



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
CHRISTINE SCHIAVO AND THE	:	
MORNING CALL,	:	
Requester	:	
	:	
v.	:	Docket No.: AP 2018-0049
	:	
PENNSYLVANIA DEPARTMENT	:	
OF HEALTH,	:	
Respondent	:	

INTRODUCTION

Christine Shiavo and The Morning Call (collectively, the “Requester”) submitted a request (“Request”) to the Pennsylvania Department of Health (“Department”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking records related to by E. coli cases in the Commonwealth. The Department denied the Request, claiming that the records are made confidential under the Disease Prevention and Control Law of 1955 (“DPCL”), 35 P.S. § 521.1, *et seq.* 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 Department is not required to take any further.

FACTUAL BACKGROUND

On January 2, 2018, the Request was filed, stating:

The Centers for Disease Control and Prevention [("CDC")] has identified one case of E. coli in Pennsylvania from an outbreak spanning November and December. I would like to know which county that case is from. Also, I would like to know if any cases of E. coli were reported in Lehigh or Northampton counties from Nov. 1, 2017, to Dec. 31, 2017.

Lastly, I would like to know if E. coli was the cause of any deaths in Pennsylvania in 2017 and if so, how many.

On January 9, 2018, the Department denied the Request, claiming that it sought records made confidential under the DCPL, among other grounds for denial.

On January 10, 2018, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. The Requester argues that the records sought are not records protected by the DCPL because the Request seeks county-level information, not individual information. The Requester also explains that the information requested is no different than information routinely released by the Department for cases of influenza and Lyme disease. As a result, the Requester argues that it is in the public interest to know what counties were affected by the E. coli outbreak announced by the CDC. 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 23, 2018, the Department submitted a position statement, reiterating its grounds for denial, along with the sworn attestations of Dr. Atmaram Nambiar, the Epidemiologist Manager in the Department's Bureau of Epidemiology.

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 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.* The decision to hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Pa. Dep’t of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, the parties did not request a hearing; however, the OOR has the necessary 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)(1). Similarly, the burden of proof in claiming a privilege from disclosure is on the party asserting that privilege. *Levy v. Senate of Pa.*, 34 A.3d 243, 249 (Pa. Commw. Ct. 2011); *Pa. Dep’t of Transp. v. Drack*, 42 A.3d 355, 364 (Pa. Commw. Ct. 2012) (“[T]he RTKL places an evidentiary burden upon agencies seeking to deny access to records even when a privilege is involved”); *In re: Subpoena No. 22*, 709 A.2d 385 (Pa. Super. Ct. 1998). 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)). “The 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 Department argues that the Request seeks records made confidential under the DCPL.

Section 15 of the DCPL provides:

State and local health authorities may not disclose reports of diseases, any records maintained as a result of any action taken in consequence of such reports, or any other records maintained pursuant to this act or any regulations, to any person who is not a member of the department or a local board or department of health, except where necessary to carry out the purposes of this act. State and local health authorities may permit the use of such data contained in disease reports and other records, maintained pursuant to this act, or any regulation, for research purposes, subject to strict supervision by the health authorities in insure that the use of the reports and records is limited to specific research purposes.

35 P.S. § 521.15. Therefore, any reports of diseases or any records maintained by the Department pursuant to the DCPL are confidential. *Id.*

The Department is expressly authorized to promulgate regulations to carry out the purposes of the DCPL. 35 P.S. § 521.16. In accordance with this authority, the Department has promulgated regulations regarding communicable and non-communicable diseases under Title 28, Chapter 27 of the Pennsylvania Code. Pursuant to these regulations, outbreaks and unusual diseases, infections and conditions, including unusual or group expressions of illness, are required to be reported within 24 hours. 28 Pa. Code § 27.3. The DCPL makes confidential, with extremely limited exceptions, any records maintained by the Department pursuant to the DCPL or its regulations, and this restriction is made expressly applicable to records relating to outbreaks and unusual diseases, infections and conditions.

Here, the Request seeks records related to an E. coli outbreak announced by the CDC. Dr. Nambiar attests that:

10. The records [requested] ... deal with the Department's epidemiological investigation regarding a disease or condition reportable under the Communicable and Non-communicable Disease Regulations promulgated pursuant to the DCPL. [(citations omitted)]....
11. The Department's investigation in this case included a detailed examination of all available records and data regarding the reported disease and an official probe based upon the Department's authority under the DCPL.
12. Any information regarding the Department's epidemiological investigation constitute records received, created or maintained by the Department pursuant to the Department's authority under the DCPL and are, therefore, confidential under the DPCL.
13. The records may be released only if the Department deems release necessary to prevent and control the spread of disease.
14. The Department has determined that release of the requested to [the Requester] ... is not necessary to prevent and control the spread of disease.

15. Additionally, the Department does not maintain a record of deaths caused by E. coli; the Department has no records in its possession, custody or control responsive to this portion of the [R]equest.

Under the RTKL, a sworn affidavit 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 competent evidence that the Department acted in bad faith or that the records exist, “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)). After a review of the evidence submitted by the Department, the Department has met its burden of proving that the records responsive to the Request are maintained by the Department pursuant to the DCPL and are therefore subject to the broad confidentiality provisions of the DCPL. *See also Segelbaum and the York Daily Record v. Dep’t of Health*, OOR Dkt. AP 2015-2925, 2016 PA O.O.R.D. LEXIS 306 (holding that records of a bacterial outbreak at WellSpan York Hospital were confidential under the DCPL); *Young and USA Today v. Dep’t of Health*, OOR Dkt. AP 2011-1040, 2011 PA O.O.R.D. LEXIS 677 (holding that records of blood-lead test data were confidential under the DCPL). In addition, the Department has demonstrated that it does not possess records related to deaths caused by E. coli that are responsive to the Request. As a result, the appeal is denied.

CONCLUSION

For the foregoing reasons, the Requester’s appeal is **denied**, and the Department 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 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.¹ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: March 23, 2018

/s/ Benjamin A. Lorah

APPEALS OFFICER
BENJAMIN A. LORAH, ESQ.

Sent to: Christine Shiavo (via e-mail only);
Carol Mowery, Esq. (via e-mail only);
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¹ See *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).