



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
KATHLEEN YURCHAK,	:	
Requester	:	
	:	
v.	:	Docket No: AP 2018-0212
	:	
CENTRE COUNTY,	:	
Respondent	:	

INTRODUCTION

Kathleen Yurchak, Esq. (“Requester”) submitted a request (“Request”) to Centre County (“County”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking various electronic communications. The County denied the Request, claiming the records are not readily accessible and that some of the documents are protected by the attorney-client privilege. 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 January 18, 2018, the Request was filed, stating:

Request Item 1

Please send the following information *only* in the ***electronic medium or format*** in which it exists:

All electronic communication exchanges exchanged during the time-period between County officials – without any DA official being a recipient or sender of

any communication exchange – that referenced any official business relating to former County employee Michelle Shutt.

Request Item 2

Please send the following information *only* in the **electronic medium or format** in which it exists:

All electronic communication exchanges exchanged during the time-period between any County official and any DA official that referenced any official business relating to former County employee Michelle Shutt.

On January 25, 2018, the County denied the Request, stating that the records are not readily accessible, and that some of the documents requested are protected by privilege.

On February 6, 2018, the Requester filed an appeal with the Office of Open Records (“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 pursuant to 65 P.S. § 67.1101(c).

On February 20, 2018, the County submitted a position statement, along with affidavits reiterating its argument that the records do not exist in a readily producible record, that some of the emails that may be recovered could contain attorney-client protected communications, and that the cost to provide the records would be over \$150,000.00. Also, on February 20, 2018, the Requester provided a position statement arguing that the County cannot escape its obligations under the RTKL by claiming that its method of maintaining and organizing its records would make retrieval too costly. The Requester also asked that the OOR conduct an *in camera* review of the records in this matter.

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 LLC 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.” 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.* The law also states that an appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* Here, the Requester requested that the OOR conduct an in camera review; however, as the OOR has the requisite information and evidence before it to properly adjudicate the matter, that request is denied.

The County is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in 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 clearly 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 County has not established that the records do not exist

The County asserts that no records exist in the format provided per Section 705 of the RTKL and that production of the records would require the creation of a record. In support, the County submits the affidavit of Natalie Corman, Human Services Administrator/Deputy Court Administrator, and temporary Open Records Officer, who attests as follows:

2. Centre County Government maintains a contract with RBA Professional Data Systems, Inc. (“RBA”) who is responsible for managing and maintaining electronic records of the County....
3. County utilizes the services of RBA in managing and maintaining electronic records of the County....
4. Per the submitted RBA affidavit, the County will need over \$150,000.00 and 120 days to compile the records requested.
6. Since 2016, communications related to Ms. Shutt have occurred between counsel to the County and County officials related to the litigation and should any of the messages retrievable by RBA contain such communications, those would be protected by privilege.
7. There are records of the District Attorney housed on servers owned by the County but those records belong to the District Attorney’s Office.

The County also submits the affidavit of William L. Browder, Director of Information Technology for RBA, who attests as follows:

1. RBA ..., a Pennsylvania corporation, as subcontractor, is the party responsible by contract for managing and maintaining electronic records of the County....
2. RBA regularly completes and maintains back up files for the electronic files and records, including electronic communications, of the County which includes those of County officials, the Office of the Centre County District Attorney (“DA official”) and all County Employees.
3. I am the Director of the RBA office maintained on County property and responsible for managing all obligations under the RBA contract with the County.
4. In connection with the same, I was provided the above-referenced request submitted to the County, namely that portion of the request for all electronic communications exchanges exchanged during the timer period (January 6, 2014, to January 17, 2018) between County officials referencing any official business relating to former County employee Michelle Shutt. A similar request has been made for the same between any County official and any DA official that referenced official business relating to former County employee Michelle Shutt.
5. While it is possible that information responsive to the request is contained on back up equipment, the files are not readily retrievable for the following reasons:
 - a. Back up systems were changed in early March, 2015, and records prior to that date, on the BUE system, require recreation of the records – reattaching the old drive to a system, locating the materials on the back up tape, cataloguing the tape, restoring the tape to exchange and then copying to separate media – in order to then search the same in order to generate any records responsive to the request.
 - b. Back up systems for the BUE system only exist through the latter part of 2014; all back ups prior to that date were destroyed in accordance with County policies.
 - c. The new system employed for the County’s electronic system, VEEAM, was initiated in March, 2015, but back ups beyond 90 days are stored on tape (rather than disk which stores the last remaining 90 days) and therefore require the information to be located on the back up tapes, indexed, restored and recreated, then extracted to different media so the same could be searched to locate any records responsive to a request for information.
 - d. Further, older tapes may contain data that is problematic – used former email systems – so the restoration/recreation may fail and numerous attempts to recreate the same will involve more time and expense.

6. RBA has previously estimated that it will take a minimum of 898.75 hours to restore/recreate files beyond 90 days post. This will require additional cost to the County and work by an outside contractor with estimates of greater than \$100,000.00 for such contractor to complete the same.
7. The estimate by RBA does not include time to search the files (the number of files will be numerous – each employee mailbox for each day being a separate file), once recreated/restored, to select those matters responsive to the request, an activity that will be done by a representative for the County.
8. The estimate by RBA does not include the cost to purchase additional equipment – servers – to transfer the recreated data to, programs necessary to allow for search and review of the same and/or the additional time to load the recreated/restored information to the new equipment/software and proceed to review and search the information.
9. Given that records will have to be recreated to review them and therefore respond to the same, there is no way for the County to know if there are in fact any records that exist in the time periods contained in the request.

Section 102 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. Section 705 of the RTKL states that “[w]hen responding to a request for access, 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. While the County is not required to create records that currently do not exist, the County admits that the responsive information does exist in its possession, custody or control. The Commonwealth Court has noted that the RTKL:

permits a [requester] to request and obtain public records, subject to claims of exemption. A [requester] cannot control how an agency catalogues or organizes such files. As such, an agency’s failure to maintain the files in a way necessary to meet its obligations under the RTKL should not be held against the requester. To so hold would permit an agency to avoid its obligations under the RTKL simply by failing to orderly maintain its records.

Dep't of Env'tl. Prot. v. Legere, 50 A.3d 260, 265 (Pa. Commw. Ct. 2012). 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. Comw. 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. Here, the County admits that it maintains the information requested. The fact that the County will incur time and costs to retrieve that information because of its own failure to maintain the files in a way necessary to meet its obligations under the RTKL cannot be held against the Requester. Because the County has constructive possession of records contained among the back up files managed by RBA, the County must search for and, to the extent responsive records exist, obtain the records from the back up files and provide them to the Requester to comply with its obligations under the RTKL. See *Pa. Dep't of Labor and Indus. v. Earley*, 126 A.3d 355 (Pa. Commw. Ct. 2015) (concluding that an agency failed to meet its burden of proof where the agency did not search its servers for previously deleted emails responsive to the request);

The County argues that in a 2016 case¹, similar records were requested and that a similar affidavit was provided regarding the efforts and costs necessary to fulfill the request. However, that case is distinguishable since that appeal was denied by the OOR because the underlying request was insufficiently specific. Because it was denied pursuant to Section 703, 65 P.S. § 703,

¹ See *Campbell v. Centre County District Attorney's Office*, OOR Dkt. AP 2016-0735, 2016 PA O.O.R.D. LEXIS 777.

the OOR did not reach the additional merits of the case. Therefore, the County has an obligation to perform a search of its files for responsive records and to provide those records to the Requester.

2. The County has not proven that the records are protected by the attorney-client privilege

The County claims that some of the records requested may contain information that is protected by the attorney-client privilege. However, the County has not identified any record or parts of records that would be protected under the attorney-client privilege. In fact, the County has not identified any records because it has not yet performed a search for responsive records. As the County has not submitted any evidence establishing what records may be exempt from disclosure, the County has failed to meet its burden of proof to withhold the requested records. *See* 65 P.S. § 67.708(a)(1).

CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted**, and the County is required to provide all records responsive to the Request. 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 Centre 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 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 website at: <http://openrecords.pa.gov>.

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

FINAL DETERMINATION ISSUED AND MAILED: March 8, 2017

/s/ Charles Rees Brown

Charles Rees Brown
Chief Counsel

Sent to: Kathleen Yurchak, Esq. (via e-mail only)
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