

IN THE COMMONWEALTH COURT OF PENNSYLVANIA**PublicSource and
Nicole Brambila,
Petitioners**

No. ____ C.D. 2020

v.

**Pennsylvania Department of
Health,
Respondent****RECEIVED**

OCT 16 2020

OFFICE OF OPEN RECORDS

PETITION FOR REVIEW

PublicSource, a Pittsburgh nonprofit news outlet, along with a PublicSource reporter, Nicole Brambila, petition for review of the final determination of the Office of Open Records ("OOR") docketed at OOR AP 2020-1182 and in support of their petition assert:

STATEMENT OF JURISDICTION

1. This Honorable Court has de novo appellate jurisdiction over this appeal from the OOR's Final Determination pursuant to 65 P.S. § 1301(a) of the Right to Know Law ("RTKL"), Rule 1511 of the Pennsylvania Rules of Appellate Procedure, and Section 763(a)(2) of the Judicial Code, 42 Pa.C.S. Sec. 763(a)(2).

PARTIES

2. PublicSource is a nonprofit digital-first news organization with a mission of delivering public-service reporting and analysis in the Pittsburgh region.
3. Nicole Brambila ("Requester") is a reporter with PublicSource.
4. The Pennsylvania Department of Health ("DOH") is an independent Commonwealth agency as defined in Section 102 of the Right to Know Law and is subject to the Right to Know Law pursuant to section 301.

GOVERNMENTAL UNIT THAT MADE DETERMINATION SOUGHT TO BE REVIEWED

5. The OOR is a governmental unit established to receive and determine appeals of agency Right to Know Law decisions pursuant to Sections 1101 and 1310 of the Right to Know Law.

GENERAL STATEMENT OF MATERIAL FACTS

6. On May 21, 2020, Requester submitted a Right to Know Law request to DOH seeking "copies of public records that show pneumonia and influenza deaths in Pennsylvania by count and date for 2015, 2016, 2017, 2018, 2019, and Jan. 1, 2020 through May 21, 2020,

as reported to the Centers for Disease Control and Prevention.” The request and attachments to the request are appended at Exhibit A.

7. The request sought the pneumonia and influenza deaths in Pennsylvania, by county, as reported to the Centers for Disease Control and Prevention.
8. One of the databases involved in Requester’s submission is the Enterprise Data Dissemination Informatics Exchange (“EDDIE”), the Commonwealth’s database for publicly available death statistics.
9. On June 5, 2020, DOH invoked a thirty-day extension to respond pursuant to 65 P.S. § 67.902.
10. On July 6, 2020, DOH granted access to a website link to three weeks of statewide data made publicly available through the Centers for Disease Control and Prevention, but denied access to the records in any other form pursuant to various RTKL exemptions and the Disease Prevention and Control Law, 35 P.S. § 521.1 et seq. Upon information and belief, the data in the three weeks of CDC information came from information provided by the DOH Bureau of Health Statistics and Registries.
11. The agency’s justifications for withholding the requested information included: (1) records are connected to a noncriminal investigation, (2) disclosure would identify individual health information, (3) records would disclose personal identification, and (4) records are exempt under state and federal law or regulation.
12. Requester appealed to the OOR on July 21, 2020.
13. After receiving arguments from both parties, the OOR on September 18, 2020, denied Requester’s appeal.
14. The OOR reasoned that DOH was not “required to create a record for 2019 and 2020 that has not yet been compiled, coded and aggregated for the EDDIE database.” Nonetheless, even if DOH was required to provide the information in the format in which it existed, OOR agreed that the death records and reports used to create the aggregate data in the EDDIE database are confidential under the Vital Statistics Law (“VSL”).
15. Although OOR denied Requester’s appeal, she has continued to gather information about influenza and coronavirus rates and deaths, as it is a serious matter of public concern and one of importance to the readers of PublicSource.
16. In the course of her continued reporting, Requester on October 13, 2020, contacted a DOH press representative, Nate Wardle, to ask additional questions about influenza and coronavirus rates.
17. In his response (attached as Exhibit B), Wardle sent Requester a link that provides 2019-2020 influenza data, information that is partially responsive to the records sought in the instant appeal, because the EDDIE dashboard is current only through 2018. The link, however, does not provide the deaths by county.
18. The October 13, 2020, email to Requester demonstrates that at least for the 2019-2020 flu year (typically from October to April, but can run as late as May) — part of the instant appeal — DOH did, in fact, possess the records sought by Requester and in a manner that was easily accessible.
19. The October 13, 2020, email suggests DOH did not conduct a good faith search of its records.

DETERMINATION FOR WHICH REVIEW IS SOUGHT

20. A true and correct copy of the OOR's Final Determination is attached as Exhibit C.
21. A true and correct copy of Requester's Petition for Reconsideration is attached as Exhibit D.
22. A true and correct copy of the OOR's October 15, 2020, denial of Requester's Petition for Reconsideration is attached as Exhibit E.

GENERAL STATEMENTS OF OBJECTIONS TO THE DETERMINATION

23. The OOR erred by determining that the death records and reports used to create the aggregate data in the EDDIE database are confidential under the Vital Statistics Law ("VSL"), 35 P.S. §§ 450.804-450.806, and cannot be provided until they are compiled for the EDDIE database.
24. The OOR also erred by concluding that DOH would be required to correlate and aggregate information by manually coding and verifying the information from death records to produce the aggregated information.
25. Requester sought raw data rathered by DOH and then provided to and used by the CDC to produce the graphic with weekly influenza and pneumonia deaths in Pennsylvania.
26. The nature of Requester's query did not require DOH to create a document, but rather to provide her with the information in the format in which it is available. See *Department of Environmental Protection v. Cole*, 52 A.3d 541 (Pa. Cmwlth. 2012).

REQUEST TO SUPPLEMENT THE RECORD

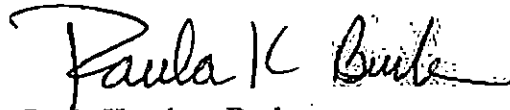
27. In connection with the court's de novo standard of review and plenary scope of review applicable to this Petition for Review, Requester respectfully requests the opportunity to supplement the record with respect to information sought in the instant appeal so the Court can fulfill its statutory duties as the ultimate finder of fact. See 65 P.S. § 67.1301(a), *see also* *Bowling v. Office of Open Records*, 75 A.3d 453, 476-77 (Pa. 2013).
28. This Court may consider evidence that was not presented before the OOR. *Pennsylvania State Police v. Office of Open Records*, 5 A.3d 473, 477 (Pa. Cmwlth. 2010) (citing *Bowling v. Office of Open Records* 990 A.2d, 813, 820, 823 (Pa. Cmwlth. 2010), *affirmed by Bowling* 75 A.3d 453).

STATEMENT OF THE RELIEF SOUGHT

WHEREFORE, Petitioners PublicSoure and Nicole Brambila respectfully request that this Honorable Court:

- (a) Reverse the OOR determination of September 18, 2020, or
- (b) In the alternative, allow Requester to supplement the record before this Honorable Court, or
- (c) In the alternative, remand the matter back to the OOR for a full evidentiary hearing pursuant to Pa.R.A.P. 1542, including testimony and argument on the matter of bad faith and attorneys fees as provided by Sections 1304 and 1305 of the RTKL.

Respectfully submitted,



Paula Knudsen Burke

REPORTERS COMMITTEE FOR FREEDOM OF
THE PRESS

PA ID: 87607

PO Box 1328

Lancaster, PA 17608

pknudsen@rcfp.org

Counsel for Nicole Brambila and PublicSource

Dated: 10/16/20

VERIFICATION

I, Nicole C. Brambila-Forres, hereby state that the facts above set forth in the Petition for Review are true and correct to the best of my knowledge, information and belief and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 (relating to unsworn falsification to authorities).



(signature)

Date:

10/16/2020

CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by: Paula Knudsen Burke

Signature: Paula K. Burke

Attorney No.: 87607

PROOF OF SERVICE

I hereby certify that I have served the foregoing document, Petition for Review, upon the persons listed on the date and in the manner indicated below, which satisfies the requirements of Pa.R.A.P. 121:

Notification by first class mail addressed as follows:

Christopher J. Gleeson
Assistant Counsel
Office of Legal Counsel
Department of Health
825 Health and Welfare Building
625 Forster Street
Harrisburg, PA 17120
cgleeson@pa.gov

Jill Wolfe
Appeals Officer
Office of Open Records
333 Market St., 16th Floor
Harrisburg, PA 17101-2234
jiwolfe@pa.gov

Dated: 10/16/20



Paula Knudsen Burke
REPORTERS COMMITTEE FOR FREEDOM OF
THE PRESS
PA ID: 87607
PO Box 1328
Lancaster, PA 17608
pknudsen@rcfp.org
Counsel for Nicole Brambila and PublicSource

EXHIBIT A

PUBLICSOURCE

Stories
for a better
Pittsburgh.

May 21, 2020

Lisa Keefer
Right-to-Know Officer
Pennsylvania Department of Health
825 Health & Welfare Building
Harrisburg, PA 17120
PADOHRTK@pa.gov

VIA EMAIL

Dear Lisa Keefer:

Under the Pennsylvania Right to Know Law, 65 P.S. §67.101, et seq., I am requesting copies of public records that show pneumonia and influenza deaths in Pennsylvania by county and date for 2015, 2016, 2017, 2018, 2019 and Jan. 1, 2020 through May 21, 2020, as reported to the Centers for Disease Control and Prevention.

If there are any fees for searching or copying these records, please inform me if the cost will exceed \$50. However, I would also like to request a waiver of all fees in that the disclosure of the requested information is in the public interest and is being sought for reporting purposes on behalf of PublicSource, a nonprofit news organization.

The Pennsylvania Right to Know Law requires a response time within five business days. If access to the records I am requesting will take longer than this amount of time, please contact me with information about when I might expect copies or the ability to inspect the requested records. If the records are available in electronic form, I'd like to receive it in electronic form.


Should you deny any or all of this request, please cite each specific exemption you feel justifies the refusal to release the information and notify me of the appeal procedures available to me under the law.

Please don't hesitate to call should you have any questions regarding my request.

Thank you for considering my request.

Because I am working remotely during the COVID-19 pandemic, please correspond via email or cell phone.

Best,



Nicole C. Brambila
PublicSource
Staff Writer
nicole@publicsource.org
412-368-2654, cell

PublicSource | 1936 5th Avenue, Pittsburgh, PA 15214 | www.publicsource.org



pennsylvania
DEPARTMENT OF HEALTH

June 5, 2020

Nicole C. Brambila
PublicSource
1936 5th Avenue
Pittsburgh, PA 15214

nicole@publicsource.org

**RE: Right to Know Law Request
DOH-RTKL-MS-144-2020**

Dear Ms. Brambila:

This letter acknowledges receipt by the Pennsylvania Department of Health (Department) of your written request for records under the Pennsylvania Right-to-Know Law (RTKL), 65 P.S. §§ 67.101-67.3104. I received your request on May 21, 2020 when the Department was closed due to the COVID-19 pandemic. Although the Department remains closed to the public, the Department is responding to requests when able to access records remotely. You requested:


I am requesting copies of public records that show- pneumonia and influenza deaths in Pennsylvania by county and date for 2015, 2016, 2017, 2018, 2019, and Jan. 1, 2020 through May 21, 2020, as reported to the Centers for Disease Control and Prevention.

This is an interim response, not a final response, to your RTKL request. Under the provisions of 65 P.S. § 67.902(b)(2), you are hereby notified that, because a legal review of the records potentially responsive to your requests is required, the Department will require up to an additional 30 days, i.e., until July 6, 2020, in which to provide a final response to your request. See 65 P.S. § 67.902(a)(2).

The Department's final response will include a total for the estimated or actual fees owed, if applicable. Due to the reasons cited above for requiring additional time to provide a final response to your request, we are unable to determine that estimate at this time. Should your actual fees meet or exceed \$100, the Department will require cleared prepayment prior to releasing any responsive records.

Should you have any questions regarding the status of your request or this letter, please contact the undersigned and reference RTKL Request #DOH-RTKL-MS-144-2020.

Sincerely,

A handwritten signature in cursive script that reads "Lisa M. Keefer".

Lisa M. Keefer
Agency Open Records Officer
Pennsylvania Department of Health
625 Forster Street
825 Health and Welfare Building
Harrisburg, PA 17120-0701

Date of Mailing: 06/05/2020



pennsylvania
DEPARTMENT OF HEALTH

July 6, 2020

Nicole C. Brambila
PublicSource
1936 5th Avenue
Pittsburgh, PA 15214

nicole@publicsource.org

**RE: Right to Know Law Request
DOH-RTKL-MS-144-2020**

Dear Ms. Brambila:

This letter acknowledges receipt by the Pennsylvania Department of Health (Department) of your written request for records under the Pennsylvania Right-to-Know Law (RTKL), 65 P.S. §§ 67.101-67.3104. I received your request on May 21, 2020 when the Department was closed due to the COVID-19 pandemic. By letter, dated June 5, 2020, the Department acknowledged receipt of your request and secured an extension of time in which to respond in accordance with the RTKL. Although the Department remains closed to the public, the Department is responding to requests when able to access records remotely. You requested the following records:

I am requesting copies of public records that show- pneumonia and influenza deaths in Pennsylvania by county and date for 2015, 2016, 2017, 2018, 2019, and Jan. 1, 2020 through May 21, 2020, as reported to the Centers for Disease Control and Prevention.

Your request is granted in part and denied in part. Please find a link to publicly available information related to pneumonia and influenza deaths, as reported to the Centers for Disease Control and Prevention, below:

<https://gis.cdc.gov/grasp/fluview/mortality.html>

The remainder of your request, seeking data broken down by county, is denied because the records in the Department's custody and control pertaining to reports of communicable and non-communicable diseases and the Department's epidemiological investigations are exempt from public access pursuant to the following provisions in the RTKL that preclude access to: (1) records connected with a noncriminal investigation, 65 P.S. § 67.708(b)(17); (2) records that would disclose individually identifiable health information, 65 P.S. § 67.708(b)(5); (3) records which would disclose personal identification information, 65 P.S. § 67.708(b)(6)(i)(A); and (4) records that are "exempt from being disclosed under any . . . Federal or State law or regulation . . ." 65 P.S. § 67.102 (paragraph (2) in the definition of a "public record.") See also, 65 P.S. § 67.305(a)(3). A more detailed discussion of the exemptions to disclosure under the RTKL follows.

A strict statutory confidentiality provision prohibits the release of the records you have requested. The Department's authority to conduct an epidemiological investigation is found in The Disease Prevention and Control Law (the Act) of 1955, 35 P.S. § 521.1, *et seq.*, and the Administrative Code of 1929, 71 P.S. § 532(a) and (b). Documentation received by and/or maintained by the Department pursuant to its authority under the Act is protected by the strict confidentiality provision contained therein. Section 15 of the Act provides, in relevant part, as follows:

State and local health authorities may not disclose reports of diseases, any records maintained as a result of any action taken in consequence of such reports, or any other records maintained pursuant to this Act or any regulation, to any person who is not a member of the Department or of any local board or department of health *except where necessary to carry out the purposes of this Act.*

35 P.S. § 521.15 (Emphasis added).

Pursuant to the authority given to it under the Act, the Department promulgated regulations, found at 28 Pa. Code, Chapter 27 (relating to communicable and non-communicable diseases). The regulations underscore the confidentiality of reports of communicable and non-communicable diseases, and any information obtained by the Department pursuant to the Act.

The records you have requested are records which would be maintained as a result of an action taken by the Department in consequence of its receiving reports of a disease or condition reportable under the Communicable and Non-communicable Diseases Regulations promulgated pursuant to the Act. *See* 28 Pa. Code §27.3. The Department has disclosed all information that the Department deems necessary to carry out the purposes of the Act, which is to prevent and control the spread of disease, at the link provided above. Any information not released remains confidential based upon the statutory and regulatory prohibition on disclosure. 65 P.S. § 67.102.

Pennsylvania's Office of Open Records (OOR) has affirmed the Department's denial of access to records protected under the confidentiality provision of the Act. *See Alison Young and USA Today v. Pennsylvania Dep't of Health* (OOR Docket No. AP 2011-1040) and *Dylan Segelbaum and York Daily Record v. Pennsylvania Dep't of Health* (OOR Docket No. AP 2015-2925).

Further, the Department's epidemiological investigations constitute an exercise of the Department's authority to conduct a noncriminal investigation. The RTKL exempts from access by a requester the following:

A record of an agency relating to a noncriminal investigation, including:

- (i) Complaints submitted to an agency.
- (ii) Investigative materials, notes, correspondence and reports.

65 P.S. § 67.708(b)(17). *See Aamodt v. Dep't of Health*, 502 A.2d 776 (Pa. Cmwlth. 1986) (Court affirmed Department's denial of access to records related to a study conducted by the Department following the March 28, 1979 accident at the Three Mile Island Nuclear Generating Station (TMI))

to review the effects of the TMI accident on pregnancy outcomes in the vicinity of TMI on the basis that they related to an investigation conducted by the Department.)

Department records, including records connected with an epidemiological investigation, that may contain individually identifiable health information or other private identifying and contact information would be exempt from disclosure under 65 P.S. § 67.708(b)(1)(ii), (b)(5), (b)(6)(i).

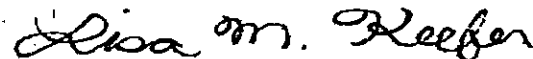
If you choose to appeal under the RTKL, your appeal should be submitted in writing to: Executive Director, OOR, 333 Market Street, 16th Floor, Harrisburg, Pennsylvania 17101. If you choose to file an appeal you must do so within 15 business days of the mailing date of this response and send to the OOR:

- 1) This response;
- 2) Your request;
- 3) The reasons why you think the agency is wrong in denying access to the requested records.

Also, the OOR has an appeal form available on the OOR website at: <https://www.openrecords.pa.gov/Appeals/AppealForm.cfm>.

Please be advised that this correspondence will serve to close this record with our office as permitted by law.

Sincerely,



Lisa M. Keefer
Agency Open Records Officer
Pennsylvania Department of Health
625 Forster Street
825 Health and Welfare Building
Harrisburg, PA 17120-0701

Date of Mailing: 07/06/2020

PUBLICSOURCE

Stories
for a better
Pittsburgh.

July 21, 2020

Erik Arneson
Executive Director
Pennsylvania Office of Open Records
333 Market St., 16th Floor
Harrisburg, PA 17120-2234

Dear Erik Arneson:

This is an appeal of a records denial from the Pennsylvania Department of Health (DOH) to your office.

On May 21, 2020, I requested under Pennsylvania's Right-to-Know law, 65 P.S. §67.101, et seq., records that show "pneumonia and influenza deaths in Pennsylvania by county and date for 2015, 2016, 2017, 2018, 2019 and Jan. 1, 2020 through May 21, 2020, as reported to the Centers for Disease Control and Prevention."

The requested records are under the purview of DOH and therefore subject to Pennsylvania's RKTL.

Lisa Keefer, DOH's Open Record officer, provided an interim response on June 5, 2020, invoking a 30-day extension stating, "the Department was closed due to the COVID-19 pandemic."

A final response was expected on or before July 6, 2020.

On July 6, 2020, Keefer provided the Department's final response, granting and denying in part my request, by providing the following link: <https://gis.cdc.gov/grasp/fluview/mortality.html>, which is a statewide tally of pneumonia and influenza deaths for weeks 26, 27 and 28. (Attached is a screenshot.)

The link Keefer provided is not responsive to my request as it includes only three weeks of data and none of it by county.

In her denial, Keefer cited the following exemptions: 1) records are connected to a noncriminal investigation [65 P.S. § 67.708(b)(17)] 2) disclosure would identify individual health information [65 P.S. § 67.708(b)(5)] 3) records would disclose personal identification [65 P.S. § 67.708(b)(6)(i)(A)] and 4) records are exempt under state and federal law or regulation 65 P.S. § 67.102 and 65 P.S. § 67.305(a)(3).

The investigation exemption does not apply to aggregated data by operation of section 708(d).

Keefer's privacy concerns do not address that I had requested access to aggregated data, making 708(b)(17) inapplicable under 708(d).

Further, aggregated data is raw data and is not capable of identifying individuals exempt under 708(b)(5) and (6). These exemptions apply to records that contain information that would identify specific individuals, not raw data.

Similarly, the nature of the requested data also makes their reliance on other state or federal law misplaced. The Department didn't cite the specific laws upon which they rely, but in light of the Department's position on sections 708(b)(5) and (6), presumably they are relying on HIPAA. HIPAA only applies to "covered entities" and there's been no showing that the Department is a "covered entity" for the purposes of this request. Moreover, even if the Department is a "covered entity" HIPAA only applies to "individually identifiable information relating to the past, present, or future health status of an individual" and again, the requested information is aggregated data not capable of identifying individuals.

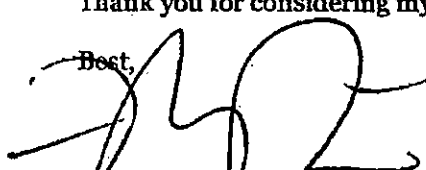
Additionally, my request was tailored to mirror the data DOH submits to the Centers for Disease Control & Prevention (CDC) and releases to the public on Department's Enterprise Data Dissemination Informatics Exchange (EDDIE). (<https://www.phaim1.health.pa.gov/EDD/>) While the available the EDDIE dashboard provides pneumonia and influenza deaths by county, this data is only available through 2018, and does not include the requested data for 2019 and 2020. (Attached is a screenshot.)

As the DOH's final response to my RTK was a link to aggregated data, I believe Keefer understood my request was not for any personal information. The requested data is public under the RTKL and the Department erred by not releasing it.

I am working remotely because of the COVID-19 pandemic. Please contact me via email or cell phone (412-368-2654) should you have any questions.

Thank you for considering my appeal.

Best,



Nicole C. Brambila
PublicSource
Staff Writer
Nicole@PublicSource.org
412-515-0072, direct



Pneumonia and Influenza Mortality Surveillance from the National Center for Health Statistics

Mortality Surveillance System

Season:

2019-20



40

50

1

10

20

28



National
Region

State



Age:

All

National Summary for week 28 (ending July 11, 2020)

Download Image



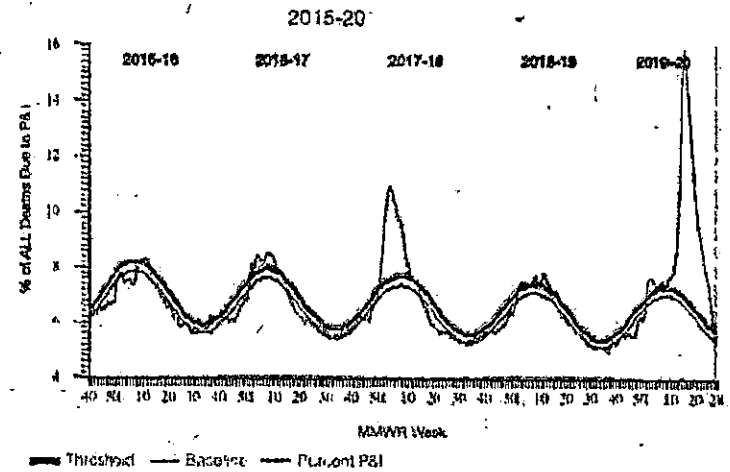
Legend

Normal levels

At or Above Threshold

Percentage of all deaths due to pneumonia and influenza, National Summary

Download Image



Information for selected week and previous two weeks, national summary, all ages

Selected Week	Normal levels	At or Above Threshold	Percent PAI	Percent PAI
28)	1,018	18,374	40.7%	
Week 27	0	2,113	36,448	76.6%
Week 26	8	3,127	46,700	98.2%



pennsylvania
DEPARTMENT OF HEALTH

Enterprise Data Dissemination Informatics Exchange



Home > Death : County State : Table

1: Underlying Cause of Death

Select All

ICD Codes

Hypertensive heart and renal disease
 Hypertensive heart disease
 In situ, benign and uncertain neoplasms
 Infectious and parasitic diseases
Influenza
 Influenza and pneumonia
 Ischemic heart diseases
 Liver disease, chronic and cirrhosis
 Liver, alcoholic liver disease
 Malnutrition
 Meningitis
 Mental and behavioral disorders
 Multiple sclerosis
 Nephritis, nephrotic syndrome and nephrosis
 Nutritional deficiencies
 Pancreas and biliary tract disorders
 Parkinson's disease
 Peptic ulcer
 Perinatal conditions
 Phlebitis, thrombophlebitis, venous embolism and thrombosis
 Pneumoconiosis
Pneumonia
 Pneumonitis due to solids and liquids
 Poisoning (accidental, suicide, homicide, undetermined, legal)
 Renal failure
 Rheumatic fever (acute) and chronic rheumatic heart disease
 Rheumatoid arthritis and related inflammatory polyarthropathy
 Septicemia
 Suffocation and strangulation
 Suicide (intentional self-harm)

2: County / State

Select All

Pennsylvania
 Adams
 Allegheny
 Armstrong
 Beaver
 Bedford
 Berks
 Blair
 Bradford
 Bucks
 Butler
 Cambria
 Cameron
 Carbon
 Centre
 Chester
 Clarion
 Clearfield
 Clinton
 Columbia
 Crawford
 Cumberland
 Dauphin
 Delaware
 Elk
 Erie
 Fayette
 Forest
 Franklin
 Fulton

3: Year

Select All

One
 Three
 Five
 2018
 2017
 2016
 2015
 2014
 2013
 2012
 2011
 2010
 2009
 2008
 2007
 2006
 2005
 2004
 2003
 2002
 2001
 2000
 1999
 1998
 1997
 1996
 1995
 1994

4: Sex

Select All

Total
 Male
 Female

Short Menu Menu Notes

7: Age

Select All

All Ages

5: Race / Ethnicity

Select All

All Races
 White
 Black
 Asian/Pacific Islander
 Multi-Race
 Hispanic

6: Rate / Ratio

Age-Adjusted Rate
 Crude/Age-Specific Rate
 Standardized Mortality Ratio

Create Table

Reset Selections

EXHIBIT B

----- Forwarded message -----

From: Wardle, Nate <nwardle@pa.gov>
Date: Tue, Oct 13, 2020 at 1:32 PM
Subject: RE: [External] COVID-19 testing,
To: Nicole C. Brambila <nicole@publicsource.org>

Nicole,

The CDC has worked on a PCR test that detects influenza A, influenza B and COVID-19 in one test run.

The test has obtained the FDA's Emergency Use Authorization recently and the department's Bureau of Laboratories is preparing to start to run the test once we start to see flu circulation in the community.

Also, commercial laboratories have access to similar platforms from commercial manufacturers. Most point of care testing manufacturers have similar platforms that will be available for use in the near future.

So, that will assist in the testing for these respiratory viruses.

Since the beginning of the pandemic in March through October 12, we've received 3,326,440 test results for the state, which equates to close to 26 percent of the state's population; however, some people have received multiple tests. Pennsylvania is in the top dozen for total number of tests for COVID-19 in the country. Our goal for the month of September was to test five percent of the population and we achieved that goal. That is also our goal for October.

We continue to ramp up our testing capacity. We have partnered with companies and organizations such as CVS, Rite Aid, Walmart, Latino Connection and AMI to ensure testing is available to all Pennsylvanians.

As we report a large increase of cases, it is a reminder to all Pennsylvanians that COVID-19 remains a threat in our communities. Together, we can unite against COVID by wearing a mask, practicing social distancing, downloading COVID Alert PA, avoiding large gatherings and washing hands frequently. In addition, if you are sick, you should stay home.

Getting a flu shot is also another important step people can take to protect themselves as we look at the increase in cases.

Regarding flu, yes flu season typically starts around Week 40 (this year that started September 26th) and technically runs for an entire year. However, flu season is typically considered to be October through April, with it ramping up in November or December.

Our 2019-2020 flu season data is available here:

<https://www.health.pa.gov/topics/Documents/Diseases%20and%20Conditions/Flu/Flu%20Summary%202019-20%20Season.pdf>

Prior archived years can be found here:

<https://www.health.pa.gov/topics/disease/Flu/Pages/Archive.aspx>

If you need anything else, just let me know!

Nate

From: Nicole C. Brambila <nicole@publicsource.org>

Sent: Tuesday, October 13, 2020 9:10 AM

To: Wardle, Nate <nwardle@pa.gov>

Subject: [External] COVID-19 testing,

ATTENTION: This email message is from an external sender. Do not open links or attachments from unknown sources. To report suspicious email, forward the message as an attachment to CWOPA_SPAM@pa.gov.

Good morning, Nate. I hope your week is going well.

I a question I was hoping you could help with. I've asked it to both UMPC and ACHD Director Dr. Debra Bogen with little specificity.

Given that COVID-19 cases nationally are on the rise as we head into flu season and the symptoms and transmission is very similar to influenza, how many more tests does Dr. Levine believe will be necessary? Does she expect – given at least 40% of transmission is from asymptomatic patients – that the likelihood is high that flu season will see a dramatic jump in the need for COVID tests?

How many more tests does the state have on hand for this?

Or is there some other way to quantify this?

Additionally, can you verify these influenza numbers I found in this LNP story: "Lancaster County during the 2019-2020 flu season saw cases rise to 2,790 from 2,368 the previous season, but deaths fell from seven to three."

And lastly, the flu season is typically from October to April, correct?

Best,

Nicole C. Brambila

Staff Writer

PublicSource

412-515-0072, direct

412-368-2654, cell

EXHIBIT C



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

**NICOLE BRAMBILA,
Requester**

v.

**PENNSYLVANIA DEPARTMENT OF
HEALTH,
Respondent**

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Docket No: AP 2020-1182

INTRODUCTION

Nicole Brambila ("Requester"), a reporter with PublicSource, submitted a request ("Request") to the Pennsylvania Department of Health ("Department") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq.*, seeking pneumonia and influenza death statistics. The Department partially denied the Request, providing certain aggregate data, but stating that the withheld information is confidential pursuant to the Disease Prevention and Control Law. The Requester appealed to the Office of Open Records ("OOR"). For the reasons set forth in this Final Determination, the appeal is **denied**, and the Department is not required to take any further action.

FACTUAL BACKGROUND

On May 21, 2020, the Request were filed seeking, "copies of public records that show pneumonia and influenza deaths in Pennsylvania by count and date for 2015, 2016, 2017, 2018, 2019, and Jan. 1, 2020 through May 21, 2020, as reported to the Centers for Disease Control and

Prevention.” On June 5, 2020,¹ the Department invoked a thirty day extension to respond pursuant to 65 P.S. § 67.902. On July 6, 2020, the Department granted access to information made publicly available through the Centers for Disease Control and Prevention, but denied access to the records in any other form pursuant to various RTKL exemptions and the Disease Prevention and Control Law, 35 P.S. §§ 521.1 *et seq.*

On July 21, 2020, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. The Requester indicated that she received the aggregate data through 2018 but did not receive the information for 2019 and 2020. The OOR invited both parties to supplement the record and directed the Department to notify any third parties of their ability to participate in the appeal pursuant to 65 P.S. § 67.1101(c).

On August 11, 2020, the Department submitted its position statement, stating that it provided data responsive to the Request and found in the Enterprise Data Dissemination Informatics Exchange (“EDDIE”) database for 2015-2018, but that 2019 and 2020 has not yet been compiled for EDDIE. In support, the Department provided the affidavit made under the penalty of perjury from, Atmaram Nambiar, Department of Health’s Epidemiology Manager in the Bureau of Epidemiology.

On August 12, 2020, the Requester confirmed that she is seeking the remaining information for 2019 and 2020 that has not been provided because it has not been compiled for the EDDIE database.

On August 17, 2020, in response to the OOR’s request for additional information and clarification, the Department supplemented the record with an affidavit from Audrey Morrocco, the Department of Health’s Director for the Bureau of Health Statistics and Registries.

¹ The Department stated that the Request was submitted while the Department’s offices were closed due to the COVID-19 pandemic.

LEGAL ANALYSIS

“The objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government.” *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law is “designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions.” *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff’d* 75 A.3d 453 (Pa. 2013).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the request” and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The law also states that an appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* The decision to hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Pa. Dep’t of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, neither party requested a hearing; however, the OOR has the necessary information and evidence before it to properly adjudicate the matter.

The Department is a Commonwealth agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.301. Records in the possession of a Commonwealth agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and respond within

five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.” 65 P.S. § 67.708(a). 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 Request sought the pneumonia and influenza deaths in Pennsylvania, by county, as reported to the Center for Disease Control and Prevention. The Department has provided access to EDDIE—the Commonwealth’s database for publicly available death statistics. The Department, however, did not provide this information for the years 2019 and 2020 because the “data has not yet been compiled.” The Department confirms that the information for 2019 will be available in the next two to four months and the 2020 information will not be compiled for the website until 2021. As such, the Department argues that it is not required to create a record of this information.

Under Section 705 of the RTKL, 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; *see also Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010) (holding that an agency cannot be made to create a record that does not exist). Providing information from an agency database does not constitute the creation of a record. *See Commonwealth 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 Right-to-Know Law”); *see also Gingrich v. Pa. Game Comm’n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38, (Pa. Commw. Ct. 2012). An agency is not required to create a list or spreadsheet containing the requested information; “the information ... must simply be provided to requestors in the same format that it would be available to agency personnel.” *Cole*, at 549 n.12.

Here, Ms. Marrocco explains, in her affidavit, that the records sought in this Request are records of the Department’s Bureau of Health Statistics and Registries (“Bureau”). As the Director of the Bureau, she explains the process of gathering the death statistics and how they are compiled into the EDDIE database for public access:

6. The Bureau uses the Data Application for Vital Events (DAVE) to maintain electronic registry database for these vital records.

7. The Bureau receives death information for persons who have died in the Commonwealth through a reporting system and creates and maintains death records based on those reports.

She further explains that deaths can be reported on paper or electronically and contain two parts—medical certification information and demographic information. The electronic death reports can be directly entered into DAVE using a registry system. Paper reports are received through the mail and require manual review and data entry by the Bureau. Both the data entry and review of the paper reports takes several months before death record data is finalized for statistical health reporting purposes.

As far as preparing the information on the EDDIE database, Ms. Marrocco attests that:

16. On an annual basis, the Bureau, with assistance from the Pennsylvania Office of Administration...issues reports through ... EDDIE.

...

18. For cause of death statistics in EDDIE, the Bureau uses aggregate data based on ICD-10 coding to create reports relating to the cause of death.²

...

20. To obtain consistent ICD-10 coding, and in accordance with national standards, the Bureau shares death information with the Centers for Disease Control and Prevention (CDC). The CDC then provides the Bureau with an extraction file to apply the ICD-10 codes to the Bureau's death records.

21. The application of the CDC extraction file to the Bureau records is in part a manual process in that the Bureau personnel has to apply the file to the records. This process also requires the Bureau to research individual cases where cause of death information needs to be clarified prior to applying an ICD-10 code.

22. The Department provides the CDC with a daily list of raw data.³

...

25. ...after the ICD-10 codes are completely applied and the aggregate report is generated, the Bureau provides the information to [the Pennsylvania Office of Administration] to incorporate into EDDIE.

26. The Bureau provides its aggregate data, which includes a breakdown by county, only after ICD-10 codes are applied...

27. Prior to the application of the ICD-10 codes, death records cannot be efficiently compiled and aggregated into a report based on a cause of death. A manual nosology coding and verification process would be required.

28. Until the cause of death is aggregated into a report, the only place where the cause of death information appears is on the decedent's death record and the death record

² ICD-10 is the 10th revision of the International Statistical Classification of Diseases and Related Health Problems, a standardized medical classification system adopted by the World Health Organization.

³ On August 19, 2020, the Requester argued that this raw data would be responsive to the Request. However, the Department explained that the data is not responsive because it contains no data fields; only after it has been assigned the ICD-10 codes is the data aggregated and does it contain data fields.

Here, the Department has provided evidence that there is no database that exists wherein it could pull the requested information. Rather it would be required to correlate and aggregate the information by manually coding and verifying the information from death records to produce the aggregated information. *See Bell v. Pa. Dep't of Labor & Industry*, OOR Dkt. AP 2018-1433, 2018 PA O.O.R.D. LEXIS 1151 (finding that the agency was not required to provide responsive information when doing so would require aggregating and correlating the data in a “complex, multi-step task”); *Imburgia v. Phila. Sch. Dist.*, OOR Dkt. AP 2018-0635, 2018 PA O.O.R.D. LEXIS 799 (finding that the agency was not required to respond to a request where a response would require the generation of a report based on calculations made from data from various tables). Therefore, the Department is not required to create a record for 2019 and 2020 that has not yet been compiled, coded and aggregated for the EDDIE database.

Although the Department is not required to create a record, it may be required to provide the information in the format it exists. *See* 65 P.S. § 67.705. Here, the Department confirmed that information is contained in the death records and the issue becomes whether the death records are subject to access. The Department argues that the death records and reports used to create the aggregate data in the EDDIE database are confidential under the Vital Statistics Law (“VSL”), 35 P.S. §§ 450.804-450.806.

Section 105 of the VSL defines “vital statistics” as including “the registration, preparation, transcription, collection, *compilation*, analysis and preservation of data pertaining to births, adoptions, legitimations, *deaths*, fetal deaths, marital status and data incidental thereto.” 35 P.S. § 450.105 (emphasis added). Section 801 of the VSL provides:

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.

35 P.S. § 450.801.

In *Gries v. Pa. Dep't of Health*, the request sought death indices that the Department personnel used to locate death records. OOR Dkt. AP 2011-1124, 2011 PA O.O.R.D. LEXIS 796. Applying various sections of the VSL, the OOR determined that “the [r]equest facially seeks death certificate information that, pursuant to the [VSL], may only be released upon following the course outlined in 35 P.S. § 450.804.” *Gries*, 2011 PA O.O.R.D. LEXIS 796, *6. As set forth above, Section 801 of the VSL prohibits the disclosure of vital statistic records for an expressly proscribed time period. Section 804 of the VSL delineates procedures and parameters for the release of vital statistics records during the confidentiality period. More specifically, Section 804 provides the following:

[e]xcept for records described in sections eight hundred two and eight hundred three of this act [related to marriage registration, court report records and disclosure of illegitimacy of birth], the department shall issue certified copies of or disclose a vital statistics record or part thereof if an officer of the department designated by the Secretary of Health finds that the applicant therefor has a direct interest in the content of the record and that the information contained therein is necessary for the determination of personal or property rights.

35 P.S. § 450.804; *see also* 35 P.S. § 450.805 (permitting disclosure for research purposes, “subject to strict supervision by the department”); 35 P.S. § 450.806 (permitting disclosure to governmental agencies). Therefore, as in *Gries*, the OOR determines that because the records are made

confidential under the VSL, the Department is not required to provide the death record information prior to it being compiled for the EDDIE database.⁴

CONCLUSION

For the foregoing reasons, 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.⁵ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: September 18, 2020

/s/ Jill S. Wolfe

APPEALS OFFICER
JILL S. WOLFE, ESQ.

Sent via email to: Nicole Brambila;
Christopher Gleeson, Esq.;
Lisa Keefer

⁴ The OOR need not address the Department's additional reasons for withholding the information.

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

EXHIBIT D

From: Nicole C. Brambila nicole@publicsource.org
Subject: Re: Brambila v. Dept of Health, OOR Pkt. AP 2020-1182
Date: September 28, 2020 at 4:21 PM
To: Wolfe, Jill jiwolfe@pa.gov
Cc: Gleeson, Christopher cgleeson@pa.gov, Keefer, Lisa likeefer@pa.gov



Jill S. Wolfe:

Having reviewed OOR Docket No: AP 2020-1182, I am respectfully asking you to reconsider your decision for the following reasons:

- 1) I did not receive as a part of my RTK request the aggregated data through 2018 as stated in paragraph 2 on page 2. What I received from the Pennsylvania Department of Health (DOH) was a Centers for Disease Control & Prevention link to data for the weeks 26, 27 and 28 with week 28 ending July 11, 2020.
- 2) I requested from DOH records that show "pneumonia and influenza deaths in Pennsylvania by county and date for 2015, 2016, 2017, 2018, 2019 and Jan. 1, 2020 through May 21, 2020 ***as reported to the Centers for Disease Control and Prevention.***" (Italics added.) In an affidavit, the Department says it provides the CDC "with a daily list of raw data." (Page 6, item 22 of your order.)

According to footnote 6, "The Department explained that the data is not responsive because it contains no data fields; only after it has been assigned the ICD-10 codes is the data aggregated and does it contain data fields." This explanation fails to explain how the CDC link was responsive to my request, but not the raw data provided to the CDC to produce the weekly tally in the link the Department provided in its final response.

Additionally, I didn't request specific data fields. Again, I requested the records that show the pneumonia and influenza deaths reported to the CDC.

It is my belief that the Department erred by not providing the "raw data" gathered by DOH, then provided to and used by the CDC to produce the graphic with weekly influenza and the pneumonia deaths in Pennsylvania that Lisa M. Keefer provided in her July 6, 2020 final response to my RTK.

Here's the link to responsive documents Keefer provided: <https://gis.cdc.gov/grasp/fluview/mortality.html>

Had I received all the requested information, I should have received – at a minimum – the weekly CDC tallies from 2015, 2016, 2017, 2018, 2019 and Jan. 1, 2020 through May 21, 2020, as requested by me on May 21, 2020.

The EDDIE data was not requested in my RTK and was used for illustrative purposes only, and the EDDIE fields should not be used to limit the scope of the request.

Thank you for considering my petition for reconsideration.

Best,
Nicole C. Brambila
Staff Writer
PublicSource
412-515-0072, direct
412-368-2654, cell

On Fri, Sep 18, 2020 at 8:59 AM Wolfe, Jill <jiwolfe@pa.gov> wrote:

Dear parties:

EXHIBIT E



PETITION FOR RECONSIDERATION

DATE ISSUED AND MAILED: October 15, 2020

IN RE: *Nicole Brambila v. Pennsylvania Department of Health*, OOR Dkt. AP 2020-1182

Upon review of the petition for reconsideration filed with the Office of Open Records ("OOR") to the above-referenced docket number, it is determined that the petition is **DENIED** because:

Based on the evidence provided on appeal, the OOR concluded that the information requested, other than that provided by the Department of Health ("Department") was confidential under the Vital Statistics Law ("VSL"). In the petition for reconsideration you argue that you are entitled to the raw data reported by the Department to the Center for Disease Control but do not allege that the raw data is not confidential under the VSL. A review of the file does not indicate that the OOR erred in concluding that death records information is confidential under the VSL. Therefore, we deny your petition for reconsideration.

Issued by:

/s/ Charles Rees Brown

CHIEF COUNSEL

Sent to: Requester, Agency Open Records Officer

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Brambila, Nicole, et al., Petitioner v. Gleeson, : AP-2020-1182
Christopher :
:

PROOF OF SERVICE

I hereby certify that this 16th day of October, 2020, I have served the attached document(s) to the persons on the date(s)
and in the manner(s) stated below, which service satisfies the requirements of Pa.R.A.P. 121:

Service

Served: Attorney General
Service Method: eService
Service Date: 10/16/2020
Address: Strawberry Square
16th Floor
Harrisburg, PA 17120
Phone: (71-7) -787-3391

Served: Christopher Gleeson
Service Method: First Class Mail
Service Date: 10/16/2020
Address: Office of Legal Counsel
825 Health and Welfare Building
625 Forster Street
Harrisburg, PA 17120
Phone: --
Representing: Respondent Christopher Gleeson

Served: Office of Open Records
Service Method: eService
Service Date: 10/16/2020
Address: 333 Market St.
16th Floor
Harrisburg, PA 17101-2234
Phone: 717-42-5-5991

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served: Office of Open Records
Service Method: First Class Mail
Service Date: 10/16/2020
Address: Office of Open Records
Commonwealth Keystone Building, 400 North Street, Plaza Level
Harrisburg, PA 171200225
Phone: 717-346-9903

/s/ Paula Knudsen Burke

(Signature of Person Serving)

Person Serving: Knudsen Burke, Paula
Attorney Registration No: 087607
Law Firm: Reporters Committee for Freedom of the Press
Address: Po Box 1328
Lancaster, PA 17608
Representing: Petitioner Brambila, Nicole
Petitioner PublicSource, Pittsburgh