



FINAL DETERMINATION

IN THE MATTER OF

**DARWIN LEUBA,
Requester**

v.

**ALLEGHENY COUNTY,
Respondent**

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Docket No: AP 2022-0248

On January 12, 2022, Darwin Leuba (“Requester”) submitted a request (“Request”) to Allegheny County (“County”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking “[t]he audio file for the hold music in the [C]ounty phone system, (and all audio files for the hold music in every [C]ounty phone system, if there are multiple).”

On January 19, 2022, the County denied the Request, arguing that the audio file is not a public record as defined by the RTKL. 65 P.S. § 67.102.

On January 24, 2022, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. 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 February 3, 2022, the County submitted a position statement reiterating its grounds for denial. The County claims that the audio file is not a record of the agency because it does not document a transaction or activity of the agency and, even if it were a record of the agency, it

would be exempt from disclosure as a trade secret or confidential proprietary information, 65 P.S. § 67.708(b)(11). In support of its position, the County submitted the statement, made under the penalty of perjury, of Jason Ditzenberger, the County’s Chief Information Officer.¹

On February 4, 2022, the Requester submitted supplemental argument asserting that the choice of hold music documents an activity of the agency because the “intentional choice of the most grating music would indicate a hostility toward public comment or interaction, and the choice of the most pleasant music would indicate consideration of the points at which residents interact with their government.” He further asserts that the information is not a trade secret. Finally, he asserts that the County did not meet its obligation under the RTKL in its final response because it does not cite a specific reason for the denial.²

The County asserts that the audio file for hold music is not a “public record” as defined by the RTKL. 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. To determine if certain material is a record, the RTKL imposes a two-part inquiry: (1) does the material document a “transaction or activity of the 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 County Dep’t of Admin. Servs. v. A Second*

¹ Under the RTKL, a sworn affidavit or statement made under the 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. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any evidence that the County has acted in bad faith, “the averments in [the statement] should be accepted as true.” *McGowan v. Pa. Dep’t of Envtl. 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)).

² An agency response denying access to records is required to include, among other things, “the specific reason for the denial, including a citation of supporting legal authority....” See 65 P.S. § 67.903(2). Here, the County did cite to Section 102 of the RTKL, in support of its assertion that the record is not a “public record” as defined by the RTKL. Despite the Requester’s assertions to the contrary, this is a sufficient citation to legal authority.

Chance, Inc., 13 A.3d 1025, 1034-35 (Pa. Commw. Ct. 2011). Because the RTKL is remedial legislation, the definition of a record must be liberally construed. *Id.*; *Gingrich v. Pa. Game Comm’n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38 at *13 (Pa. Commw. Ct. 2012). 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.

Mr. Ditzenberger affirms, in relevant part:

3. Allegheny County utilizes Cisco Voice over Internet Protocol “VOIP” as its telephone system. The system is comprised of a variety of hardware and software. A key component of the system the Call Manager Server. The Call Manager server has hardware and software components. The software, which includes default on-hold music, is provided to Allegheny County under a licensing agreement from Cisco. This agreement provides Allegheny County the authorization to utilize the software under specific conditions and with stipulations. The agreement does not provide Allegheny County ownership of the software (including on-hold music). The licensing agreement prohibits Allegheny County from distributing the software, including on-hold music, to any entity.

4. Cisco Call Manager, as configured at Allegheny County, utilizes a selection of default music on hold that is provided with Cisco Call Manager as part of the County’s licensing agreement with Cisco. This is the hold music that individuals who contact County offices by phone hear. No one employed by Allegheny County had a role in the choice of hold music beyond the selections included with Cisco Call Manager.

He further explains that the County licenses a Music On-Hold CD-Rom from Cisco that contains other music and voice prompts designed for use with the Music On-Hold feature. Statement ¶ 5. Mr. Ditzenberger’s statement is sufficient to demonstrate that the audio file is not a record of the agency as defined by the RTKL. The audio file, while provided as part of the County’s contract

with Cisco, does not document a transaction or activity of the County, nor does the audio file demonstrate a governmental action.³ Accordingly, the audio file is not a record under the RTKL.

For the foregoing reasons, the appeal is **denied**, and the County 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 Allegheny 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. 65 P.S. § 67.1303. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.⁴ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: February 16, 2022

/s/ *Erin Burlew*

APPEALS OFFICER
ERIN BURLEW, ESQ.

Sent via email to: Darwin Leuba; Maggie Shiels, Esq.

³ Because the County has demonstrated that the information is not a record of the agency, the OOR need not reach the County's alternative grounds for denying access. *See Jamison v. Norristown Bor. Police Dept.*, OOR Dkt. AP 2011-1233, 2011 PA O.O.R.D. LEXIS 927

⁴ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).