



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

**RACHEL LANGAN,
Requester**

v.

**CHESTER COUNTY,
Respondent**

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Docket No.: AP 2021-0691

INTRODUCTION

Rachel Langan (“Requester”) submitted a request (“Request”) to Chester County (“County”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking records of COVID-19 tests and infections in the West Chester Area School District. The County denied the Request, arguing that the Request was misdirected and should be made to the Pennsylvania Department of Health (“Department”). The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted**, and the County is required to take further action as directed.

FACTUAL BACKGROUND

On March 23, 2021, the Request was filed, stating:

Health Data/Covid Stats for West Chester Area School District
Please provide statistics month by month (August 31, 2020 through March 19, 2021):

How many students tested positive during a given month?

How many students were “presumed positive” during a given month?

How many students were quarantined during a given month?
How many teachers tested positive during a given month?
How many teachers were “presumed positive” during a given month?
How many teachers were quarantined during a given month?

On March 30, 2021, the County denied the Request, stating that the Request was misdirected because the responsive data sought was maintained in the Department’s National Electronic Disease Surveillance System (“PA-NEDSS”), and therefore should be directed to the Department.

On April 9, 2021, the Requester appealed to the OOR, arguing that the Commonwealth refused to provide access to PA-NEDSS and that she does not believe the Commonwealth tracks the information sought. The OOR invited the parties to supplement the record and directed the County to notify third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

On May 12, 2021, the County submitted a position statement explaining that it had consulted with the Department and had not been advised that it was permitted to provide data from the PA-NEDSS system. The County further argued that the responsive records would relate to noncriminal investigations conducted by the County’s health department. *See* 65 P.S. § 67.708(b)(17). In support of these arguments, the County submitted the verification of Michelle Barone, Esq., who attests that she conducted a search and that the only responsive records are those contained on the PA-NEDSS system. The County also submitted the verification of Jeanne Franklin, the Director of the County health department, who attests that she has signed a confidentiality agreement that forbids release of health data from PA-NEDSS without the consent of the Department, and that the health data was generated by County investigators and contact tracers in response to reports of infection.

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 decision to hold a hearing is discretionary and non-appealable. *Id.* Here, neither party requested a hearing.

The County is a local agency subject to the RTKL that is required to disclose public records. 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. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and to respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemption(s). *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).

1. The County has demonstrated that the responsive records exist within PA-NEDSS

The Request seeks statistics showing breakdowns of students and teachers in the West Chester School District who contracted COVID-19, were presumed positive, and/or quarantined during a seven-month period. On appeal, the County asserts that the only responsive records are reports recorded within the PA-NEDSS system. In support of this argument, the County submitted the verification of Attorney Barone, who attests that:

3. I am familiar with the records of the [County].
4. After conducting a good faith search of the [County’s] files, I have determined and confirmed that the [County] does not possess responsive records independent from the [PA-NEDSS].
5. On April 20, 2021, [I] corresponded with Danica Hoppes, Legal Administrative Officer at the [Department], and apprised her of the pending appeal.

Under the RTKL, an affidavit may serve as sufficient evidentiary support for the nonexistence of records. *See 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). In the absence of any competent evidence that the County acted in bad faith or

that additional responsive records exist, “the averments in [the verification] should be accepted as true.” *McGowan v. Pa. Dep’t of Env’tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)). Here, the County has demonstrated that a good-faith search for records was conducted and that the only responsive records within the County’s possession exist within the PA-NEDSS system. Therefore, the County has demonstrated that no other responsive records exist. *Hodges*, 29 A.3d at 1192.

2. The County may not withhold records under the PA-NEDSS policy

The County argues that the responsive information may not be provided from PA-NEDSS without the consent of the Division Director. In support of this argument, the County submitted a copy of the Declaration of Confidentiality and Data Security each authorized user of the PA-NEDSS system must sign, which states that:

I understand and acknowledge that all and any data/reports that identify an individual may only be released to other APPROVED public health workers and/or investigators who have a legitimate need for such information in the pursuit of an investigation and/or case follow-up. Such releases may only be made by registered mail or in person. All other releases of such data or report(s) are strictly prohibited.

Data releases without identification may be made only with the consent of the Division Director or the delegated Section Director who shall rely on the published Division Policy when ruling on such requests.

The County explains that it contacted the Department repeatedly in response to the Request and appeal, but it was not authorized to release the aggregated data. The OOR notes the difficult situation facing the County in this request and appeal. However, although the County has amply demonstrated the existence of a confidentiality contract with the Department, there is no section in the RTKL which permits an agency to withhold records simply because it has agreed to make those records confidential. *See Newspaper Holdings, Inc. v. New Castle Area Sch. Dist.*, 911 A.2d

644, 649 n11 (Pa. Commw. Ct. 2006) (“In any event, a [an agency] may not contract away the public’s right of access to public records because the purpose of access is to keep open the doors of government, to prohibit secrets, to scrutinize the actions of public officials and to make public officials accountable in their use of public funds. [...] A confidentiality clause contained in a settlement agreement that runs afoul of the RTKL violates public policy and is unenforceable.”) (internal citations removed). Although the execution of a confidentiality agreement is suggestive of an intent to maintain the secrecy of the information protected by the agreement, the courts and the OOR have consistently held that confidentiality agreements/clauses, alone, are unenforceable under the RTKL. *See Tribune-Review Publ’g Co. v. Westmoreland County Hous. Auth.*, 833 A.3d 112, 117 (Pa. 2003) (“That the litigation settlement involves ‘personal’ as well as ‘official’ conduct, or contains a confidentiality clause, does not vitiate the public nature of the document”); *see also Gould v. North Strabane Twp.*, OOR Dkt. AP 2014-0905, 2014 PA O.O.R.D. LEXIS 784; *Schwartz v. Borough of Berwick*, OOR Dkt. AP 2011-0995, 2011 PA O.O.R.D. LEXIS 529. Such agreements may be relevant in other situations, such as demonstrating secrecy in a trade secret analysis under Section 708(b)(11) or showing that a third party has interest in the responsive records. Here, however, the Department was notified of this appeal and did not intervene as a direct interest participant in the appeal to explain why the requested aggregated data relating to the pandemic must be kept confidential. Therefore, the County’s confidentiality agreement is not a basis for withholding the responsive records.

3. Aggregated data may not be withheld under Section 708(b)(17) of the RTKL

The County additionally argues that the responsive records are exempt under Section 708(b)(17) of the RTKL. Section 708(b)(17) of the RTKL exempts from disclosure, “[a] record of an agency relating to a noncriminal investigation, including ... [c]omplaints submitted to an

agency.” 65 P.S. § 67.708(b)(17). For this exemption to apply, an agency must demonstrate that “a systematic or searching inquiry, a detailed examination, or an official probe” was conducted regarding a noncriminal matter. *See Pa. Dep’t of Health v. Office of Open Records*, 4 A.3d 803, 810-11 (Pa. Commw. Ct. 2010). Further, the inquiry, examination, or probe must be “conducted as part of an agency’s official duties.” *Id.* at 814; *see also Johnson v. Pa. Convention Center Auth.*, 49 A.3d 920 (Pa. Commw. Ct. 2012). Additionally, the investigations must specifically involve an agency’s legislatively granted fact-finding powers. *See Pa. Dep’t of Pub. Welf. v. Chawaga*, 91 A.3d 257 (Pa. Commw. Ct. 2014).

In this instance, Director Franklin attests, in part:

1. I am the Director of the Chester County Health Department (“CCHD”) [...]

12. The requested data was collected by the CCHD an[d] contemporaneously uploaded to PA-NEDSS in the course of the case investigations and contact tracing; the CCHD does not possess another copy of the requested data.

13. Case investigations commence each day when CCHD investigators receive a list of new cases identified in PA-NEDSS that require investigation. The investigators review the case to ensure they have contact information for the identified individual. Contact is made via telephone call. The investigator confirms the individual’s information in PA-NEDSS and updates any demographic or contact information, if necessary. An interview consisting of a series of state-mandated questions is performed and the responses are documented in PA-NEDSS. The investigator then provides the individual with information relevant to isolation requirements and offers other resources, as necessary. [...]

16. The requested records were generated for the purpose of contact tracing and investigating cases of COVID-19, a disease judged by the CCHD to be a potential threat to public health. The CCHD is authorized to conduct these investigations pursuant to 28 § 27.152.

As noted above, a statement made under the penalty of perjury is competent evidence to sustain an agency’s burden of proof under the RTKL. *See Sherry*, 20 A.3d at 520-21; *Moore*, 992 A.2d at 909. The OOR has previously considered the public health investigations and contact tracing activities performed by the Department and various local agencies and concluded that such

activities constitute investigations. *See, e.g., Coyle v. Pa. Dep't of Health*, OOR Dkt. AP 2020-1702, 2021 PA O.O.R.D. LEXIS 880. Therefore, the County has demonstrated that the responsive data relates to non-criminal investigations conducted by the County pursuant to statute.

However, under the RTKL, the noncriminal investigative records exemption does not apply to aggregated data maintained or received by an agency. 65 P.S. § 67.708(d). Aggregated data is “[a] tabulation of data which relate to broad classes, groups or categories so that it is not possible to distinguish the properties of individuals within those classes, groups or categories.” 65 P.S. § 67.102. Here, there is no doubt that the information sought by the Requester is aggregated data, as the Request seeks only the number of recorded infections, presumed infections, and quarantines in the West Chester Area School District, broken down by month. Because simple tallies of such a large population cannot be used to distinguish any individuals within the group, those numbers are aggregated data, and, as such, the County may not withhold them under Section 708(b)(17) of the RTKL.¹ Additionally, the release of aggregated data not only allows citizens to hold its government accountable, but serves the public interest

CONCLUSION

For the foregoing reasons, the Requester’s appeal is **granted**, and the County is required to provide the responsive aggregated data 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 Chester 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

¹ Section 708(d) of the RTKL does not apply to records withheld as individual medical records under Section 708(b)(5) of the RTKL or to records withheld under Pennsylvania’s Disease Protection and Control Law. 65 P.S. § 67.708(b)(5); 35 P.S. § 521.15. Here, however, the County does not argue that these exemptions to disclosure apply, and the OOR will not consider them *sua sponte*.

according to court rules 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.² This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: June 10, 2021

/s/ Jordan C. Davis

Jordan C. Davis, Esq.
Appeals Officer

Sent to: Rachel Langan (via email);
Michelle Barone, Esq. (via email only)

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