



I am requesting an opportunity to inspect or obtain copies or both of aggregate data that shows the number of PB-22 forms<sup>1</sup> facilities filed with the Department of Health from 2008-2015, or for the years for which the agency is required to keep and has kept the documentation, according to its retention schedule.

Please also provide, likewise in aggregate data, the following information:

- The facility type (whether a nursing home, home health, hospital or intermediate care facility for the mentally retarded).
- County in which the facility is located.
- Department of Health field office in which the PB-22 form was filed.
- Nature of the abuse.
- Agencies notified and/or involved (whether protective services, departments of Aging and/or State; local law enforcement or the Office of Attorney General).
- Conclusions, whether the facility substantiated or unsubstantiated allegations.

On November 30, 2016,<sup>2</sup> the Department invoked a thirty-day extension of time to respond to the Request. *See* 65 P.S. § 67.902. On December 30, 2016, the Department denied the Request, asserting that the requested information is confidential and not subject to disclosure pursuant to 28 Pa. Code § 51.3. Additionally, the Department denied the Request, stating that records connected with survey, licensure and certification of nursing facilities are exempt from disclosure because they relate to a noncriminal investigation. *See* 65 P.S. § 67.708(b)(17). The Department further stated that it does not keep the requested data in aggregate form.

On January 9, 2017, 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 Department to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On January 20, 2017, the Department submitted a position statement, reiterating its reasons for denial, along with the sworn attestation of Susan Williamson, Director of the

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<sup>1</sup> Known as a Provider Bulletin-22 reporting form, this form is required to be completed and submitted following an investigation into any allegation of abuse.

<sup>2</sup> Commonwealth offices were closed on November 24, 2016 and November 25, 2016.

Division of Nursing Care Facilities for the Department. As an exhibit to its position statement, the Department also submitted a blank PB-22 form (“Report Form for Investigation of Alleged Abuse, Neglect, Misappropriation of Property”). On January 30, 2017, the Requester submitted a position statement, arguing that she is not looking for information that would identify a specific patient or facility. Additionally, the Requester states that she is “prepared to modify” her Request.

### 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.*; *Giurintano v. Dep’t of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, neither party requested a hearing; however, has the necessary, requisite 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 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 *Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

### **1. The Requester cannot modify, explain or expand the Request on appeal**

On appeal, the Requester attempts to explain what is not being requested and states that she is prepared to modify her Request. However, a requester may not modify, explain or expand upon a request on appeal. *See Pa. State Police v. Office of Open Records*, 995 A.2d 515, 516 (Pa. Commw. Ct. 2010); *Staley v. Pittsburgh Water and Sewer Auth.*, OOR Dkt. AP 2010-0275, 2010 PA O.O.R.D. LEXIS 256 (“A requester may not modify the original request as the denial, if any, is premised upon the original request as written”). Therefore, the OOR’s review on

appeal is confined to the Request as written, and any modification or explanation of the Request on appeal will not be considered. *See Petka v. Pa. Dep't of Transp.*, OOR Dkt. AP 2014-1288, 2014 PA O.O.R.D. LEXIS 996. Notwithstanding the foregoing, however, the Requester may submit a new request to the Department.

**2. The Department has demonstrated that the requested information is confidential pursuant to Department regulations**

The Department argues that the requested information regarding PB-22 forms is confidential pursuant to Department regulations. Pursuant to Department regulations, health care facilities have a duty to report allegations of abuse to the Department. 28 Pa. Code § 51.3(e)-(f).

Section 51.3 further provides that:

Information contained in the notification submitted to the Department by a facility under subsection (e) or (f) may not, unless otherwise ordered by a court for good cause shown, be produced for inspection or by copying by, nor may the contents thereof be disclosed to, a person other than the Secretary, the Secretary's representative or another government agency, without the consent of the facility which filed the report.

28 Pa. Code § 51.3(i).

In support of its argument that records are confidential, the Department submits the sworn attestation of Susan Williamson, Director of the Division of Nursing Care Facilities ("Division") for the Department, who attests the following:

4. A nursing care facility must report an allegation of resident abuse or neglect to the Department immediately, through the Department's electronic reporting system (ERS).
5. Once the facility files its report, an electronic version of the Department's PB-22 form becomes available in the ERS system for the facility to complete. The facility has five (5) days to complete the PB-22 form and file it with the Department through the ERS system....
7. Upon receipt of the PB-22 form, the Department of Health field office with responsibility of the geographic area of the State in which the facility is located will review the document to determine if it contains all the necessary information.

If it does not, the field office will send it back to the facility for further information.

8. Once the file office has a PB-22 that is complete, it will initiate a facility investigation the purposes of which is to determine whether there are any deficiencies in the facility's compliance with applicable State and Federal regulations governing operation of the nursing care facility and the facility's responsibility to address allegations of abuse and neglect....
10. Once the Division's investigation is completed and the Division has received a plan of correction for any regulatory deficiencies identified, the PB-22 is "accepted" by the ERS system, with the result that the information from the PB-22 report is incorporated within the Department's electronic system for tracking both complaints and incident reports, the Pennsylvania Automated Complaint Tracking System (PACTS).
11. Records and information maintained within PACTS are confidential and not released to the public.
12. The Division does not release information about incident reports that facilities file with the Division because state regulations prohibit release of that information and because, if the Division released the information, facilities would stop filing the reports. If facilities stop filing reports, the Division would lose an essential tool in maintaining effective oversight of nursing care facilities and ensuring the protection of vulnerable and elderly nursing home residents.

Under the RTKL, a sworn attestation is competent evidence to sustain an agency's burden of proof. *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 Department acted in bad faith, "the averments in [the attestation] 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)). Based on the evidence submitted, the Department has demonstrated that the requested information, regarding County, Department filed office, nature of abuse, agencies involved, and conclusions, is confidential under Department regulations, and is not, therefore, subject to disclosure. *See* 65 P.S. 67.305(a)(3).

**3. The Department has not demonstrated that the total number of filed PB-22 forms is exempt from disclosure**

In addition to seeking specific information from PB-22 forms, the Request sought “[a]ggregate data that shows the number of PB-22 forms facilities filed with the Department of Health from 2008-2015, or for the years in which the agency is required to keep and has kept the documentation, according to its retention schedule.”

The RTKL defines “aggregated data” as “[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. The OOR has considered this term in a number of prior Final Determinations. In *Malley v. Pa. Dep’t of State*, the OOR held that a request did not seek aggregated data because it “seeks records of a specific file, not data related to multiple files.” OOR Dkt. AP 2010-0529, 2010 PA O.O.R.D. LEXIS 464. In *Public Interest Law Center of Philadelphia v. Police Advisory Commission*, the OOR, noting that “aggregated data does not reveal any facts or information relative to a specific investigation,” held that records that “reveal how many complaints were dropped from the complaint and investigation process and how many interviews were conducted” constituted aggregated data because the “release of the data would [not] reveal when a specific investigation was actually initiated or identify facts, parties, or information from a specific investigation.” OOR Dkt. AP 2009-0576, 2009 PA O.O.R.D. LEXIS 754.

Here, the release of the total number of PB-22 forms, filed for each year in the timeframe specified, would not reveal any specific facts or information made confidential under Board regulations.

In its response denying the Request, the Department stated that it does not keep records of the data in aggregate form. However, while an affidavit or statement made under the penalty

of perjury is competent evidence to sustain an agency's burden of proof, *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), unsworn statements may not be relied upon as competent evidence to withhold records under the RTKL. *See Hous. Auth. of the City of Pittsburgh v. Van Osdol*, 40 A.3d 209, 216 (Pa. Commw. Ct. 2012) (holding that unsworn statements of counsel are not competent evidence); *City of Phila. v. Juzang*, July Term 2010, No. 2048 (Phila. Com. Pl. June 28, 2011) ("Because the letter written by City's counsel is a legal brief, it cannot be ... evidence at all").

Furthermore, information contained in an agency's database is considered a record under the RTKL and is subject to disclosure. 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) ("drawing information from a database does not constitute creating a record under the Right-to-Know Law"); *see also Gingrich*, 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"). Here, the Department acknowledges that the PB-22 forms are tracked and maintained in its PACTS system, therefore making the requested data regarding the number of PB-22 forms filed within the Department's control. As such, this information is subject to disclosure.

## CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted in part** and **denied in part**, and the Department is required to provide the number of PB-22 forms filed with the Department for the time period requested, 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

or petition for review 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.<sup>3</sup> This Final Determination shall be placed on the website at: <http://www.openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: March 9, 2017**

/s/ Kathleen A. Higgins

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