

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

**COMMONWEALTH OF
PENNSYLVANIA,
PENNSYLVANIA HISTORICAL
AND MUSEUM COMMISSION,
Petitioner,**

v.

**ALEC FERRETTI,
Respondent.**

Docket No. ____ CD 2023

Petition for Review of the
Final Determination of the
Office of Open Records at
Docket No. AP 2022-2106

PETITION FOR REVIEW

AND NOW comes Petitioner, Commonwealth of Pennsylvania, Pennsylvania Historical and Museum Commission (PHMC), which petitions this Honorable Court to review the Order of the Office of Open Records (OOR), dated January 26, 2023, at Docket No. AP 2022-2106. In support of its appeal, the Office states as follows:

1. This Court has appellate jurisdiction over this matter pursuant to Section 1301 of the Right-to-Know Law (RTKL), 65 P.S. § 67.1301, and 42 Pa.C.S. § 763(a)(1).

2. The parties in this matter are: PHMC, an independent agency operating under the laws of this Commonwealth, Petitioner and Alec Ferretti (Requester), Respondent.

3. The Office seeks review of OOR's Final Determination, issued at Docket No. AP 2022-2106 and filed on January 26, 2023, wherein the OOR granted the Requesters' appeal from the Office's denial of access under the Right-to-Know Law, 65 P.S. § 6.101, *et seq.* (RTKL). A copy of the Final Determination of the OOR dated January 26, 2023 and docketed at AP 2022-2016, is attached hereto as Exhibit A.

4. ISSUES PRESENTED FOR REVIEW:

- a. WHETHER the OOR erred as a matter of law in determining that a request for all data produced according to a contract with Ancestry, comprising dozens of terabytes of data and more than fourteen years of archival work, is "sufficiently specific" to be requested under the RTKL?
- b. WHETHER the OOR erred as a matter of law in determining that scanned copies of State Archive records and their indexing metadata are not exempt archival records under the RTKL?
- c. WHETHER the OOR erred as a matter of law in determining that PHMC's contract with Ancestry does not prohibit the transfer of all data made pursuant to that contract?
- d. WHETHER the OOR erred as a matter of law in determining that a request for terabytes of scanned records and their indexing metadata is not an "extensive dataset" for which PHMC and Ancestry could charge the market value fee for the request?

WHEREFORE, the Pennsylvania Historical and Museum Commission respectfully requests that this Honorable Court REVERSE the determination of

the OOR, in pertinent part, or in the alternative REMAND the matter to the OOR for further proceedings or take such other action as justice may require.

Respectfully submitted,

Rodney R. Akers
Chief Counsel

By: /s/Gerard A. Leone
GERARD A. LEONE
Assistant Counsel
Attorney I.D. No. 320814
PENNSYLVANIA
HISTORICAL AND MUSEUM
COMMISSION
The State Museum Building
300 North Street
Harrisburg, PA 17120
(717) 346-3835 (phone)
(717) 329-2660 (fax)
geleone@pa.gov

*Attorney for Petitioner
Pennsylvania Historical and
Museum Commission*

Dated: February 27, 2023

EXHIBIT A



FINAL DETERMINATION

IN THE MATTER OF	:
	:
ALEC FERRETTI,	:
Requester	:
	:
v.	: Docket No: AP 2022-2106
	:
PENNSYLVANIA HISTORICAL AND	:
MUSEUM COMMISSION,	:
Respondent	:

FACTUAL BACKGROUND

On September 1, 2022, Alec Ferretti (“Requester”) submitted a request (“Request”) to the Pennsylvania Historical and Museum Commission (“PHMC”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking:

All documents scanned (and subsequent indexes and metadata created) pursuant to the contract signed in 2008 between PHMC and The Generations Network, along with all documents scanned (and subsequent indexes and metadata created) pursuant to any addenda to that contract, including but not limited to all birth and death records and metadata for birth and death records.

On September 9, 2022, the PHMC denied the Request, arguing that no responsive records exist within its possession, custody or control and that it is not required to create a record, 65 P.S. § 67.705.

On September 9, 2022, the Requester appealed to the Office of Open Records (“OOR”), challenging the denial and stating grounds for disclosure.¹ The OOR invited both parties to supplement the record and directed the PHMC to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On September 30, 2022, the PHMC submitted a position statement reiterating its grounds for denial. The PHMC explains that when it learned from The Generations Network/Ancestry (“TGN” or “Ancestry”) that the data scanned by Ancestry, on behalf of the PHMC, comprised approximately 45 terabytes and would have required approximately \$300,000 per year to maintain, the PHMC chose to have Ancestry maintain the scanned records for the Commonwealth. The PHMC further argues that the Request is insufficiently specific, 65 P.S. § 67.703. In support of its position, the PHMC submitted the affidavit of Cynthia Bendroth, the PHMC Open Records Officer.

On October 19, 2022, the undersigned was reassigned the appeal.

On October 25, 2022, the Requester submitted a position statement, along with a request that the OOR accept the submission after the record closing date. The Requester asserts that the requested records are in the legal custody possession of the PHMC and, therefore, the PHMC is still obligated to provide responsive records under the RTKL. The Requester further asserts that it is possible to transfer the data by way of USB hard drives copied by Ancestry, such that the large amount of data is not a basis for denial of the Request. Finally, the Requester argues that the Request is sufficiently specific, in that the PHMC was able to ascertain what records to search for and that the “potentially responsive materials ... are discrete deliverables from clearly itemized

¹ The Requester granted the OOR additional time to issue a final determination. *See* 65 P.S. § 67.1101(b)(1) (“Unless the requester agrees otherwise, the appeals officer shall make a final determination which shall be mailed to the requester and the agency within 30 days of receipt of the appeal filed under subsection (a).”).

agreements.” The Requester attached a copy of the service contract between the PHMC and Ancestry, dated December 15, 2008, along with executed Addenda for various years through July 12, 2021.

On November 14, 2022, the PHMC submitted a reply to the Requester’s submission, reasserting the argument that the Request is “so vague that it cannot be fulfilled.” Also, for the first time, the PHMC claims that the entirety of the Request is exempt from disclosure under Section 708(b)(24) of the RTKL because the records are “archived materials” of the Commonwealth that are *already available to the public*. (Emphasis in original). The PHMC explains that the records “are maintained by Ancestry.com and made available for no charge through the State Archives” and, “[a]s such, they are statutorily excluded from being provided according to the Request at issue.” Finally, the PHMC asserts that ability of providing a copy of the data maintained by Ancestry.com is not as simple as portrayed by the Requester.

On December 6, 2022, the PHMC provided a third supplemental submission in response to the OOR’s November 29, 2022, request for further clarification. The OOR’s inquiry included a request for clarification regarding how an individual can access the State Archive records electronically and whether a person will be charged a fee for access. The OOR’s inquiry also sought an explanation about why the requested records could not be downloaded by TGN/Ancestry, subject to the payment of a fee for the necessary equipment, as suggested by the Requester. Finally, the OOR’s inquiry asked if the metadata would be included in records accessed through the PHMC’s link to the Ancestry website and, also, requested that the PHMC further clarify its position that all of the records are fully exempt under Section 708(b)(24).

In PHMC’s December 6, 2022 submission, it explained how records may be accessed via the Pennsylvania State Archives Ancestry page at <https://www.phmc.pa.gov/Archives/Research->

[Online/Pages/Ancestry-PA.aspx](#) and physically in the State Archives Reading Room during business hours. The PHMC also explained that the metadata of the requested records is not available to the public via the Ancestry portal and, also, that the metadata is exempt from public access. The PHMC argues that because the records sought “are stored according to statute in the Pennsylvania State Archives, they are archived, and therefore exempt by § 708(b)(24).” Finally, the PHMC asserts that copying the records and the metadata would cause a breach of its contract with TGN/Ancestry and, further, the cost would consist of more than the cost of copying and downloading the records, as it would also be comprised of “the market value of the requested extensive dataset.” In support of the cost argument the PHMC relies on 65 P.S. § 67.1307(b)(4).

On December 8, 2022, the Requester submitted a reply to the PHMC’s third supplemental submission. The Requester argues that because he is not a legal Pennsylvania resident, he is unable to access the records sought by using the Pennsylvania Archives webpage on Ancestry.com and, therefore, he would be required to pay a fee for an Ancestry subscription to access the records. The Requester further asserts that downloading all of the records implicated by the Request would likely violate his user agreement with Ancestry.com, if he had a subscription. The Requester disputes the PHMC’s argument that it is not the owner of the metadata associated with the records and he also disputes the assertion that the PHMC is not required to obtain the records from Ancestry to respond to the Request. The Requester argues that Section 708(b)(24) does not apply to the records sought and he also disputes that a fee to provide the records would require a determination of the reasonable market value of a “complex and extensive” dataset, under 65 P.S. § 67.1307(b)(4).²

² Because the arguments were probative and served to further develop the record, the Requester’s reply to the PHMC’s third supplemental submission was admitted. *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 16, 2022, the OOR requested clarification regarding whether the PHMC had notified TGN/Ancestry of the pendency of the appeal. On December 19, 2022, counsel for the PHMC provided the OOR with a copy of an email of the same date that notified TGN/Ancestry of the appeal. On December 20, 2022, Jared Akenhead, Senior Manager – Content Acquisition for TGN/Ancestry emailed the undersigned, requesting a meeting to discuss issues related to TGN/Ancestry’s possible participation in the appeal. The OOR directed Mr. Akenhead to the OOR website for forms and additional information on how to submit a Request to Participate before the OOR and, also, referred him to PHMC counsel for any additional information regarding the appeal. To date, the OOR has not received any additional information from Mr. Akenhead or another representative of TGN/Ancestry related to the instant appeal.

LEGAL ANALYSIS

The PHMC 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 PHMC 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)).

1. The Request is sufficiently specific

The PHMC argues that, even if it were able to provide the requested records maintained by TGN/Ancestry, because the Request failed to identify the records sought with sufficient specificity

to allow PHMC to conduct a search. The PHMC asserts that the Request “identifies a universe of records that comprises terabytes of data” and that the Requester “may ask for birth and death records possessed by Ancestry,” but, a Requester is not entitled to receive all or entire categories of the entire Archives of the Commonwealth, and yet that is what the Requester has effectively asked for.”

Section 703 of the RTKL provides, in pertinent part, “[a] written request should identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested” 65 P.S. § 67.703. When interpreting a RTKL request, agencies should rely on the common meaning of words and phrases, as the RTKL is remedial legislation that must be interpreted to maximize access. *See Gingrich v. Pa. Game Comm’n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38 at *16 (Pa. Commw. Ct. 2012) (citing *Bowling*, 990 A.2d at 824). In determining whether a particular request is sufficiently specific, the OOR uses the three-part balancing test employed by the Commonwealth Court in *Pa. Dep’t of Educ. v. Pittsburgh Post-Gazette*, 119 A.3d 1121 (Pa. Commw. Ct. 2015), and *Carey v. Pa. Dep’t of Corr.*, 61 A.3d 367, 372 (Pa. Commw. Ct. 2013). First, “[t]he subject matter of the request must identify the ‘transaction or activity’ of the agency for which the record is sought.” *Pa. Dep’t of Educ.*, 119 A.3d at 1125. Second, the scope of the request must identify a discrete group of documents (*e.g.*, type or recipient). *See Id.* at 1125. Third, “[t]he timeframe of the request should identify a finite period of time for which the records are sought.” *Id.* at 1126. This factor is the most fluid and is dependent upon the request’s subject matter and scope. *Id.* Failure to identify a finite timeframe will not automatically render a sufficiently specific request overbroad; likewise, a short timeframe will not transform an overly broad request into a specific one. *Id.*

The Bendroth affidavit provides information on the contract between PHMC and TGN/Ancestry for scanning and indexing services, which began in 2009. The Bendroth affidavit states, “[i]n 2016, the volume of data received by PHMC from TGN was near 45 Terabytes of data”³ However, requester is not prohibited from requesting a large amount of records. *See* 65 P.S. § 67.1308(1). Here, the Request states a finite timeframe, albeit a long timeframe, of the date in 2008 when the PHMC entered into the agreement for scanning and indexing with TGN/Ancestry until the date of the Request – approximately 14 years. In addition, the Request specifically seeks electronic copies of documents scanned, indexes created and the underlying metadata pursuant to the 2008 agreement and any subsequent addendum to the contract. Therefore, a scope is sufficiently identified and outlined in the contract. The Request does not state a specific subject matter, however, the lack of an identified subject matter is not fatal to a request. In *Carey*, the Commonwealth Court found a request for unspecified records (“all documents/communications”) related to a specific agency project (“the transfer of Pennsylvania inmates to Michigan”) that included a limiting timeframe to be sufficiently specific “to apprise [the agency] of the records sought.” 61 A.3d 367. In the instant matter, it is reasonable to infer that the PHMC is well familiar with the TGN/Ancestry scanning project and what records are implicated. In so far as the “activities” of the PHMC, the Pennsylvania History Code, 37 Pa.C.S. §§ 101 – 906, created the PHMC and sets forth its powers and duties. *See* 37 Pa.C.S. §§ 301-302. Finally, based on a review of the contract executed between the PHMC and TGN/Ancestry in 2008, that the Requester included with the appeal, Appendix A to the agreement lists the “Collections considered the Records for purposes of [the] A[greement],” as well as the approximate number of images, years

³ Under the RTKL, a sworn affidavit or statement made under the penalty of perjury may serve as sufficient evidentiary support. *See Sherry*, 20 A.3d at 520-21; *Moore*, 992 at 909.

covered, format and exclusivity timeframe. Such information is also included in the subsequent addenda to the contract. Accordingly, we determine that the Request is sufficiently specific.

2. The PHMC has not proven that the Request seeks records exempt under Section 708(b)(24) of the RTKL

The PHMC argues that the Request seeks records exempt in its entirety under Section 708(b)(24), because the requested records are archived materials “that are *already available to the public*.” (Emphasis in the original). Section 708(b)(24) states, “[l]ibrary archived and museum materials, or valuable or rare book collections or documents contributed by gift, grant, bequest or devise, to the extent of any limitations imposed by the donor as a condition of the contribution.” 65 P.S. § 67.708(b)(24). In response to the OOR’s request for further clarification regarding the PHMC’s claim of exemption, the PHMC further asserts, the records are “stored according to statute in the Pennsylvania State Archives, they are archived, and therefore exempt by § 708(b)(24).” The PHMC references the Merriam-Webster definition of “archived”⁴ and 35 P.S. § 450.801, in support of its position. The PHMC further states, “[w]hen PHMC describes these records as ‘already available’ to the public, it does so to point to the attribute shared between all the elements in the list of ‘library archived and museum materials’: the Commonwealth already makes all of the collections of the state libraries, museums, and archives available to the public for its education and pleasure.¹ As the General Assembly did not seek to make libraries or state museums needlessly copy or expose their collections to which the public already had access, so, too, archived materials like those requested records are exempt from the RTKL.”

The PHMC references 35 P.S. § 450.801, to support its position that the requested records are archived materials. Section 801 of the Vital Statistics Law of 1953, provides:

§ 450.801. Records: Disclosure in general

⁴ See <https://www.merriam-webster.com/dictionary/archived> (last accessed December 12, 2022).

The vital statistics records of the department and of local registrars shall not be open to public inspection except as authorized by the provisions of this act and the regulations of the Advisory Health Board. Neither the department nor local registrars shall issue copies of or disclose any vital statistics record or part thereof created under the provisions of this or prior acts except in compliance with the provisions of this act and the regulations of the Advisory Health Board. When one hundred five (105) years have elapsed after the date of birth or fifty (50) years have elapsed after the date of death, *the records shall become public records*. To ensure the proper safekeeping of original birth records after one hundred five (105) years and death records after fifty (50) years the records *shall be maintained by the State Archives*.

It is unclear how Section 801 applies to the PHMC's claim of exemption in this matter, as the statute applies to the Department of Health⁵ and its disclosure of records and, further, regarding the transfer of birth and death records to the State Archives after a stated length of time, Section 801 expressly states that they become public records. The PHMC's website indicates that its powers and duties are found in the History Code, 37 Pa.C.S. §§ 101-906. Section 102(2) of the Code - "Declaration of Policy" states, "The conservation of Pennsylvania's historic and natural heritage and the preservation of *public records*, historic documents and objects of historic interest, and the identification, restoration and preservation of architecturally and historically significant sites and structures are duties vested primarily in the Pennsylvania Historical and Museum Commission." (Emphasis added). In addition, the general powers of the PHMC include, the following:

(1) Serve as the official agency of the Commonwealth for the conservation of Pennsylvania's cultural heritage.

(2) *Preserve public records*, historical documents and objects of historical interest, possession and control of which have been transferred to the commission....

37 Pa.C.S. § 301(1)-(2) (emphasis added). It is clear that the PHMC's authorizing statute mandates that it maintains public records. However, the PHMC is simultaneously arguing that the requested

⁵ See 35 P.S. § 450.105.

records are already available to the public either through TGN/Ancestry or in person and that it has granted access to the same, but also argues that the same records are not accessible under the RTKL. Further, while an affidavit may serve as sufficient evidence in support of an exemption from public access, *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), unsworn statements may not be relied upon as competent evidence to withhold records under the RTKL. *See Hous. Auth. of the City of Pittsburgh v. Van Osdol*, 40 A.3d 209 (Pa. Commw. Ct. 2012) (holding that statements of counsel are not competent evidence); *City of Phila. v. Juzang*, July Term 2010, No. 2048 (Phila. Com. Pl. June 28, 2011) (“Because the letter written by City’s counsel is a legal brief, it cannot be ... evidence at all”). Accordingly, the PHMC has not proven that the Request is exempt in its entirety under Section 708(b)(24) of the RTKL.

3. The PHMC has not demonstrated that the requested records do not exist within its custody, possession or control

The PHMC argues that the requested records do not exist within its possession or control because PHMC “currently relies on [TGN/Ancestry] to provide storage and public access to the records for Pennsylvania residents.” The PHMC explains that it entered into a contract with TGN/Ancestry to scan records and create digital copies, but, in 2016, when the PHMC received a copy of the data comprising the scanned documents, a determination was made that Ancestry would maintain the scanned records for the Commonwealth. The PHMC further argues that, while it does not possess the requested records, “it could not even imagine to accommodate the request working with Ancestry because the [R]equest is so immense that to fulfill it would be a gross misapplication of the RTKL.” The PHMC also asserts that “the RTKL is intended to facilitate transparency and not such a wholesale transfer of valuable Commonwealth property.” In support of the PHMC’s argument, the Bendroth affidavit provides, the following:

4. With regard to the contract referred to by [the Requester] [in the Request]: PHMC had signed an agreement effective February 2009 with ... 'TGN', now known as Ancestry. According to the contract, TGN would have access to and be permitted to copy PHMC's microfilm records including, census, tax, pension, birth, death, and marriage records. In exchange for scanning those records, PHMC would receive a digital copy of those records.

5. In 2016, it became clear to the Archives and the PHMC leadership that the volume of data created by TGN through the scanning and indexing process would be immense. In 2016, the volume of the data received by PHMC from TGN was near 45 Terabytes of data, which would cost between \$297,000 and \$321,000 to maintain per year.

6. Because of the immense cost, PHMC signed a new agreement with TGN to maintain data on their servers. In exchange, the staff, patrons, and researchers in the State Archives may access this data for free, and TGN's customers continue to access it for a fee.

7. Since 2016, that volume of data and the cost of its maintenance has only grown.

In response to the OOR's request for clarification, the PHMC explains that an individual is not required to be physically present in the State Archives building in order to access the records at issue. The PHMC further explains, "Pennsylvania residents can access all of the Pennsylvania records housed on the Ancestry website free of charge at any time, from any computer, by going to the Pennsylvania State Archives Ancestry page (<http://www.phmc.pa.gov/Archives/Research-Online/Pages/Ancestry-PA.aspx>)" and enter a zip code, which, once it is verified by the system, the individual is taken to the Ancestry site and given a free account to access Pennsylvania records. In addition, "[a]ll users, including non-Pennsylvanians, may access the entire Ancestry website (including the Pennsylvania records) free of charge in the State Archives Reading Room during the Archives' normal business hours."

The Requester argues that, although the requested records are "maintained" by TGN/Ancestry, the PHMC is still the legal custodian of the records/data. The Requester further argues that the PHMC is not permitted to contract away its obligations under the RTKL and, also,

notes that that he is not a Pennsylvania resident and to access the records through Ancestry.com requires a paid subscription. The Requester asserts that, even if he were to subscribe to Ancestry.com, if he were to download every single responsive records, it would likely be a violation of Ancestry's user terms and conditions.

Under the RTKL, two groups of records are accessible to requesters: records in an agency's actual or constructive possession reached directly under Section 901 of the RTKL, and records in the possession of third parties that are indirectly accessible through Section 506(d) of the RTKL. 65 P.S. § 67.506(d); *see also Dental Benefit Providers, Inc. v. Eiseman*, 86 A.3d 932, 938-39 (Pa. Commw. Ct. 2014), *aff'd* 124 A.3d 1214. Section 506(d)(1) of the RTKL states that:

A public record that is not in the possession of an agency but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the agency, and which directly relates to the governmental function and is not exempt under this action, shall be considered a public record of the agency for purposes of this act.

65 P.S. § 67.506(d)(1). In *Allegheny County Dep't of Admin. Servs. v. A Second Chance, Inc.*, the Commonwealth Court explained that records "in the possession of a party with whom an agency has contracted to perform a governmental function on behalf of the agency" are presumptively public records subject to public access, "so long as the record (a) directly relates to the governmental function and (b) is not exempt under the RTKL." 13 A.3d 1025, 1039 (Pa. Commw. Ct. 2011); *see also* 65 P.S. § 67.305(a). "[T]o satisfy the 'directly relates' prong, the records must relate to the performance of the governmental function." *Eiseman*, 86 A.3d at 940. This must include the "delegation of some substantial facet of the agency's role and responsibilities, as opposed to entry into routine service agreements with independent contractors." *Wintermantel*, 45 A.3d at 1043. In determining whether records directly relate to a third party's performance of its governmental function, the Commonwealth Court has consistently looked to whether the records

are relevant to the third party's performance of its governmental function. *See Buehl v. Office of Open Records*, 6 A.3d 27 (Pa. Commw. Ct. 2010); *Giurintano v. Pa. Dep't of Gen. Servs.*, 20 A.3d 613, 615 (Pa. Commw. Ct. 2011).

The Bendroth affidavit establishes that the PHMC entered an agreement with TGN/Ancestry to perform scanning and indexing services for records preserved in its archives and, then, the electronic files would be provided to the PHMC. The Bendroth affidavit also establishes that the PHMC subsequently decided to have TGN/Ancestry maintain the resulting electronic records, instead of taking possession of them. The Bendroth further establishes that the PHMC "signed a new agreement with TGN to maintain data on their servers. In exchange, the staff, patrons, and researchers in the State Archives may access this data for free, and TGN's customers continue to access it for a fee."

The 2008 License Agreement ("Agreement") referenced in the Request, which was also attached to the appeal, states, in pertinent part, "....PHMC owns or has the rights to historical records, including the records covered in Appendix A (the 'records'), as may be supplemented from time to time by mutual agreement...." In addition, the Agreement states, "[t]he term 'Records' shall mean those PHMC Collections as described in Appendix A" and "[t]he term 'Licensed Materials' shall mean those digital images and indexes that TGN creates as a result of digitizing and indexing the records." Further, Sections 2.2 and 2.4 of the Agreement provide, in pertinent part, the following:

2.2 By TGN. TGN grants PHMC a non-exclusive, non-transferable right and license *to use the Licensed Materials for the benefit of its patrons*. ... The Licensed Materials may not be distributed or resold by PHMC to a company or institution for any purpose, and is *solely for the use individual patrons*

2.4 The PHMC *reserves all rights pertaining to the use of the original records*, as described in Appendix A, provided to TGN. (Emphasis added).

Finally, although PHMC states in the third supplemental position statement that it does not possess the requested metadata, the PHMC also states, “Ancestry is contracted with the State Archives to scan those vital records that *are preserved in the State Archives* so that more easily accessible electronic records may be made available to the *public*.” (Emphasis added).

A third party performs a governmental function on behalf of an agency where it performs “a function generally performed by that agency and is not ancillary to the agency’s functions” *Eiseman*, 86 A.3d at 939 (citing *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1027, 1044 (Pa. 2012)). This must include the “delegation of some substantial facet of the agency’s role and responsibilities, as opposed to entry into routine service agreements with independent contractors.” *Wintermantel*, 45 A.3d at 1043. The governmental function of maintaining the State Archives records of the Commonwealth rests with the PHMC. Based on a review of the evidence and the record as a whole, we find that TGN/Ancestry has been contracted to perform the PHMC’s governmental function under its statutory mandate to “[p]reserve public records, historical documents and objects of historical interest, possession and control of which have been transferred to the commission....” 37 Pa.C.S. § 301(2). Accordingly, the requested records are accessible pursuant to Section 506(d)(1) of the RTKL, 65 P.S. § 67.506(d)(1), by obtaining them from the contractor providing the governmental function, TGN/Ancestry.

Regarding the requested metadata, the PHMC explains that the “metadata is not available to the public via the Ancestry portal.” The PHMC argues that, nevertheless, the metadata would not be accessible under RTKL because “the metadata of each scanned record is a record in possession of a private party” and such records are records in the possession of a private party and, therefore, exempt under Section 506(d)(2) of the RTKL. 65 P.S. § 67.506(d)(2). As set forth above, Section 506(d) provides:

A public record that is not in the possession of an agency but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the agency, and which directly relates to the governmental function and is not exempt under this action, shall be considered a public record of the agency for purposes of this act.

65 P.S. § 67.506(d)(1). However, Section 506, further provides, “[n]othing in this act shall be construed to require access to any other record of the party in possession of the public record.” 65 P.S. § 67.506(d)(2). The PHMC asserts that Ancestry created the scanned records and the associated metadata and, “assuming for the sake of argument that the scanned images of archival records” are public under Section 506(d)(1), the “metadata that Ancestry created when making the scan would [be] a record possessed by a contractor according to [506](d)(2).”

The issue to be determined with respect to the requested metadata is whether the metadata created when Ancestry performed the document scanning/digitizing pursuant to contract with the PHMC, is directly related to the government function performed by Ancestry under the contract, as set forth in our analysis of the records defined in the contract. *See Eiseman*, 86 A.3d at 939. The PHMC website provides a link to the “State Records Management Manual (M210.7)” and the Manual Glossary defines “Metadata” as, “[d]ata about data. Metadata describes how, when and by whom a particular set of data was collected, and how the data is formatted.”⁶ The contract with TGN/Ancestry states, “[t]he term ‘Licensed Materials’ shall mean those digital images and indexes that TGN creates as a result of digitizing and indexing the records.” Furthermore, the PHMC publishes “Records Management Technical Leaflets” on its website including, a leaflet that is titled, “What Metadata Should I Collect.”⁷ The Leaflet, also identified as Archives Advice Number 04, states, in part, the following:

⁶ See https://www.phmc.pa.gov/Archives/Records-Management/Pages/Policies-Laws.aspx;https://www.oa.pa.gov/Policies/Documents/m210_7.pdf (last accessed January 13, 2023).

⁷ See https://www.phmc.pa.gov/Archives/Records-Management/Documents/04_Metadata%20and%20Scanning.pdf (last accessed January 13, 2023).

Metadata is descriptive data that helps you quickly retrieve a scan when you need it. *The process of collecting metadata is often called Indexing.*

How you index your scanned documents will determine how easily you are able to search for and find them later. *Indexing makes use of metadata*, a set of data that describes or gives information about other data. The metadata you collect depends on the type of document you scanned and the ways you want to be able to retrieve it. For example, you might collect the following metadata for a birth record: name of newborn, date of birth, names of parents, and such.

You, or your scanning vendor, can collect as many different types of metadata as you would like, though the more metadata you collect, the more labor-intensive indexing you'll be doing. (Emphasis added).⁸

Further, the license agreement executed between TGN/Ancestry, in 2008, states, in part:

1. Records Access

1.1 By PHMC. PHMC shall: a) deliver to TGN a copy of the Records on microfilm, and b) provide TGN with copies of digital records, as specified in Appendix A.

1.2 By TGN. TGN agrees to digitize and create a basic index of the Records, and, prior to or simultaneously to posting such records on the TGN Network, provide PHMC with a digital copy of the images and *indexes*, in a digital format approved by PHMC, subject to the use restrictions stated below....

In *Allegheny County Dep't of Admin. Servs. v. Parsons*, a requester sought information from a third-party contractor about its employees; specifically, names, dates of birth, and hire dates. 61 A.3d 336, 342 (Pa. Commw. Ct. 2013). The Commonwealth Court found that these records did not directly relate to the third party's governmental function, noting that the contract did not require the third party to provide the requested information to the agency and that the requested information was not essential to the performance of the contract. The Commonwealth Court held:

After careful consideration, we reach the same conclusion as the trial court: "[t]he 'directly relates' test, as applied to cases such as the instant case, focuses on what services are performed and how they are performed, not who performs them." ...

⁸ *Id.*

The information requested does not concern accountability or fitness and is not directly related, or even relevant to [the third party's] performance of a governmental function.

Id. at 347. In determining whether records directly relate to a third party's governmental function, the Commonwealth Court has consistently looked to whether the records are relevant to the third party's performance of its governmental function. *C.f. Buehl*, 6 A.3d 27 (Pa. Commw. Ct. 2010) (“[W]hat [a third-party contractor] paid for the items is beyond the parameters of its contract with the Department -- it does not directly relate to performing or carrying out this governmental function”).

The evidence presented by the PHMC demonstrates that the original agreement between TGN/Ancestry contemplated that the digitized records would be returned to the PHMC, in order for the agency to continue carrying out its statutory duties. Nothing in the evidence or the contract establishes that possession or ownership of the records provided to TGN/Ancestry to be scanned, digitized and index would be transferred away from PHMC. The services provided by TGN/Ancestry include indexing and the indexes would be provided to the PHMC, when the services were complete. The internal policy and/or financial decision by the PHMC to have TGN/Ancestry continue to maintain the digitized records and the metadata that resulted from the digitization does not change the fact that the services provided directly related to the governmental function of “[p]reserve public records, historical documents and objects of historical interest, possession and control of which have been transferred to the commission....” 37 Pa.C.S. § 301(2). Based on the services contemplated in the contract, which included indexing, and the guidance published on the PHMC's website, it is a reasonable conclusion that the metadata created from the scanning/digitizing services provision of the service by TGN/Ancestry and, now, the data maintenance services, directly relate to the PHMC's governmental functions. Accordingly, we

determine that the requested metadata does not consist of a private record in the possession of a party in possession of a public record under Section 506(d)(2).

4. The Request is not satisfied by accessing the Ancestry.com website

The PHMC explains, “Pennsylvania residents can access all of the Pennsylvania records housed on the Ancestry website free of charge at any time, from any computer, by going to the Pennsylvania State Archives Ancestry page (<http://www.phmc.pa.gov/Archives/Research-Online/Pages/Ancestry-PA.aspx>)...” 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), and that “an agency may respond to a request by notifying the requester that the record is available through publicly accessible electronic means or that the agency will provide access to inspect the record electronically.” 65 P.S. § 67.704(b)(1). However, here, there is no dispute that the Requester is not a Pennsylvania resident and when a non-Pennsylvania zip code is entered on the PHMC’s website the following statement appears, “This is not a Pennsylvania zip code. Pennsylvania State Archives records at Ancestry.com are only available to Pennsylvania residents.”⁹ Therefore, the Requester would not be able access the records by way of the Ancestry Pennsylvania page free of charge. While free access is available to non-Pennsylvanians in person at the State Archives building, the Request seeks electronic copies of the records, not inspection of them. In addition, the PHMC has clarified that the metadata associated with the records is not available to the public via the Ancestry website.

5. The PHMC has not demonstrated that it is not required to download the requested data

The Requester asserts that the PHMC should be able to respond to the Request by having TGN/Ancestry electronically transfer the records in some manner such as, by downloading them

⁹ <http://www.phmc.pa.gov/Archives/Research-Online/Pages/Ancestry-PA.aspx> (last accessed December 15, 2022).

to hard drives that can be provided to the Requester upon the payment of any necessary fees under Section 1307 of the RTKL.¹⁰ Relying on section 2.2 of the agreement, the PHMC argues that providing the Requester with a download of the scanned images and the metadata would violate the contract with TGN/Ancestry. The section 2.2 language quoted by the PHMC states, “[t]he Licensed Materials may not be distributed or resold by PHMC to a company or institution for any purpose, and is solely for the use individual patrons....” The PHMC argues that “if [it] were to distribute these records to the Requester, Ancestry would be within its contractual rights to claim a breach of its license and withdraw the infrastructure that provides these records to the public free of charge. As such, PHMC cannot violate its contractual obligation to Ancestry and imperil the relationship through which it vastly expanded the public’s access to vital records.”¹¹ Based on a plain reading of section 2.2, it is unclear how the Requester is a “company or institution” and not a patron of the PHMC, such that the distribution of the records would violate the agreement with TGN/Ancestry.

In addition, regarding the fees for downloading the records, the PHMC argues that the “cost of the transfer itself is *not the cost of the total [R]equest* under the RTKL. Instead, under the RTKL the cost to be reckoned would be the market value of the requested extensive dataset.” (Emphasis in original). The PHMC asserts that the “relevant estimate that PHMC and Ancestry would have to be instructed by OOR to prepare would be an estimate of the market value of the

¹⁰ The Requester states, regarding the 45 terabytes of information the PHMC indicates comprises the records, that “[t]hree hard drives on Amazon can fit the entirety of the data, at a cost of less than \$600 (presumably to be paid by the requester).^[1] Assuming the data was being transferred from and to 1 standard USB 3.0 hard drives, at standard USB 3.0 speeds, the entire transfer would take less than 5 days.^[1] At the technology’s upper bound transfer rate, the transfer would take less than a 2 single day.” The Requester cites the following internet sources for the assertions: https://smile.amazon.com/dp/B08KTRKB6S/ref=twister_B0BGM428M4?_encoding=UTF8&th=1; <https://www.macworld.com/article/221042/how-fast-is-usb-3-0-really.html>.

¹¹ We note that the PHMC submitted a copy of the notice provided to TGN/Ancestry of the pending appeal that included information on how to file a request to participate as a direct interested party in this appeal. However, the OOR did not receive a request to participate from TGN/Ancestry.

[R]equest and not the cost of its download or transfer in and of itself.” Section 1307(b)(4)(i) of the RTKL provides that fees for copying “complex and extensive data sets, including geographic information systems or integrated property assessment lists ... may be based on the reasonable market value of the same or closely related data sets.” 65 P.S. § 67.1307(b)(4)(i).

In *Noto and Zillow Group v. Luzerne Cnty.*, the OOR considered the sole issue of “whether the County was permitted to levy a fee of \$8,400 for the requested property records,” there were comprised of an electronic copy of the 2021 Tax Assessment Files for all parcels in Luzerne County, under Section 1307(b)(4)(ii). OOR Dkt. AP 2021-1359, 2021 PA O.O.R.D. LEXIS 1561, *5. In *Noto*, the County submitted the attestation of the Director of Assessment in support of its position that the fee assessed to process and respond to the request, who attested to the details of the amount of responsive data and expenses incurred in maintaining the data per parcel. The County’s evidence also included Director of Assessment’s attestation regarding the charges imposed by other counties for similar records. *Noto* at *6-7. The OOR considered the requester’s attestation disputing the County’s evidence and concluded that, based on the evidence as a whole, the fee being assessed by Luzerne County constituted a reasonable fair market value of the dataset under Section 1307(b)(4)(ii). *Id.* at *9; *see also Ingalls v. Westmoreland Cnty.*, OOR Dkt. AP 2017-2222, 2018 PA O.O.R.D. LEXIS 193 (concluding that geographic and assessment records of land parcels are extensive datasets and the county proved that the fee assessed fell within in the reasonable market range).

In this matter, unlike *Noto*, the PHMC has not submitted any such supporting evidence to establish that the responsive records are a “complex and extensive dataset” and what the reasonable fair market value would be for producing the dataset. Instead, the PHMC relies on the position statement submitted by counsel. As stated above, unsworn statements are not competent evidence

to sustain the agency's burden of proof. *Van Osdol*, 40 A.3d 209; *Juzang*, July Term 2010, No. 2048 (Phila. Com. Pl. June 28, 2011); *see also Highmark Inc. v. Voltz*, 163 A.3d 485, 491 (Pa. Commw. Ct. 2017) (*en banc*) (stating that "it is not incumbent upon OOR to request additional evidence when developing the record. Rather, it is the parties' burden to submit sufficient evidence to establish material facts."). Accordingly, the PHMC has not proven that it is unable to provide the responsive records by downloading the electronic files from TGN/Ancestry.

CONCLUSION

For the foregoing reasons, the appeal is **granted**, and the PHMC is required to provide all responsive records 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. 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.¹² This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: January 26, 2023

/s/ Kelly C. Isenberg

SENIOR APPEALS OFFICER
KELLY C. ISENBERG

Sent via E-file Portal to: Alec Ferretti; Gerard Leone, Esq.; Cynthia Bendroth

¹² *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).