

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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**Docket No. 1021 CD 2020**

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**PUBLICSOURCE and NICOLE BRAMBILA,**  
Petitioners,

v.

**PENNSYLVANIA DEPARTMENT OF HEALTH,**  
Respondent.

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**PRINCIPAL BRIEF OF PUBLICSOURCE AND NICOLE BRAMBILA**

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Appeal from the Final Determination of the Office of Open Records dated  
September 18, 2020 at Docket No. AP 2020-1182

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Paula Knudsen Burke (No. 87607)  
The Reporters Committee for  
Freedom of the Press  
1156 15th St. NW, Suite 1020  
Washington, D.C. 20005  
Phone: 202.795.9300  
Facsimile: 202.795.9310  
pknudsen@rcfp.org

**Dated: March 15, 2021**

Counsel for Petitioners

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## **STATEMENT OF JURISDICTION**

The Commonwealth Court has appellate jurisdiction over this matter pursuant to 65 P.S. § 67.1301(a) of the Right to Know Law (“RTKL”), Rule 1511 of the Pennsylvania Rules of Appellate Procedure, and Section 763(a)(2) of the Judicial Code, 42 Pa.C.S. § 763(a)(2).

## **SCOPE AND STANDARD OF REVIEW**

The Commonwealth Court exercises *de novo* and plenary review of both factual and legal findings made by the Office of Open Records. 65 P.S. § 67.1301(a); 42 Pa.C.S. § 763(a); *Bowling v. Office of Open Records*, 75 A.3d 453, 474 (Pa. 2013). Under this standard, the Court may “adopt[] . . . the appeals officer’s factual findings and legal conclusions when appropriate,” but may affirm or reverse the decision below on the basis of any rationale. *Bowling*, 75 A.3d at 474. The Court is entitled to the broadest scope of review. *Id.* at 477.

**TEXT OF THE ORDER IN QUESTION**

“For the foregoing reasons, Requester’s appeal is **denied**, and the Department is not required to take any further action.”

The September 18, 2020 Final Determination by Office of Open Records Appeals Officer Jill S. Wolfe is attached as Appendix A.

## STATEMENT OF THE QUESTIONS INVOLVED

1. Was the Office of Open Records correct in concluding that the requested data was exempt from disclosure because it was connected with a noncriminal investigation under 65 P.S. § 67.708(b)(17)?

Suggested answer: No

2. Was the Office of Open Records correct in concluding that the requested data was exempt from disclosure because it constituted individual health information under 65 P.S. § 67.708(b)(5) or other personal information under 65 P.S. § 67.708(b)(6)(i)(A)?

Suggested answer: No

3. Was the Office of Open Records correct in concluding that the requested data is exempt from disclosure under the Disease Prevention and Control Law?

Suggested answer: No

4. Was the Office of Open Records correct in concluding that the Pennsylvania Department of Health would be required to correlate and aggregate information by manually coding and verifying the information from death records to produce the aggregated information?

Suggested answer: No

5. Was the Office of Open Records correct in determining that the death records used to create the aggregate data in the Enterprise Data Dissemination Informatics Exchange database are confidential under the Vital Statistics Law, 35 P.S. §§ 450.804-450.806, and cannot be provided until they are compiled for the Enterprise Data Dissemination Informatics Exchange database?

Suggested answer: No



## STATEMENT OF THE CASE

This case raises an issue of fundamental importance regarding the public’s right to be informed about pneumonia and influenza deaths in Pennsylvania, particularly in light of the ongoing COVID-19 pandemic.

In spring of 2020, as the country grappled with business and school closures, unemployment and economic uncertainty, and the grim toll of the growing number of lives lost to the novel coronavirus, reporters and editors at news outlets across the Commonwealth were racing to provide their readers and listeners with critical information about the virus. PublicSource, a nonprofit news outlet in Pittsburgh, was among the news media organizations working to provide readers with relevant information to help them stay healthy and understand the pandemic that had upended their daily lives. Since March 14, 2020, PublicSource has been updating its website daily, providing the most relevant news focused on COVID-19 in Allegheny County and Pennsylvania.<sup>1</sup>

Nicole Brambila, a government reporter for PublicSource during this time period, was writing extensively about the novel coronavirus. She was also following reporting from national news outlets—including coverage early in the

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<sup>1</sup> PublicSource Reporters, *Allegheny County reports 329 new COVID-19 cases, no new deaths*, PublicSource (last visited Mar. 13, 2021), <https://perma.cc/KQ5V-JC5W>.

pandemic that underreporting of COVID-19 deaths was potentially linked to untested home-deaths of pneumonia or other comorbidities, which may not have been included in the tally.<sup>2</sup> In order to determine whether agencies were underreporting deaths in Pennsylvania, Brambila and PublicSource, (collectively, the “Petitioners”), sought records regarding pneumonia and influenza deaths from the Pennsylvania Department of Health (“DOH” or “Respondent”).

Specifically, on May 21, 2020, Brambila (“Requester”) submitted a Right to Know Law request (“RTK Request”) to the DOH for “pneumonia and influenza deaths in Pennsylvania from county and date for 2015, 2016, 2017, 2018, 2019 and Jan. 1, 2020 through May 21, 2020, as reported to the Centers for Disease Control and Prevention.” R.R. 1a.

On July 6, 2020, after invoking a thirty-day extension, R.R. 2a-3a, the DOH sent Requester its final response. R.R. 4a-6a. The agency shared a publicly available website <<https://gis.cdc.gov/grasp/fluview/mortality.html>> (“CDC FluView website”), which contains statewide data made publicly available through the Centers for Disease Control and Prevention. *See* R.R. 4a. However, the DOH denied access to the records in any other form pursuant to various RTKL

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<sup>2</sup> Jayme Fraser et al., *Spike in US deaths and cases flagged as pneumonia suggests even greater COVID-19 impact*, USA TODAY (Apr. 29, 2020), <https://perma.cc/ERA7-TWJD>; Sarah Kliff and Julie Bosman, *Official Counts Understate the U.S. Coronavirus Death Toll*, N.Y. Times (Apr. 5, 2020), <https://perma.cc/B5ZE-GJQX>.

exemptions<sup>3</sup> and the Disease Prevention and Control Law of 1955, 35 P.S. §§ 521.1 *et seq.* (“DPCL”). Upon information and belief, the data on the CDC FluView website was derived from information provided by the DOH Bureau of Health Statistics and Registries.

Requester appealed to the Office of Open Records (“OOR”) on July 21, 2020, challenging the DOH’s partial denial of the Request. R.R. 7a. On August 11, 2020, the DOH submitted its position statement and supporting affidavit from Dr. Atmaram Nambiar, Epidemiologist Manager, stating that it had provided all responsive data found in the Enterprise Data Dissemination Informatics Exchange (“EDDIE”) for 2015-2018. R.R. 11a-28a. The DOH stated that data from the years 2019 and 2020 had not yet been compiled for EDDIE. R.R. 21a. On August 17, 2020, the DOH submitted an affidavit from Audrey Marrocco, the Department of Health’s Director for the Bureau of Health Statistics and Registries. R.R. 29a-35a.

On September 18, 2020, the OOR issued a ruling denying Requester’s appeal. R.R. 36a-44a. The OOR reasoned that DOH was not “required to create a record for 2019 and 2020 that has not yet been compiled, coded and aggregated for

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<sup>3</sup> DOH cited the following exemptions: 1) records are connected with a noncriminal investigation [65 P.S. § 67.708(b)(17)]; 2) disclosure would identify individual health information [65 P.S. § 67.708(b)(5)]; 3) records would disclose personal identification [65 P.S. § 67.708(b)(6)(i)(A)]; and 4) records are exempt under state and federal law or regulation [65 P.S. § 67.102 and 65 P.S. § 67.305(a)(3)].

the EDDIE database.” R.R. 42a. Moreover, the OOR held that because the requested records are confidential under the Vital Statistics Law (“VSL”), 35 P.S. §§ 450.804-450.806, “the Department is not required to provide the death record information prior to it being compiled for the EDDIE database.” R.R. 43a-44a.

On September 28, 2020, Requester filed a Petition for Reconsideration with the Office of Open Records. R.R. 45a-47a. The petition was denied by OOR’s Chief Counsel, Charles Rees Brown, on October 15, 2020. R.R. 48a.

Petitioners timely appealed the OOR decision to this Court on October 16, 2020. R.R. 49a-55a.

### **SUMMARY OF ARGUMENT**

Through the RTKL, the Pennsylvania Legislature expanded access to public records; it is, as this Court has stated, a law that “empower[s] citizens by affording them access to information concerning the activities of their government.” *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1042 (Pa. 2012). It is “remedial legislation 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). Accordingly, “exemptions from disclosure must be narrowly construed.” *Id.*

The influenza and pneumonia data sought by Petitioners would help PublicSource’s readers understand how comorbidities, such as pneumonia, affected the reported COVID-19 death count. Given the unprecedented nature of the COVID-19 pandemic and states’ varying responses to it, local coverage of this topic is essential to keeping Pennsylvanians informed, especially when reporting has shown how confusing and error-riddled the death reporting system is in Pennsylvania.<sup>4</sup>

In its response to Petitioners’ request, the DOH invoked several provisions of Pennsylvania law. The DOH alleged that the data was “connected with a noncriminal investigation” and exempt under 65 P.S. § 67.708(b)(17); that disclosure of the data would identify individual health information, rendering it exempt under 65 P.S. § 67.708(b)(5); that the records would disclose personal identification, triggering 65 P.S. § 67.708(b)(6)(i)(A); and that the records were also exempt under federal or state law or regulation (65 P.S. § 67.102 and 65 P.S. § 67.305(a)(3)). R.R. 4a. The DOH’s July 6, 2020 letter did not identify the federal or state laws, but subsequent filings made clear that the DOH was invoking two

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<sup>4</sup> See Aneri Pattani, *Pa. health officials quietly alter erroneous nursing home case, death counts as providers cry foul*, Spotlight PA (May 21, 2020), <https://perma.cc/J2YS-AC3M>; Hurubie Meko, *How many people have died, and where? COVID-19 data from coroners, state don’t mesh, making it hard to tell*, LancasterOnline (Apr. 23, 2020), <https://perma.cc/5WMT-25YG>; Oliver Morrison, *Fact-check: Has PA seen 7,000 deaths beyond the state’s norm during the pandemic?*, PublicSource (May 6, 2020), <https://perma.cc/L8M7-LERV>.

state laws: The Disease Prevention and Control Law of 1955, 35 P.S. §§ 521.1 *et seq.*, and the Vital Statistics Law, 35 P.S. §§ 450.804-450.806. None of these provisions apply to the data sought by Petitioners.

First, the DOH has not shown evidence demonstrating that the requested data is connected with a noncriminal investigation. Second, the exemptions for medical and identifying information can be addressed, if necessary, through redaction. Third, the DOH's application of the DPCL violates Act 77 of 2020 ("Act 77"), a law passed by the Pennsylvania Legislature. 71 P.S. §§ 720.301 *et seq.* Fourth, the OOR's application of the VSL erroneously relies on Ms. Marrocco's affidavit, in contravention of existing case law. Additionally, disclosure of the requested information would be consistent with the intent of the Pennsylvania Legislature, as expressed in Act 77.

In addition to the aforementioned exemptions, the DOH also claimed that the data for 2019 and 2020 could not be shared because the "data has not yet been compiled." R.R. 39a. However, Petitioners sought raw data, so the DOH would not be required to correlate and aggregate information by manually coding and verifying the information from death records. For these reasons, Petitioners respectfully ask the Court to reverse the OOR's September 18, 2020 Final Determination; or, in the alternative, allow Petitioners to supplement the record before this Honorable Court; or, in the alternative, remand the matter back to the

OOR for a full evidentiary hearing pursuant to Pa. R.A.P. 1542, including testimony and argument on the matter of bad faith and attorneys' fees provided by sections 67.1304 and 67.1305 of the RTKL.

### ARGUMENT

**I. The requested data is not connected with a “noncriminal investigation” pursuant to 65 P.S. § 67.708(b)(17).**

The DOH argued that the requested data was exempt under section 67.708(b)(17) of the RTKL because it was connected to a noncriminal investigation. However, in order for an agency to assert the noncriminal investigation exemption, it must demonstrate that “a systematic or searching inquiry, a detailed examination, or an official probe” was conducted regarding a noncriminal matter. *Pa. Dep’t of Health v. Office of Open Records*, 4 A.3d 803, 810-11 (Pa. Commw. Ct. 2010). Further, the inquiry, examination or probe must be “conducted as part of an agency’s official duties.” *Id.* at 814. An official probe only applies to noncriminal investigations conducted by agencies acting within their legislatively granted fact-finding and investigative powers. *Johnson v. Pa. Convention Ctr. Auth.*, 49 A.3d 920 (Pa. Commw. Ct. 2012). The DOH has not shown that there was an “official probe” or other investigation related to influenza and pneumonia death records.

**II. The RTKL’s exemptions for medical data and other personal information do not apply to the requested data.**

Contrary to the DOH’s filings, Petitioners did not ask for “[a] record of an individual’s medical, psychiatric or psychological history or disability status . . . or related information that would disclose individually identifiable health information,” 65 P.S. § 67.708(b)(5), nor did they ask for “[a] record containing all or part of a person’s Social Security number, driver’s license number, personal financial information, home, cellular or personal telephone numbers, personal e-mail addresses, employee number or other confidential personal identification number,” 65 P.S. § 67.708(b)(6)(i)(A). And none of Petitioners’ filings indicate that they are seeking such information. To the extent that exempt data appears in the public record described by Requester, the DOH must comply with the RTKL by redacting it. *See* 65 P.S. § 67.706 (“The agency may not deny access to the record if the information which is not subject to access is able to be redacted.”).

**III. The DOH’s application of the DPCL violates Act 77, a law passed by the Pennsylvania Legislature in 2020.**

The DOH argues that the requested records are confidential under the DPCL. In its August 11, 2020 Legal Argument to the OOR, the DOH cited Section 15 of the DPCL, which 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 of a



local board or department of health, except . . . where necessary to carry out the purposes of this act.

35 P.S. § 521.15; R.R. 16a. However, on July 27, 2020, the Pennsylvania Legislature passed Act 77, a law designed to encourage disclosure of COVID-19-related data. 71 P.S. §§ 720.301 *et seq.* The new legislation permits disclosure of certain data that relate to disaster declarations, creating an exception to the provisions of the DPCL that establish the confidentiality of records of diseases.<sup>5</sup> *Id.* The influenza and pneumonia data requested in this case, to the extent it was used by the DOH in making COVID-19-related decisions, is “data used by a Commonwealth agency for any rules, policies or actions taken by the Commonwealth agency.” *Id.* § 720.305. Therefore, the data is not exempt from disclosure under the DPCL.

**IV. The death records used to create the aggregate data in the EDDIE database are not confidential under the VSL, 35 P.S. §§ 450.804-450.806.**

The OOR reasoned that even if DOH was not required to “create a record, it may be required to provide the information in the format it exists.” R.R. 42a. Because the DOH confirmed that the requested information “is contained in the death records,” the “issue becomes whether the death records are subject to

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<sup>5</sup> See 71 P.S. § 720.305 (“Subject to section 708 of the act of February 14, 2008 (P.L. 6, No. 3), known as the Right-to-Know Law, the following information shall be considered a public record under the Right-to-Know Law during a disaster declaration: (1) Data used by a Commonwealth agency for any rules, policies or actions taken by the Commonwealth agency in relation to a disaster declaration. . . .”).

access.” *Id.* The OOR held that the death records were not subject to access because they were confidential under the VSL, 35 P.S. §§ 450.804-450.806. *Id.* Citing its own ruling in *Gries v. Pennsylvania Department of Health*, the OOR held that “because the records are made confidential under the VSL, the Department is not required to provide the death record information prior to it being compiled for the EDDIE database.” R.R. 43a-44a. The OOR’s determination was erroneous for at least two reasons.

**i. The OOR’s Final Determination erroneously relies on Ms. Marrocco’s affidavit.**

First, in concluding that all other responsive information was only available in death records, the OOR erroneously relied on an affidavit made by Audrey Marrocco. According to Ms. Marrocco’s affidavit from August 17, 2020:

27. Prior to the application of the ICD-10 codes, death records cannot be efficiently compiled and aggregated into a report based on a cause of death. A manual nosology coding and verification process would be required.

28. Until the cause of death is aggregated into a report, the only place where the cause of death information appears is on a decedent’s death record and the death record and data contained therein is confidential under the VSL.

R.R. 34a. The OOR appears to have relied on this affidavit for the premise that “the issue becomes whether the death records are subject to access.”<sup>6</sup> This reliance

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<sup>6</sup> The OOR did not provide any citation in support of its statement that “the issue becomes whether the death records are subject to access.” R.R. 42a. However, the only evidence that would possibly support this statement is Ms. Marrocco’s affidavit.

is inconsistent with OOR’s holding in *Klaproth v. Pennsylvania Department of Health* that “[w]hile an affidavit may serve as sufficient evidence in support of an exemption from public access . . . unsworn statements may not be relied upon as competent evidence to withhold records under the RTKL.” Final Determination at 9, OOR Dkt. AP 2020-1102 (internal citations omitted). In *Klaproth*, the Pennsylvania Department of Health argued in part that certain health records were exempt from disclosure under the “noncriminal investigations” provision, 65 P.S. § 67.708(b)(17). *Id.* at 2. To support this argument, DOH provided an affidavit made under the penalty of perjury by Lisa Keefer, an Open Records Officer. *Id.* at 3. The affidavit stated that the “records requested are potentially maintained by the Department as a result of investigating the COVID-19 pandemic.” *Id.* at 9. The OOR held that the affidavit “does not provide sufficient evidence that a noncriminal investigation was conducted and that the records responsive to the Request relate to this investigation.” *Id.*

In this case, the DOH again attempts to offer similar affidavits as evidence. R.R. 40a-42a. Yet this Court’s precedent requires more than an affidavit to support its premise that the responsive information was only available in death records. *Id.*; *see also Hous. Auth. of Pittsburgh v. Van Osdol*, 40 A.3d 209 (Pa. Commw. Ct. 2012) (statements of counsel are not adequate 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.”).

**ii. Disclosure of the requested information is consistent with Act 77.**

The text and legislative history of Act 77 of 2020, also discussed in Section III, demonstrate the Pennsylvania Legislature’s intent to make available to the public the information used by agencies to make public health decisions during the pandemic. The text of the law states that, during a disaster declaration, the definition of “public record” under the RTKL includes 1) *data* used by an agency for “any rules, policies, or actions” taken “in relation to a disaster declaration,” 2) *the process* an agency uses to determine how it will collect data used for the aforementioned rules, policies, or actions, and 3) the *models* used by the agency for the aforementioned rules, policies, or actions. *See* 71 P.S. §§ 720.305, *et seq* (emphasis added).

The legislative history of Act 77 also demonstrates this intent. As stated by Representative Seth Grove during his May 5<sup>th</sup>, 2020 remarks about Act 77 before the Pennsylvania House of Representatives:

Mr. Speaker, this is important legislation that reopens our Right-to-Know offices and ensures, provides we have robust data during emergency declarations so we have a full understanding of the scope of the emergency, as well as how the administration is moving forward with decisions. This legislation is critical in these times. *Transparency should never be delayed, and it should be emphasized during times of emergency disaster, Mr. Speaker.*

Pa. H.R. Legis. Journal, 204th Gen. Assemb., No. 26, at 598 (May 5, 2020) (emphasis added). Respondent's invocation of the VSL in this case runs contrary to the Pennsylvania Legislature's intent, as evinced by the text and legislative history of Act 77, by denying access to information regarding the DOH's COVID-19 data. This inhibits Requester's reporting and, in turn, the public's understanding of the pandemic. Moreover, this Court has made clear that "exemptions from disclosure must be narrowly construed." *Bowling*, 990 A.2d at 824.

**V. The DOH would not be required to correlate and aggregate information by manually coding and verifying the information from death records to produce the aggregated information.**

In its Final Determination, the OOR stated that the DOH did not provide information for the years 2019 and 2020 because the "data has not yet been compiled." R.R. 39a. The OOR cited Section 705 of the RTKL, which provides that an agency responding to a request "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." R.R. 39a-40a. After a review of the DOH's methods of obtaining death information, the OOR found that "there is no database that exists wherein it could pull the requested information. Rather it would be required to correlate and aggregate the information by manually coding and verifying the

information from death records to produce the aggregated information.” R.R. 42a. Relying on this incorrect finding, the OOR concluded that the DOH was not “required to create a record for 2019 and 2020 that has not yet been compiled, coded and aggregated for the EDDIE database.” *Id.*

Contrary to the OOR’s finding, compliance with Petitioners’ RTKL request would not have required the DOH to correlate and aggregate the death information through manual coding and verification. Petitioners only asked for “copies of public records that show pneumonia and influenza deaths in Pennsylvania by county and date for 2015, 2016, 2017, 2018, 2019, and Jan. 1, 2020 through May 21, 2020, as reported to the Centers for Disease Control and Prevention.” R.R. 1a.

According to the August 17, 2020 affidavit from Ms. Marrocco, the Director of the Bureau of Health Statistics and Registries, death information goes through a multi-step process. A “death record” is created when the Bureau registers a death. R.R. 31a. Next, the Bureau provides vital statistics to eligible persons such as family members. *Id.* The Bureau also “shares death information with the Centers for Disease Control and Prevention (CDC).” R.R. 32a-33a. This is restated in paragraph 22 of the Marrocco affidavit: “The Department provides the CDC with a daily list of raw death data.” R.R. 33a. Next, the CDC “provides the Bureau with an extraction file to apply the ICD-10 codes to the Bureau’s death records.” *Id.* Then the Bureau applies the ICD-10 codes, researching individual cases as needed,

and generates an aggregate report that “includes a breakdown by county.” *Id.*

Finally, the information is integrated into EDDIE. *Id.*

Petitioners sought death information from the step described in paragraph 20 and also paragraph 22 of the Marrocco affidavit—an early stage in the overall process. The later steps of aggregating and correlating information are irrelevant to the information sought here. Respondent argued to the OOR that the requested data would not be responsive, because “it contains no data fields; only after it has been assigned the ICD-10 codes is the data aggregated and does it contain data fields.” R.R. 41a. However, this is inconsistent with the DOH’s July 6, 2020 response to Requester’s RTKL request. R.R. 4a. The DOH’s response provided a link to a CDC graphic with the weekly influenza and pneumonia deaths in Pennsylvania. *Id.* As Petitioners noted in their petition for reconsideration by the OOR, Petitioners sought the “‘raw data’ gathered by DOH, then provided to and used by the CDC to produce the graphic.” R.R. 46a. If the graphic was responsive, then the information used to create the graphic should be responsive as well.

Further, to the extent that the requested information required manipulation in order to be understandable to the public, Petitioners are willing and able to do that work. For example, Petitioners did not ask or expect the DOH to create a chart of weekly data by county; that is something Petitioners can create using the EDDIE

data (which provides data by county and year) and the CDC data (which provides data by state and week).

### CONCLUSION

For these reasons, Petitioners respectfully ask the Court to REVERSE the OOR's September 18, 2020 Final Determination; or, in the alternative, allow Petitioners to supplement the record before this Honorable Court; or, in the alternative, remand the matter back to the OOR for a full evidentiary hearing pursuant to Pa. R.A.P. 1542, including testimony and argument on the matter of bad faith and attorneys' fees provided by sections 67.1304 and 67.1305 of the RTKL.

Respectfully submitted,

/s/ Paula Knudsen Burke  
Paula Knudsen Burke (No. 87607)  
The Reporters Committee for  
Freedom of the Press  
1156 15th St. NW, Suite 1020  
Washington, D.C. 20005  
Phone: 202.795.9300  
Facsimile: 202.795.9310  
pknudsen@rcfp.org

**Dated: March 15, 2021**

*Counsel for Petitioners*



## CERTIFICATE OF COMPLIANCE

I hereby certify that this filing complies with the word count limit set forth in Pa. R.A.P. 2135(a)(1). Based on the Microsoft Word program word count function, Petitioners' Brief contains 4,157 words.

I further certify that Petitioners' Brief complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

/s/ Paula Knudsen Burke  
Paula Knudsen Burke (No. 87607)

## **APPENDIX A**



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

**IN THE MATTER OF**

**NICOLE BRAMBILA,  
Requester**

**v.**

**PENNSYLVANIA DEPARTMENT OF  
HEALTH,  
Respondent**

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**Docket No: AP 2020-1182**

### **INTRODUCTION**

Nicole Brambila (“Requester”), a reporter with PublicSource, 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 pneumonia and influenza death statistics. The Department partially denied the Request, providing certain aggregate data, but stating that the withheld information is confidential pursuant to the Disease Prevention and Control Law. 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 action.

### **FACTUAL BACKGROUND**

On May 21, 2020, the Request were filed seeking, “copies of public records that show pneumonia and influenza deaths in Pennsylvania by count and date for 2015, 2016, 2017, 2018, 2019, and Jan. 1, 2020 through May 21, 2020, as reported to the Centers for Disease Control and

Prevention.” On June 5, 2020,<sup>1</sup> the Department invoked a thirty day extension to respond pursuant to 65 P.S. § 67.902. On July 6, 2020, the Department granted access to information made publicly available through the Centers for Disease Control and Prevention, but denied access to the records in any other form pursuant to various RTKL exemptions and the Disease Prevention and Control Law, 35 P.S. §§ 521.1 *et seq.*

On July 21, 2020, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. The Requester indicated that she received the aggregate data through 2018 but did not receive the information for 2019 and 2020. The OOR invited both parties to supplement the record and directed the Department to notify any third parties of their ability to participate in the appeal pursuant to 65 P.S. § 67.1101(c).

On August 11, 2020, the Department submitted its position statement, stating that it provided data responsive to the Request and found in the Enterprise Data Dissemination Informatics Exchange (“EDDIE”) database for 2015-2018, but that 2019 and 2020 has not yet been compiled for EDDIE. In support, the Department provided the affidavit made under the penalty of perjury from, Atmaram Nambiar, Department of Health’s Epidemiology Manager in the Bureau of Epidemiology.

On August 12, 2020, the Requester confirmed that she is seeking the remaining information for 2019 and 2020 that has not been provided because it has not been compiled for the EDDIE database.

On August 17, 2020, in response to the OOR’s request for additional information and clarification, the Department supplemented the record with an affidavit from Audrey Morrocco, the Department of Health’s Director for the Bureau of Health Statistics and Registries.

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<sup>1</sup> The Department stated that the Request was submitted while the Department’s offices were closed due to the COVID-19 pandemic.

## 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, neither party requested 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 the 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 *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 Request sought the pneumonia and influenza deaths in Pennsylvania, by county, as reported to the Center for Disease Control and Prevention. The Department has provided access to EDDIE—the Commonwealth’s database for publicly available death statistics. The Department, however, did not provide this information for the years 2019 and 2020 because the “data has not yet been compiled.” The Department confirms that the information for 2019 will be available in the next two to four months and the 2020 information will not be compiled for the website until 2021. As such, the Department argues that it is not required to create a record of this information.

Under Section 705 of the RTKL, 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; *see also Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010) (holding that an agency cannot be made to create a record that does not exist). 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) (“[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, (Pa. Commw. Ct. 2012). 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.” *Cole*, at 549 n.12.

Here, Ms. Marrocco explains, in her affidavit, that the records sought in this Request are records of the Department’s Bureau of Health Statistics and Registries (“Bureau”). As the Director of the Bureau, she explains the process of gathering the death statistics and how they are compiled into the EDDIE database for public access:

6. The Bureau uses the Data Application for Vital Events (DAVE) to maintain electronic registry database for these vital records.

7. The Bureau receives death information for persons who have died in the Commonwealth through a reporting system and creates and maintains death records based on those reports.

She further explains that deaths can be reported on paper or electronically and contain two parts—medical certification information and demographic information. The electronic death reports can be directly entered into DAVE using a registry system. Paper reports are received through the mail and require manual review and data entry by the Bureau. Both the data entry and review of the paper reports takes several months before death record data is finalized for statistical health reporting purposes.

As far as preparing the information on the EDDIE database, Ms. Marrocco attests that:

16. On an annual basis, the Bureau, with assistance from the Pennsylvania Office of Administration...issues reports through ... EDDIE.

...

18. For cause of death statistics in EDDIE, the Bureau uses aggregate data based on ICD-10 coding to create reports relating to the cause of death.<sup>2</sup>

...

20. To obtain consistent ICD-10 coding, and in accordance with national standards, the Bureau shares death information with the Centers for Disease Control and Prevention (CDC). The CDC then provides the Bureau with an extraction file to apply the ICD-10 codes to the Bureau's death records.

21. The application of the CDC extraction file to the Bureau records is in part a manual process in that the Bureau personnel has to apply the file to the records. This process also requires the Bureau to research individual cases where cause of death information needs to be clarified prior to applying an ICD-10 code.

22. The Department provides the CDC with a daily list of raw data.<sup>3</sup>

...

25. ...after the ICD-10 codes are completely applied and the aggregate report is generated, the Bureau provides the information to [the Pennsylvania Office of Administration] to incorporate into EDDIE.

26. The Bureau provides its aggregate data, which includes a breakdown by county, only after ICD-10 codes are applied...

27. Prior to the application of the ICD-10 codes, death records cannot be efficiently compiled and aggregated into a report based on a cause of death. A manual nosology coding and verification process would be required.

28. Until the cause of death is aggregated into a report, the only place where the cause of death information appears is on the decedent's death record and the death record

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<sup>2</sup> ICD-10 is the 10<sup>th</sup> revision of the International Statistical Classification of Diseases and Related Health Problems, a standardized medical classification system adopted by the World Health Organization.

<sup>3</sup> On August 19, 2020, the Requester argued that this raw data would be responsive to the Request. However, the Department explained that the data is not responsive because it contains no data fields; only after it has been assigned the ICD-10 codes is the data aggregated and does it contain data fields.



Here, the Department has provided evidence that there is no database that exists wherein it could pull the requested information. Rather it would be required to correlate and aggregate the information by manually coding and verifying the information from death records to produce the aggregated information. *See Bell v. Pa. Dep't of Labor & Industry*, OOR Dkt. AP 2018-1433, 2018 PA O.O.R.D. LEXIS 1151 (finding that the agency was not required to provide responsive information when doing so would require aggregating and correlating the data in a “complex, multi-step task”); *Imburgia v. Phila. Sch. Dist.*, OOR Dkt. AP 2018-0635, 2018 PA O.O.R.D. LEXIS 799 (finding that the agency was not required to respond to a request where a response would require the generation of a report based on calculations made from data from various tables). Therefore, the Department is not required to create a record for 2019 and 2020 that has not yet been compiled, coded and aggregated for the EDDIE database.

Although the Department is not required to create a record, it may be required to provide the information in the format it exists. *See* 65 P.S. § 67.705. Here, the Department confirmed that information is contained in the death records and the issue becomes whether the death records are subject to access. The Department argues that the death records and reports used to create the aggregate data in the EDDIE database are confidential under the Vital Statistics Law (“VSL”), 35 P.S. §§ 450.804-450.806.

Section 105 of the VSL defines “vital statistics” as including “the registration, preparation, transcription, collection, *compilation*, analysis and preservation of data pertaining to births, adoptions, legitimations, *deaths*, fetal deaths, marital status and data incidental thereto.” 35 P.S. § 450.105 (emphasis added). Section 801 of the VSL provides:

The vital statistics records of the department and of local registrars shall not be open to public inspection except as authorized by the provisions of this act and the regulations of the Advisory Health Board. Neither the department nor local registrars shall issue copies of or disclose any vital statistics record or part thereof

created under the provisions of this or prior acts except in compliance with the provisions of this act and the regulations of the Advisory Health Board. When one hundred five (105) years have elapsed after the date of birth or fifty (50) years have elapsed after the date of death, the records shall become public records. To ensure the proper safekeeping of original birth records after one hundred five (105) years and death records after fifty (50) years the records shall be maintained by the State Archives.

35 P.S. § 450.801.

In *Gries v. Pa. Dep't of Health*, the request sought death indices that the Department personnel used to locate death records. OOR Dkt. AP 2011-1124, 2011 PA O.O.R.D. LEXIS 796. Applying various sections of the VSL, the OOR determined that “the [r]equest facially seeks death certificate information that, pursuant to the [VSL], may only be released upon following the course outlined in 35 P.S. § 450.804.” *Gries*, 2011 PA O.O.R.D. LEXIS 796, \*6. As set forth above, Section 801 of the VSL prohibits the disclosure of vital statistic records for an expressly proscribed time period. Section 804 of the VSL delineates procedures and parameters for the release of vital statistics records during the confidentiality period. More specifically, Section 804 provides the following:

[e]xcept for records described in sections eight hundred two and eight hundred three of this act [related to marriage registration, court report records and disclosure of illegitimacy of birth], the department shall issue certified copies of or disclose a vital statistics record or part thereof if an officer of the department designated by the Secretary of Health finds that the applicant therefor has a direct interest in the content of the record and that the information contained therein is necessary for the determination of personal or property rights.

35 P.S. § 450.804; *see also* 35 P.S. § 450.805 (permitting disclosure for research purposes, “subject to strict supervision by the department”); 35 P.S. § 450.806 (permitting disclosure to governmental agencies). Therefore, as in *Gries*, the OOR determines that because the records are made

confidential under the VSL, the Department is not required to provide the death record information prior to it being compiled for the EDDIE database.<sup>4</sup>

### CONCLUSION

For the foregoing reasons, 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.<sup>5</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: September 18, 2020**

*/s/ Jill S. Wolfe*

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APPEALS OFFICER  
JILL S. WOLFE, ESQ.

Sent via email to: Nicole Brambila;  
Christopher Gleeson, Esq.;  
Lisa Keefer

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<sup>4</sup> The OOR need not address the Department's additional reasons for withholding the information.

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