



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

:

**JACK PANYARD AND
LANCASTERONLINE - LNP,
Requester**

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:

:

v.

: Docket No: AP 2023-2662

:

**LANCASTER COUNTY,
Respondent**

:

:

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FACTUAL BACKGROUND

On October 23, 2023, Jack Panyard and LancasterOnline - LNP (collectively “Requester”) submitted a request (“Request”) to Lancaster County (“County”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking:

[T]he name of the 3-year-old who died of a gunshot wound to the head at 8:07 pm [on] [October] 20, 2023 at [address omitted] from the [C]ounty [C]oroner’s office.

On October 30, 2023, the County denied the Request, arguing that the Request was not sufficiently specific, 65 P.S. § 67.703, would identify the name of a minor, 65 P.S. § 67.708(b)(30), sought records relating to a criminal investigation, 65 P.S. § 67.708(b)(16)(ii), and sought records relating to a noncriminal investigation, 65 P.S. § 67.708(b)(17).

On November 3, 2023, the Requester appealed to the Office of Open Records (“OOR”), challenging the denial and stating grounds for disclosure. Specifically, the Requester argues that the name, cause and manner of death are subject to release without consideration of age. The Requester further argues that the County is acting in bad faith. 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 16, 2023, the County submitted a position statement, reiterating its claims. Additionally, the County argues the Request does not identify records, but instead, asks a question requiring an answer and responsive records do not exist. In further support of its position, the County submitted an attestation made subject to the penalties of 28 U.S.C. § 1756, authored by Stephen Diamantoni, M.D. (“Diamantoni Attestation”), the County Coroner. At the request of the OOR, a second attestation that was also made subject to the penalties of 28 U.S.C. § 1756, and authored by Stephen Diamantoni, M.D. (“Diamantoni Supplemental Attestation”), was submitted on November 29, 2023.

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).

1. The Request is a request for records under the RTKL

The County initially and unreasonably argues that the Request seeks an answer to a question rather than records. In order to comply with the requirements of Section 703 of the RTKL, a request must seek records, rather than answers to questions. 65 P.S. § 67.703; *see also Walker v. Pa. Ins. Dep’t*, No. 1485 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 425 at *16 (Pa. Commw. Ct. 2012) (“The RTKL is not a forum for the public to demand answers to specifically posed questions to either a Commonwealth or local agency. In fact, there is no provision in the RTKL that requires an agency to respond to questions posed in a request”); *Gingrich v. Pa. Game Comm’n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38 at *14 (Pa. Commw. Ct. 2012) (noting that the portion of a request “set forth as a question” did not “trigger a response”). 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.

In *Gingrich, supra*, the Commonwealth Court held, among other things, that requests for specific pieces of information constitute requests for records under the RTKL. *Id.* at *13. (“[H]ow [can] any request that seeks information ... not [be] one that seeks records[?]”). Here, the Request seeks the “name” of a minor who died on a specific date. The OOR has previously found that a request for the name or identity of an individual is a request for a record under the RTKL. *See Bartholomew v. West Manchester Twp.*, OOR Dkt. AP 2020-0777, 2020 PA O.O.R.D. LEXIS 975 (finding that a request seeking the name of the individual that has procurement authority seeks a

record under the RTKL); *Eiland v. Dauphin County*, OOR Dkt. AP 2020-0293, 2020 PA O.O.R.D. LEXIS 718 (finding that a request seeking the names of officers who signed out or observed the return of an inmate to implicitly seek a record showing the information sought); *Melchiondo v. Pa. Game Comm'n*, OOR Dkt. AP 2016-2081, 2017 PA O.O.R.D. LEXIS 90 (finding a request seeking the names and addresses of property owners who have a license to hunt on their own properties is a request for records). Accordingly, the request for the name of an individual clearly seeks “information” and therefore, constitutes a valid request for a record under the RTKL.

2. The County has not demonstrated that a responsive record does not exist in its possession, custody or control

The County argues that a responsive record sought by the Request, i.e. the name of the minor, did not exist at the time of the Request. In response to a request for records, “an agency shall make a good faith effort to determine if ... the agency has possession, custody or control of the record[.]” 65 P.S. § 67.901. While the RTKL does not define the term “good faith effort,” in *Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr.*, the Commonwealth Court stated:

As part of a good faith search, the open records officer has a duty to advise all custodians of potentially responsive records about the request, and to obtain all potentially responsive records from those in possession... When records are not in an agency’s physical possession, an open records officer has a duty to contact agents within its control, including third-party contractors ... After obtaining potentially responsive records, an agency has the duty to review the records and assess their public nature under ... the RTKL.

185 A.3d 1161, 1171-72 (Pa. Commw. Ct. 2018) (citations omitted), *aff’d*, 243 A.3d 19 (Pa. 2020).

An agency must show, through detailed evidence submitted in good faith from individuals with knowledge of the agency’s records, that it has conducted a search reasonably calculated to uncover all relevant documents. *See Burr v. Pa. Dep’t of Health*, OOR Dkt. AP 2021-0747, 2021 PA O.O.R.D. LEXIS 750; *see also Mollick v. Twp. of Worcester*, 32 A.3d 859, 875 (Pa. Commw. Ct. 2011).

In support of its position, the Diamantoni Attestation indicates, in relevant part, the following:

2. In my capacity as the Coroner, I am familiar with the County's past and current practices regarding the release of documents in response to [RTKL] [r]equests such as the one at issue in this matter.

3. In my capacity as the Coroner, I am aware of the various types of investigations and reports completed by the [County] Coroner's Office [{"Office"}], as well as the Office's record retention policies.

4. The Coroner's Office is tasked with providing medical examinations and other investigations into the cause of death of an individual and then preparing reports on those examinations and investigations.

...

10. Since February 2022, the [County] Coroner's office policy on providing autopsy reports has been to provide autopsy reports to next of kin, or authorized representatives of next of kin, insurance companies and law enforcement agencies.

11. The [County] Coroner's Office conducted an investigation into the cause of death of a three-year old minor child[,] which occurred on approximately October 20, 2023.

...

13. Based upon the [R]equest provided, I was unable to determine what report, and therefore, what fee was to be assessed.

14. At the time of the October 23, 2023 [R]equest, the [County] [Office's] investigation in to the cause of death of this minor had not yet been completed and there were no responsive records to the [R]equest.

In further support of the County's, the Diamantoni Supplemental Attestation indicates the following:

15. At the time of the October 23, 2023 [R]equest, the [County] [Office] did not have any records that contained the requested information.

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). However, the OOR is not required to accept statements made in an affidavit or an attestation as the truth when there are countervailing factors to consider; indeed, “experienced OOR appeals officers” necessarily possess the “competency to assess the adequacy and probity of an agency affiant's characterization of the record or the credibility of its effects assessment.” *ACLU of Pa. v. Pa. State Police*, 232 A.3d 654 (Pa. 2020).

The Diamantoni Supplemental Attestation states that the Coroner’s Office “did not have any records that contained the requested information” at the time of the Request. However, there are multiple reasons to question the credibility of this statement. First, the County has unreasonably argued that the Request asks a question, thus calling into question its interpretation of the Request. *See, e.g., Mack v. Dep’t of Corr.*, No. 699 C.D. 2022, 2023 Pa. Commw. Unpub. LEXIS 393 (Pa. Commw. Ct. 2023). The Diamantoni Attestation appears to set forth an interpretation that the Request was seeking a formal report, as opposed to *any* record containing the information. Although the Diamantoni Supplemental Attestation states that the Coroner’s Office did not have “any records,” there is reason to believe that the County is treating “record” as synonymous with a “report” based upon the Diamantoni Attestation. Finally, upon view of a body, a coroner is required to “investigate the facts and circumstances concerning a death” that “occur[s] as a result of violence or trauma,” 16 P.S. § 1218-B, and is specifically required to investigate the unexplained deaths of children not more than three (3) years old, 16 P.S. § 1220-B. It strains credulity to believe that the Coroner’s Office did not possess the name of the decedent, under these circumstances, prior to the submission of the Request. Notably, there is nothing in the record indicating that the decedent was unidentified during this timeframe. For these reasons, the

evidence submitted by the County does not prove that no responsive records existed at the time of the Request.¹

Finally, the OOR would be remiss if it did not acknowledge the tragic and heartbreaking nature of this situation. However, as sad as this case is, the Legislature considered situations like this into when it declared that certain coroner records are public and are to be released. The name of the decedent is one such piece of information. Because the RTKL is clear that the name of a deceased individual is public, without consideration to the type of record the information may be contained within, 65 P.S. § 67.708(b)(20), the County is directed to provide the requested name.²

3. The OOR declines to make a finding of bad faith

The Requester presents a claim concerning the County's actions in regard to the instant Request and appeal, as well as general concerns about the denial of what the Requester feels is a public record. While the OOR may make findings of bad faith, only the courts have the authority to impose sanctions on agencies. *See generally* 65 P.S. § 67.1304(a). Under the RTKL, a finding of bad faith is appropriate where an agency refuses to comply with its statutory duties under the RTKL. *Uniontown Newspapers, Inc. v. Pa. Dep't of Corr.*, 243 A.3d 19, 28-29 (Pa. 2020); *California Univ. of Pa. v. Bradshaw*, 210 A.3d 1134 (Pa. Commw. Unpub. 2021) *appeal denied* 2019 PA LEXIS (Pa. 2019); *Office of the Dist. Atty. of Phila. v. Bagwell*, 155 A.3d 1119 (Pa. Commw. Ct. 2017).

In the instant matter, we respectfully decline to make a finding of bad faith. This is not to say that we are finding that the County has acted in good faith; instead, we defer to the judgment

¹ Notwithstanding the above, we note the County had the option to simply provide the information at any time during the appeal.

² To the extent that the County argues that the name of a deceased minor is exempt under 65 P.S. § 67.708(b)(30), we note that such an interpretation is inconsistent with the Coroner's Act, which mandates disclosure of coroner records without consideration of the decedent's age.

of a reviewing court in this instance to determine whether the facts before us, or after further development of the record, warrant a finding of bad faith. We note that the County engaged in a timely response to the Request, provided a detailed final response and fully participated on appeal, and a finding of bad faith is typically reserved only for an egregious or blatant violation of the RTKL.

CONCLUSION

For the foregoing reasons, the appeal is **granted**, and the County is required to provide the requested information 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 Lancaster 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 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.³ 65 P.S. § 67.1303. All documents or communications following the issuance of this Final Determination shall be sent to oor-postfd@pa.gov. This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: December 4, 2023

/s/ Bandy L. Jarosz

BANDY L. JAROSZ, ESQ.
APPEALS OFFICER

Sent to: Jack Panyard (via portal only)
Jacquelyn E. Pfursich, Esq. (via portal only)
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³ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).