



### **FINAL DETERMINATION**

**IN THE MATTER OF**

**ANDREW PRATT,  
Requester**

**v.**

**MERCER COUNTY,  
Respondent**

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**Docket No: AP 2022-0729**

### **INTRODUCTION**

Andrew Pratt (“Requester”) submitted a request (“Request”) to Mercer County (“County”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking records on all out-of-service events and times for four ambulance services in the County. The County denied the Request, arguing that it does not maintain responsive documents in the format requested. 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 County is not required to take any further action.

### **FACTUAL BACKGROUND**

On March 8, 2022, the Request was filed, seeking:

[T]he Out Of Service ambulance times for Mercer County in 2021. These should include Out Of Service times for McGonigle Ambulance, Superior Ambulance, Elite EMS, and Life Force Ambulance. These times are recorded by the Mercer County Department of Public Safety. Mercer County records these times for the 4 ambulance services in Mercer County, as required by the Pennsylvania Emergency Management Agency.

This request is for the yearly Out of Service times from 1/1/2021 through 12/31/2021.

These are to be broken down so that they display Out Of Service times for each EMS agency in 2021.

On March 15, 2022, the County denied the Request, arguing that the software used by the County is unable to generate a report with these details and that it does not maintain or compile the information in the manner requested, 65 P.S. 67.705.

On March 24, 2022, the Requester appealed to the OOR, challenging the County's 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 March 24, 2022, the County submitted a position statement reiterating its grounds for denial, asserting that it does not maintain or compile the information in the manner requested. The County also submitted the attestation of Ann Morrison, Open Records Officer for the County.

On March 29, 2022, the OOR requested supplemental evidence describing the search and the individuals contacted during the search for records conducted by the County. That same day, the County provided an additional attestation describing the search and individual contacted.

### **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 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)(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).

The County argues that it does not maintain or compile the records requested in the manner requested and that, under Section 705 of the RTKL, the County is not required to create a record which does not currently exist or to compile, maintain, format or organize a record in a manner in which it does not currently compile, maintain, format or organize the record. 65 P.S. § 67.705. In support of its argument, Ms. Morrison attests:

1. ...Upon receipt of the [R]equest, I conducted a thorough examination of files in the possession, custody and control of the [the County] for records responsive to the [R]equest underlying this appeal, specifically requesting call records from the Mercer County Director of Public Safety, Frank Jannetti, including a review of CAD system data at the 9-1-1 Center, 2015 S. Erie Street, Mercer PA 16137.

The 9-1-1 Center dispatchers create a separate incident in CAD every time they receive a call from an ambulance service that reports out of service. The incident is then closed when the ambulance returns to service. Incident reports may be retrieved from the CAD system by date or time; however, a custom report would have to be created to determine the start and stop times for each out of service event. Hundreds or thousands of incident reports would have to be individually reviewed for a years’ worth of history to extract the detail requested. This level of data is not available in the format requested.

2. After conducting a good faith search of the [County]’s files and inquiring with relevant [County] personnel, I identified no records are within the [County]’s possession, custody or control that are responsive to the [R]equest.

Under the RTKL, a sworn 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. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any evidence that the County acted in bad faith or that the requested records exist, “the averments in [the attestation] 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)).

Section 705 of the RTKL states that, 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. “An agency need only provide the information in the manner in which it currently exists.” *Commonwealth v. Cole*, 52 A.3d 541, 547 (Pa. Commw. Ct. 2012). The OOR has held that “where an agency does not maintain a list specified by a requester, the agency is not required to create such a list.” *See Bush v. Carrol Twp.*, OOR Dkt. AP 2019-1721, 2019 PA O.O.R.D. LEXIS 1783 (denying a request for a list of specific information where no such list exists); *Beaver County Times v. Beaver County*, OOR Dkt. AP 2014-1161, 2014 PA O.O.R.D. LEXIS 1041; *Miller v. Twp. of O’Hara*, OOR Dkt. AP 2012-1435, 2012 PA O.O.R.D. LEXIS 1224.

However, providing information from an agency database does not constitute the creation of a record if the requested information exists in a database. *See Cole*, 52 A.3d 541; *see also Gingrich*, Pa. Commw. Unpub. LEXIS 38 at \*21. As noted in *Cole*, the Commonwealth Court in *Gingrich* found that drawing information from a database does not constitute creating a record under the RTKL. The Court explained:

In *Gingrich*, a requester sought information relating to Pennsylvania’s annual deer harvest, habitat programs, and related financial information. The requester sought information contained in the Game Commission’s database and suggested possible formats for the Game Commission to produce that information. The Game Commission denied the request on the grounds that it did not have to create a record and the information sought did not exist in the formats identified by the requester. This Court held that suggesting a possible format in which to present the requested information was not an improper request to create a record. Specifically, we held that an agency can be required to draw information from a database, although the information must be drawn in formats available to the agency. In short, *to the extent*

*requested information exists in a database*, it must be provided; an agency cannot claim otherwise under Section 705 of the [RTKL].

*Cole*, 42 A.3d at 548 (emphasis added). Notably, in *Gingrich*, with respect to the portion of the request seeking “Deer Totals,” the Court determined that, while the request sought information from the Game Commission’s Deer Harvest database, the Commission demonstrated that “it does not retain deer harvest data separating antlerless and ‘button bucks’” in the database. As a result, the Court found that those particular records did not exist and, pursuant to 65 P.S. § 67.705, the Game Commission was not required to create a record in order to respond to the request. *Gingrich*, 2012 Pa. Commw. Unpub. LEXIS 38 at \*20; see also *Scicchitano and The Daily Item v. Pa. Interscholastic Athletic Ass’n*, OOR Dkt. AP 2019-1504, 2019 PA O.O.R.D. LEXIS 1521 (holding that the agency proved the requested salary database did not exist, as compared to the agency being unable to extract the information from a database; therefore, agency was not required to create a database in response to a RTKL request).

In this instance, the County argues that the specified information sought by the Requester is not kept in a single source and requires a review of all incident reports to compile a list of information. Ms. Morrison attests that the County would have to create a custom report by individually reviewing every incident report for the timeframe of the Request. Similar to *Gingrich* and *Scicchitano*, the County is asserting that the out of service events sought by the Requester, as expressed in the Request and on appeal, are not maintained in a manner by which the County could extract them from a database, in order to provide them to the Requester. In other words, the County is unable to extract information based on whether an ambulance was in service or not but is only able to extract information based on date and time.

Although the Requester argues that the requested information must exist, the Requester has not submitted evidence to dispute the County’s position that it does not maintain the requested

information for the Request in single source (i.e. a list of out of service ambulance services). The Requester also has not submitted evidence to dispute the County's position that it does not maintain the statistical data sought in the Request in a database from which the requested information can be extracted or broken down into the categories described in the Request. *See Walker and LNP Media v. Mt. Joy Borough*, OOR Dkt. AP 2021- 0379, 2021 PA O.O.R.D. LEXIS 513; *Bridge v. Pa. Dep't of Educ.*, OOR Dkt. AP 2020-1002, 2020 PA O.O.R.D. LEXIS 2458. Here, the OOR has no authority to determine whether records should exist or how they should be compiled in a way that certain stats can be extracted, only whether the County possesses them. Accordingly, based on the evidence provided, the County proved that it does not have the requested information in the format requested and providing the information would require the creation of records. *See Hodges*, 29 A.3d at 1192; *Hays v. Pa. State Police*, OOR Dkt. AP 2015-0193, 2015 PA O.O.R.D. LEXIS 294.

## CONCLUSION

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 Mercer 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.<sup>1</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

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<sup>1</sup> *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

**FINAL DETERMINATION ISSUED AND MAILED: 22 April 2022**

/s/ Lyle Hartranft  
Lyle Hartranft, Esq.  
Appeals Officer

Sent to: Andrew Pratt (via email only);  
Ann Morrison, AORO (via email only);