



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

**IN THE MATTER OF**

:

**MICHAEL MICHALSKI,  
Requester**

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:

**v.**

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**Docket No: AP 2023-0438**

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**PENNSYLVANIA DEPARTMENT OF  
CORRECTIONS,  
Respondent**

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## **FACTUAL BACKGROUND**

On January 31, 2023, Michael Michalski (“Requester”), an inmate at SCI-Albion, filed a request (“Request”) with the Pennsylvania Department of Corrections (“Department”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking the movies ordered from and shipped by Netflix to each one of eight specified correctional institutions between June of 2019 and October 31, 2021. The Request specified that it “seeks these records [to] be printed directly from the Netflix history tab...”<sup>1</sup> On February 14, 2023, after invoking an extension to respond, *see* 65 P.S. § 67.902(b), the Department denied the Request, arguing that the requested histories are not records of the Department and, as such, do not exist in the Department’s possession, custody or control.

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<sup>1</sup> The Request also sought the meeting minutes from the most recent Department Commissary Committee meeting. The Department provided these records, redacted of the first names of corrections officers, and the Requester does not challenge this aspect of the Department’s response on appeal. As a result, the Requester has waived any objections to the Department’s response to this item of the Request. *See Pa. Dep’t of Corr. v. Off. of Open Records*, 18 A.3d 429 (Pa. Commw. Ct. 2011).

On February 28, 2023, the Requester filed an appeal with the Office of Open Records (“OOR”), challenging the denial and stating grounds for disclosure. The Requester argues that each of the identified correctional institutions paid for a Netflix subscription out of each institution’s Inmate General Welfare Fund and that the institutions access Netflix on Department computers. Further, the Requester argues that the Department has previously provided Netflix histories to him, although he acknowledges that some of the institutions had provided a Word document with the requested information. The OOR invited both parties to supplement the record and directed the Department to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On March 7, 2023, the Department submitted a position statement, reiterating its arguments. In support, the Department provided the statement made under the penalty of unsworn falsification to authorities by its Deputy Open Records Officer, Kimberly Grant. On March 17, 2023, the Requester mailed a response to the evidence submitted by the Department, arguing that the Department’s acknowledgment that the histories do exist is inconsistent with the argument that no record exists, especially because the basis of the latter argument appears to be that the histories are difficult to print. The Requester argues that the histories are records of the Department because they document a transaction of the Department; alternatively, they are accessible through Section 506(d) of the RTKL. *See* 65 P.S. § 67.506(d). Further, the Requester argues that the histories can be downloaded from Netflix as a .csv file and opened with Microsoft Excel; this belies the Department’s argument that they are hard to print. Moreover, drawing information from a database does not constitute the impermissible creation of a record. *See* 65 P.S. § 67.705.

## LEGAL ANALYSIS

The Department 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 Department 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 factfinder ... to find that the existence of a contested fact is more probable than its nonexistence.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

The Department argues that the Netflix histories are not records of the Department. The RTKL defines a “record” as “[i]nformation, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency.” 65 P.S. § 67.102. The RTKL imposes a two-part inquiry for determining if certain material is a record: 1) does the material document a “transaction or activity of an agency?” and 2) if so, was the material “created, received or retained ... in connection with a transaction, business or activity of [an] agency?” *See* 65 P.S. § 67.102; *Allegheny Cnty. Dep’t of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1034-35 (Pa. Commw. Ct. 2011). Because the RTKL is remedial legislation, the definition of “record” must be liberally construed. *See A Second Chance*, 13 A.3d at 1034; *Gingrich v. Pa. Game Comm’n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38 at \*13 (Pa. Commw. Ct. Jan. 12, 2012) (“[H]ow [can] any request that seeks information ... not [be] one that seeks records[?]”). In *A Second Chance*, the Commonwealth Court interpreted the word “documents”

as meaning “proves, supports [or] evidences” and held that certain requested information met the first part of the definition of a record because it documented the existence of a governmental action.

13 A.3d at 1034.

Here, the Grant attestation provides that:

4. In response to [the R]equest, a good faith effort was made to ascertain the existence of documents responsive to the [R]equest. I contacted each of the 8 listed institutions regarding this [R]equest. If the requested information exists, it would be maintained by each individual institution.
5. Jeffrey Bigam, SCI-Fayette’s Corrections Activities [sic], indicated that the information requested would have to come directly from Netflix’s site, and is not a record the institution maintains.
- ...
8. Thus, I can state that after conducting a good faith search of the Department’s records no responsive records currently exist within the Department’s possession.

Under the RTKL, an 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. Off. 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, “the averments in the [attestation] should be accepted as true.” *McGowan v. Pa. Dep’t of Env’t Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Off. of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

Here, the Request facially seeks documents from Netflix’s website. The Requester argues that the Department can download the histories as .csv files. However, agencies are not required to create records, and the fact that some correctional institutions may have provided this information to the Requester in the past is inconsequential to this analysis. *See* 65 P.S. § 67.705. Nevertheless, as the Requester points out, the histories document the Department’s activity of ordering movies for inmates to watch. The question then become whether they are maintained in

connection with this activity. As the Grant attestation establishes, they are not. Accordingly, the Department has met its burden of proving that the Netflix histories are not records of the Department. *See* 65 P.S. § 67.305.

The Requester argues that the records are accessible under Section 506(d) of the RTKL, which provides that *public records* that are not in the possession of the agency but are in the possession of a third party are accessible if certain conditions are satisfied. *See* 65 P.S. § 67.506(d)(1) (emphasis supplied); *Dental Benefit Providers, Inc. v. Eiseman*, 86 A.3d 932, 938-39 (Pa. Commw. Ct. 2014) (citation omitted), *aff'd*, 124 A.3d 1214 (Pa. 2015). The RTKL defines “public record” as a record of a Commonwealth or local agency. *See* 65 P.S. § 67.102. However, as established above, the Netflix histories are not records of the Department, nor is there any evidence that they are records of any other local or Commonwealth agency. Rather, the Requester seeks records from the Netflix’s website; while Netflix is a publicly traded corporation, it is plainly not a local or a Commonwealth agency. *See id.* (defining “local agency” and “Commonwealth agency”); <https://www.forbes.com/companies/netflix/?sh=fe2452c8541f> (last accessed March 24, 2023). As such, Section 506(d) does not apply to the Netflix histories, and the OOR need not assess whether the conditions required to access records under Section 506(d) are satisfied in this instance.

## 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 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. 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>2</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: March 28, 2023**

*/s/ Blake Eilers*  
Blake Eilers, Esq.  
Appeals Officer

Sent to: Michael Michalski, GJ8047 (via regular mail);  
Tara Wikhian, Esq. and Andrew Filkosky (via portal access only)

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<sup>2</sup> See *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).