exceptions based upon the difficulty of querying the information or the possible inaccuracies of such information.[] The evidence is clear that the location of tanks is contained in the Department’s database and is able to be viewed by Department personnel. Pursuant to *Cole*, information in the Department’s database is subject to access under the RTKL.

Unger, 2020 PA O.O.R.D. LEXIS 2410, *12-13. In *Feldman*, the Commonwealth Court summarized its holding in *Cole*:

We note that in *Department of Environmental Protection v. Cole*, 52 A.3d 541 (Pa. Cmwlth. 2012), the requester sought information from the Department of Environmental Protection related to a rebate program that was contained in a computer database. *Id.* at 543-44. The Department argued that it could not be compelled to search through a computer database because that would constitute creating a record that did not exist, which was prohibited under section 705 of the RTKL. *Id.* In holding that the Department needed to provide the requested documents, we determined that although section 705 of the RTKL “excuses an agency from creating a new record or reorganizing existing records” and that “[a]n agency need only provide the information in the manner in which it currently exists..., drawing information from a database does not constitute creating a record” under the RTKL. *Id.* at 547. We explained that, “to the extent requested information exists in a database, it must be provided,” but that the Department was only required to provide information “in the format in which it [was] available.” *Id.* at 548. We further concluded that “pulling information from a database is not the creation of a record,” and that while an agency is not required to compile information in a certain way,” the information contained in databases that is subject to disclosure under the [RTKL] must simply be provided to the request[ers] in the same format that it would be available to agency personnel.” *Id.* at 549 and n.12.

208 A.3d 167, 173-74.

In sum, the case at hand is analogous to *Cole* and *Unger*. The PSP was able to prove the breakdowns sought in the Request do not exist, but the evidence also demonstrates that the BSS Fiscal Payroll Posting Detail is a database in which the information would be found. Specifically, the PSP’s evidence demonstrates that the Payroll Posting Detail identifies the assignment detail, personnel position identifier, and amount reimbursed by pay period. Accordingly, the appeal is

granted and the PSP need only extract information from its Payroll Posting Detail and provide the information as it exists in that database for 2021 Penn State home football games.

CONCLUSION

For the foregoing reasons, the appeal is **granted**, and the PSP is required to provide all responsive records, as directed above, within thirty days. 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 of Pennsylvania. 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 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.² This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: JANUARY 3, 2023

/s/ Lois Lara

APPEALS OFFICER
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Sent via online portal to: Min Xian and Spotlight PA
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² *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).