



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
CARTER WALKER AND LNP MEDIA GROUP, INC., Requester	:	
	:	
v.	:	Docket No: AP 2022-0712
	:	Consolidated appeal of OOR Dkt.
PENNSYLVANIA STATE POLICE, Respondent	:	Nos. AP 2022-0712, 2022-0713
	:	

FACTUAL BACKGROUND

On January 14, 2022, Carter Walker and LNP Media Group, Inc. (“Requester”) submitted a request (“Request”) to the Pennsylvania State Police (“PSP”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking, for January 1, 1997 to December 31, 2021, the underlying data set which is used to create the Hate Crime Report search function on the Uniform Crime Reporting website, as well as any data dictionary, code tables, or other manuals that define the meaning of the column headers in the data or acronyms. On March 1, 2022, following a thirty-day extension during which to respond, 65 P.S. § 67.902(b), as well as an additional one-week extension agreed to by the Requester, the PSP denied the Request, arguing that it is not required to create a record which does not currently exist, and that the software used to store the requested data is proprietary. Additionally, the PSP notified the Requester that obtaining the requested data set to fulfill this Request would cost the PSP approximately \$6,000.

On March 22, 2022, the Requester appealed to the Office of Open Records (“OOR”).¹ On April 15, 2022, the PSP submitted a position statement, reiterating its reasons for denial, and arguing that it contracts with a third party, Optimum Technologies, Inc. (“OTECH”), to provide database processing and management of the PSP’s data, and that the requested data set is not accessible by the PSP under its current contract with OTECH, and that the PSP is only required to provide records in the format which it is available to PSP personnel. *See* 65 P.S. § 67.705. The PSP also asserts that fulfilling the Request would require labor costs of approximately \$6,000. Further, the PSP argues that the software used by the PSP to store the requested data set is confidential pursuant to the Commonwealth of Pennsylvania’s contract with OTECH and, if disclosed, would reveal a trade secret or confidential proprietary information. *See* 65 P.S. § 67.708(b)(11). In support of its position, the PSP submitted the verification of William Rozier, Open Records Officer for the PSP. Also on April 15, 2022, the Requester submitted a position statement arguing that the cost associated with the Request is unreasonable, and that as a journalist, the Requester may not be charged fees for accessing complex and extensive data sets pursuant to 65 P.S. § 67.1307(b)(4)(ii)(A).

On May 6, 2022, at the request of the OOR, the PSP submitted a supplemental position statement, clarifying the costs associated with the Request, as well as the application of Section 1307 of the RTKL in this instance. *Id.* The PSP also submitted the verification of Joshua Kembel, Administrative Officer serving in the Bureau of Research and Policy Development for the PSP. Additionally, on June 7, 2022, the PSP submitted a supplemental affidavit from Mr. Rozier, who attests that on June 1, 2022, OTECH was notified by the PSP of OTECH’s ability to request to

¹ The Requester submitted two separate appeals docketed at OOR Dkt. AP 2022-0712 and OOR Dkt. AP 2022-0713. Because the appeals involve the same Request, response and parties, the appeals are hereby consolidated at OOR Dkt. AP 2022-0712. *See* 65 P.S. § 67.1102(b)(3) (stating that “the appeals officer shall rule on procedural matters on the basis of justice, fairness, and the expeditious resolution of the dispute”).

participate before the OOR pursuant to 65 P.S. § 67.1101(c), and that on June 2, 2022, OTECH confirmed that it did not wish to participate in the instant proceedings. *See* Verification of William Rozier, ¶¶ 7-8. The PSP also provided a copy of an email from OTECH confirming that it did not wish to participate in the instant appeal, and, to date, the OOR has not received a request from OTECH to participate.

LEGAL ANALYSIS

1. The PSP has not proven that it would be required to create a record that does not currently exist

The PSP acknowledges that it constructively possesses the requested information, but argues that because it contracts with an outside party to maintain the requested data, the PSP's administrative access to the underlying database does not provide the PSP with an avenue to acquire the underlying data set on the PSP's servers. Section 705 of the RTKL provides that "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. The Commonwealth Court has held that an agency cannot be made to create a record that does not exist. *See Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010); *see also 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, *21 (Pa. Commw. Ct. 2012) ("[P]ulling information from a database is not the creation of a record"). "To hold otherwise would encourage an agency to avoid disclosing public records by putting information into electronic databases." *Cole*, 52 A.3d at 549. "An agency need only provide the information in the manner in which it currently exists." *Id.* at 547. 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.” *Id.* at 549 n.12.

In support of the PSP’s argument, Mr. Rozier attests as follows:

7. The PSP Bureau of Research and Development (“BRD”) administers the Pennsylvania Uniform Crime Reporting System (“PAUCRS”). This database provides Statewide information on crime trends and volume based on the reporting and statistics by law enforcement agencies throughout the Commonwealth. This database is available to the public.

8. In order to facilitate the data processing and data management of the PAUCRS, the Commonwealth, acting through the PSP, contracted with [OTECH] to provide the underlying database processing and database management (aka “system”) software and all technical support related to the functionality of the system software to support PAUCRS.

9. Upon receipt of this [R]equest, the PSP RTKL Unit contacted PSP BRD personnel regarding records responsive to the instant [R]equest. PSP BRD identified that the [R]equest was for a data element-level breakdown of Hate Crime Incidents as far more granular than what was available administratively to the agency in the System or Public Portal. PSP BRD contacted OTECH with the [R]equest and asked for an estimate of cost to pull the raw data-set responsive to this [R]equest. OTECH responded to PSP BRD with the estimated labor effort of 50 to 60 hours at a cost of approximately \$6000 for a one-time PA SRS Hate Crime data pull.

10. With this instruction, I determined that this [R]equest encompassed information/data that was not available to the agency in such a granular format. I further assessed that this [R]equest would require the agency, via OTECH, to compile, format or organize the requested data in a manner in which the agency does not currently compile, maintain, format or organize the data. Finally, I concluded this [R]equest would require the agency, via OTECH, to create a record which does not currently exist.

11. Accordingly, I denied the [R]equest and related to [the R]equester that Section 705 of the RTKL excuses an agency from creating a new record or compiling a record in which the agency does not currently compile, maintain, format or organize the record.

Verification of William Rozier, ¶¶ 7-11. Additionally, Mr. Kembel attests that the underlying data may be obtained from OTECH for a cost of \$6,000. *See* Verification of Joshua Kembel, ¶ 7.

In the instant matter, the PSP acknowledges that the requested data may be obtained from OTECH, but asserts that obtaining the data is outside of the PSP's current contract with OTECH, and would require the PSP to make a one-time payment of \$6,000 to OTECH. Therefore, the PSP acknowledges that the data may be extracted from a database; thus not requiring the creation of a record under Section 705 of the RTKL. *See* 65 P.S. § 67.705; *see also Cole, supra; Gingrich, supra*. Accordingly, the PSP has not demonstrated that providing the requested data requires the creation of a record that does not currently exist, and to hold otherwise would encourage agencies to contract with third parties to maintain data and avoid disclosing such data to the public. *Cole, supra*.

2. The PSP has not proven that the requested data constitutes or reveals a trade secret or confidential proprietary information

The PSP argues that providing the requested data would require dissemination of confidential proprietary information or trade secrets, and that such information is confidential pursuant to the PSP's contract with OTECH. Section 708(b)(11) of the RTKL exempts from disclosure “[a] record that constitutes or reveals a trade secret or confidential proprietary information.” 65 P.S. § 67.708(b)(11). A trade secret is defined as:

Information, including a formula, drawing, pattern, compilation, including a customer list, program, device, method, technique or process that:

- (1) Derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other person who can obtain economic value from its disclosure or use; and
- (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The term includes data processing software obtained by an agency under a licensing agreement prohibiting disclosure.

65 P.S. § 67.102. Confidential proprietary information, meanwhile, is defined as “[c]ommercial or financial information received by an agency: (1) which is privileged or confidential; and (2) the disclosure of which would cause substantial harm to the competitive position of the person that submitted the information.” *Id.* An agency must establish that both elements of these two-part tests are met in order for the exemption to apply. *See Office of the Governor v. Bari*, 20 A.3d 634 (Pa. Commw. Ct. 2011). In determining whether certain information is “confidential,” the OOR considers “the efforts the parties undertook to maintain their secrecy.” *Commonwealth v. Eiseman*, 85 A.3d 1117, 1128 (Pa. Commw. Ct. 2014), *rev’d in part*, *Pa. Dep’t of Pub. Welfare v. Eiseman*, 125 A.3d 19 (Pa. 2015). “In determining whether disclosure of confidential information will cause ‘substantial harm to the competitive position’ of the person from whom the information was obtained, an entity needs to show: (1) actual competition in the relevant market; and, (2) a likelihood of substantial competitive injury if the information were released.” *Id.*

Pennsylvania courts confer “trade secret” status based upon the following factors: (1) the extent to which the information is known outside of the business; (2) the extent to which the information is known by employees and others in the business; (3) the extent of measures taken to guard the secrecy of the information; (4) the value of the information to the business and to competitors; (5) the amount of effort or money expended in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *Smith v. Pa. Dep’t of Env’tl. Prot.*, 161 A.3d 1049, 1064 (Pa. Commw. Ct. 2017). The most important indicia for determining whether information constitutes a trade secret are “substantial secrecy and competitive value to the owner.” *Mission Pa., LLC v. McKelvey*, 212 A.3d 119, 136 (Pa. Commw. Ct. 2019) (citing *W. Chester Univ. of Pa. v. Schackner (Bravo)*, 124 A.3d 382 (Pa. Commw. Ct. 2015)).

In support of the PSP's position, Mr. Rozier attests as follows:

12. Additionally, upon learning of the Contract with OTECH and their proprietary software's functionality to process and manage the data underlying the PAUCRS database, I sought to understand the Contract and Licensing provisions of the same. Based upon the confidentiality clauses contained in the IT Contract Terms and Conditions as well as the Licensing agreement; the RTKL's definition of "trade secret" to include data processing software obtained by an agency under a licensing agreement prohibiting disclosure; and the [R]equest for raw data underlying PAUCRS as opposed to the database as it was available to the agency, I determined that the Request encompassed records that the RTKL contemplates as a trade secret or confidential proprietary information.

13. Accordingly, I denied the [R]equest as exempt under RTKL §708(b)(11).

Rozier Verification, ¶¶ 12-13.

While a statement made under the penalty of perjury is competent evidence to sustain an agency's burden of proof, *see Sherry v. Radnor Twp.*, 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), "a generic determination or conclusory statements are not sufficient to justify the exemption of public records." *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013) (*en banc*); *see also Office of the Dist. Atty. of Phila. v. Bagwell*, 155 A.3d 1119, 1130 (Pa. Commw. Ct. 2017) ("Relevant and credible testimonial affidavits may provide sufficient evidence in support of a claimed exemption; however, conclusory affidavits, standing alone, will not satisfy the burden of proof an agency must sustain to show that a requester may be denied access to records under the RTKL") (citations omitted); *Pa. Dep't of Educ. v. Bagwell*, 131 A.3d 638, 659 (Pa. Commw. Ct. 2016) ("Affidavits that are conclusory or merely parrot the exemption do not suffice") (citing *Scolforo, supra*); *Schackner et al.*, 124 A.3d at 393 ("The evidence must be specific enough to permit this Court to ascertain how disclosure of the entries would reflect that the records sought fall within the proffered exemptions") (citing *Carey*, 61 A.3d at 375-79).

In the instant matter, Ms. Rozier provides a general statement that the software used to process and manage the requested data is proprietary and that the requested records are trade secrets or confidential proprietary information. The PSP's conclusory evidence does not address how the requested underlying data used to create the Hate Crime Report, is confidential or privileged, and how the release of the data would cause substantial harm to the competitive position of the person that submitted the information. *See Bari, supra.* Additionally, the PSP has not demonstrated that the requested data constitutes a trade secret, as the PSP has not addressed factors such as the extent to which the information, which is supplied by law enforcement agencies to the PSP, is known outside of the business, the extent of measures taken to guard the secrecy of the information, the value of the information to the business and to competitors, and the amount of effort or money expended in developing the information. *See Smith, supra.* It is also important to note that as previously set forth in this Final Determination, OTECH, the holder of the trade secret and the party who would be harmed by the disclosure of any confidential proprietary information, declined to participate in the instant appeal and submit evidence in support of the proprietary argument set forth by the PSP.

In its unsworn position statement, the PSP also generally states that providing the requested data would require the dissemination of OTECH's proprietary software, which is protected by "copyright laws and treaties, as well as laws and treaties related to other forms of intellectual property." However, the PSP offers no evidence or citations to support this claim that providing the requested data set, which is data provided by Commonwealth law enforcement agencies to the PSP, would violate unnamed laws and treaties. The PSP submitted copies of its contract with

OTECH,² including IT Terms and Conditions, as well as a Commonwealth Data Warehousing Policy. The PSP argues that the contract and Commonwealth policies make the requested data confidential. However, the OOR's review of these documents reveals nothing that makes the underlying data, which is information submitted by law enforcement agencies to the PSP, confidential. Further, the OOR has consistently held that confidentiality clauses and agreements are unenforceable under the RTKL. *See Tribune-Review Publ'g Co. v. Westmoreland Cnty 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 Nay v. Morrisville Borough*, OOR Dkt. AP 2019-2359, 2020 PA O.O.R.D. 1158; *Gould v. North Strabane Twp.*, OOR Dkt. AP 2014-0905, 2014 PA O.O.R.D. LEXIS 784.

Therefore, based on the evidence submitted, the PSP has not demonstrated that the requested data constitutes confidential proprietary information or a trade secret. *See* 65 P.S. § 67.708(a)(1).

3. The PSP may not require the Requester to pay labor costs

The PSP argues that providing the requested data will cost \$6,000 because the data set is beyond the scope of the contract that the PSP currently has with OTECH. The PSP also argues that it is not charging for its labor efforts, but rather only for OTECH employee labor. Both Mr. Rozier and Mr. Kembel attest that the \$6,000 was calculated by OTECH, and that the cost is for an estimated 50 to 60 hours of "labor effort." *See* Rozier Verification, ¶ 9; Kembel Verification, ¶ 6. Section 1307 of the RTKL states that except for fees expressly provided for in the RTKL or other statutes, "no other fees may be imposed unless the agency necessarily incurs costs for

² The OOR notes that the contract submitted by the PSP does not appear to be fully executed. While signed by OTECH, the contract indicates only that the required signatures of the PSP and Commonwealth of Pennsylvania representatives are "[t]o be obtained electronically[.]"

complying with the request.” *See* 65 P.S. § 67.1307(g). The Commonwealth Court has held that “the RTKL does not expressly authorize the charging of labor costs” and that agencies are “not permitted to charge a fee for such costs.” *State Employees’ Ret. Sys. v. Office of Open Records*, 10 A.3d 358, 363 (Pa. Commw. Ct. 2010). Therefore, the PSP cannot require the Requester to pay labor fees, regardless of whether the fees are for third party labor, as such fees are not authorized by the RTKL, nor can the OOR order the Requester to pay labor costs in order to receive access to public records. To find otherwise would encourage an agency to avoid disclosing public records by storing records in a third-party database and charging excessive data retrieval fees.

Additionally, Section 1307(b) of the RTKL provides that fees “must be reasonable and based on prevailing fees for comparable duplication services provided by local business entities.” *See* 65 P.S. § 67.1307(b)(2). The PSP has not set forth any evidence to demonstrate that the fees are reasonable and based on prevailing fees. Further, the Requester argues that as a journalist, he is exempt from having to pay fees for the requested data set. *See* 65 P.S. § 67.1307(4)(ii)(A) (Providing that fees for complex and extensive data sets, including geographic information systems does not apply to an individual employed by or connected with a newspaper). When asked to address the Requester’s argument regarding the exemption for journalists in Section 1307, the PSP, in its unsworn position statement, provided only that “[t]his assertion fails to establish [the Requester’s] organizations’ exemption from an assessment of costs related to this [R]equest.” Meanwhile, the Requester identifies himself as a LNP Media employee and the PSP addressed its response to the Requester at “LNP Media.” Accordingly, the PSP has not proven that the fees assessed for OTECH’s labor efforts are permissible under the RTKL.³

³ Mr. Kembel attests that a CD or flash drive may be required to transmit data to the Requester. *See* Kembel Verification, ¶ 8. The PSP is permitted to charge for the actual cost of transmitting the data through these means, as set forth in the OOR’s Official RTKL Fee Schedule. *See* <https://www.openrecords.pa.gov/RTKL/FeeStructure.cfm>.

CONCLUSION

For the foregoing reasons, the appeal is **granted**, and the PSP is required to provide the Requester with the requested 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 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. 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: June 9, 2022

/s/ Kathleen A. Higgins

KATHLEEN A. HIGGINS
DEPUTY CHIEF COUNSEL

Sent to: Carter Walker (via email only);
William A. Rozier (via email only);
Kathryn B. Daczka, Esq. (via email only);
Andrew J. Lovette, Esq. (via email only)

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