

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

**PUBLICSOURCE and NICOLE  
BRAMBILA,**

**Petitioners**

**v.**

**PENNSYLVANIA DEPARTMENT OF  
HEALTH,**

**Respondent**

**No. 1021 C.D. 2020**

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**BRIEF OF THE PENNSYLVANIA DEPARTMENT OF HEALTH**

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## **STATEMENT OF JURISDICTION**

This Honorable Court has appellate jurisdiction over this matter under section 1301(a) of the Right-to-Know-Law (RTKL), 65 P.S. § 67.1301(a), and section 763(a)(2) of the Judicial Code, 42 Pa. C.S. § 763(a)

## **COUNTER STATEMENT OF THE SCOPE AND STANDARD OF REVIEW**

In an appeal under the Right-to-Know Law (RTKL), 65 P.S. §§ 67.101-67.3104, from a final determination of the Office of Open Records (OOR), the standard of review exercised by this Court is *de novo*.

The scope of review in this case is plenary with respect to both questions of fact and law. This Court reviews the OOR's Final Determinations independently and may substitute its own findings of fact for those of the OOR. *Bowling v. Office of Open Records*, 75 A.3d 453 (Pa. 2013).

## **COUNTER STATEMENT OF QUESTIONS INVOLVED**

- I. Is the requested data excluded from the definition of public records and therefore not subject to disclosure under the RTKL?
- a. Is the requested data confidential under the Disease Prevention and Control Law (DPCL) and therefore not public record as defined at 65 P.S. § 67.102?
  - b. Does Act 77 of 2020 apply to the appeal as it was not in existence at the time of PublicSource's appeal and there is a strong presumption against the retroactive application of statutes?
  - c. Do the requested records relate to the Department's noncriminal investigations and are therefore exempt under 65 P.S. § 67.708(b)(17)?

Not answered below.

Suggested answer: Yes.

- II. Was the OOR correct in holding that releasing the requested data for the years 2019 and 2020 would result in the Department having to create a record contrary to 65 P.S. § 67.705?

Answered below in the affirmative.

Suggested answer: Yes.

- III. Did the OOR properly determine that the requested data for the year 2020 in its current form is confidential under the Vital Statistics Law (VSL)?

Answered below in the affirmative.

Suggested answer: Yes.

## **COUNTER STATEMENT OF THE CASE**

### **Procedural History**

On May 21, 2020, the Pennsylvania Department of Health (Department) received a request for records pursuant to the RTKL from Nicole Brambila, a reporter for PublicSource, the Petitioners in this case (hereinafter collectively referred to as PublicSource). R.001a. Specifically, PublicSource requested:

[C]opies 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.

*Id.*

Between March 16, 2020 and May 29, 2020, the Department's offices were closed due to the COVID-19 pandemic. On June 5, 2020, the Department provided the initial response to PublicSource, securing an extension of time within which to respond in accordance with the RTKL. R.002a-003a. Subsequently, on July 6, 2020, the Department mailed the Final Response to PublicSource, granting the request in part and denying the request in part. R.004a-006a. In its response, the Department provided a link to responsive information made publicly available through the federal Centers for Disease Control and Prevention (CDC) that contains pneumonia

and influenza mortality information.<sup>1</sup> *Id.* As a result of the language of the request, and the nature of the records, the Department included a denial in the final response on the basis that the records sought are protected by confidentiality provisions under both the RTKL and the Disease Prevention and Control Law (DPCL). *Id.*; *See* 65 P.S. §§ 67.708(b)(1)(ii), 67.708(b)(5), 67.708(b)(6), 67.708(b)(17); 35 P.S. § 521.15.

On July 21, 2020, PublicSource appealed the Department’s response to the OOR. R.007a-010a. On appeal to the OOR, the Department provided sworn affidavits in support of its denial of the request. R.025a-035a. The Department further explained on appeal to the OOR that the data sought in PublicSource’s request for the years 2015-2018 were accessible on the Enterprise Data Dissemination Informatics Exchange (EDDIE) – the Commonwealth’s interactive health statistics dissemination tool. R.013a. As of the time the Department files the instant brief, all the requested data is currently accessible on EDDIE except for the data for the year 2020.

#### OOR’s Final Determination

On September 18, 2020, the OOR issued a Final Determination denying PublicSource’s appeal. The OOR, after reviewing the affidavits submitted by the Department, determined that there is no database that currently exists from which

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<sup>1</sup> <https://gis.cdc.gov/grasp/fluview/mortality.html>

the Department could pull the requested information for the years 2019 and 2020. R.042a. Instead, pulling that data would require the Department to correlate and aggregate the information by manually coding and verifying the information from death records to produce the aggregated information. *Id.* The OOR found that this would result in the Department having to create a record which is not required under the RTKL. *Id.*; *see also* 65 P.S. § 67.705.

The OOR further determined that although the Department is not required to create a record, it might be required to release the information not currently accessible via EDDIE in its current form. R.042a. The OOR held that the Department was not required to do so, however, because the information in its current form consists of vital statistics information and is therefore confidential under the Vital Statistics Law (VSL), 35 P.S. §§ 450.101 – 450.1003. R.043a-044a.

On September 28, 2020, PublicSource filed a Petition for Reconsideration before the OOR. R.045a-047a. The OOR denied PublicSource's Petition for Reconsideration on October 15, 2020. R.048a. The OOR determined that PublicSource had failed to show how the data was not confidential under the VSL and that a review of the file did not indicate that the OOR had erred in concluding the information was confidential under the VSL. *Id.* PublicSource subsequently appealed the Final Determination of the OOR to this Honorable Court.

## **SUMMARY OF THE ARGUMENT**

The records requested by PublicSource are not public records subject to disclosure under the RTKL as they are exempt from disclosure under the DPCL. Further, the records requested by PublicSource are also exempt from disclosure under 65 P.S. § 67.708(b)(17) as they are the result of noncriminal investigations conducted by DOH pursuant to its official duties. DOH is required to conduct a searching inquiry into reports of influenza and pneumonia pursuant to the DPCL.

Further, Act 77 of 2020 is not applicable to PublicSource's appeal as it was not in effect at the time of the appeal.

Additionally, in order to produce the records sought by PublicSource for the years 2019 and 2020 DOH would have to create a record, which is not required under 65 P.S. § 67.705.

Even if the Department were required compile the documents for the years at issue in a manner that would be responsive to PublicSource's request, these records are confidential under the VSL, 35 P.S. §§ 450.101 – 450.1003. The information is maintained by the Department as it relates to deaths and as such are vital statistics under the VSL, which are confidential except for three limited exceptions. None of the limited exceptions to the confidentiality provision are applicable in the instant case.

## ARGUMENT

### **I. THE REQUESTED RECORDS ARE NOT PUBLIC RECORDS AS DEFINED BY THE RTKL AND THEREFORE ARE NOT SUBJECT TO DISCLOSURE.**

The RTKL requires a Commonwealth agency to provide “public records” in response to a RTKL request. *See* 65 P.S. § 67.301. Records which are in the possession of the Department are presumed public unless they are exempt under the RTKL or other law, or protected by privilege, judicial order, or decree. 65 P.S. § 67.305. The Department has the burden of proof to demonstrate that a particular record is exempt from disclosure. 65 P.S. § 67.708(b). The Department can establish that a particular record is exempt from disclosure by the preponderance of the evidence. 65 P.S. § 67.708(a)(1).

Under the RTKL, an affidavit or statement made under the penalty of perjury may serve as sufficient evidentiary support. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Cmwlth.), *appeal denied*, 31 A.3d 292 (Pa. 2011); *Moore v. Off. of Open Recs.*, 992 A.2d 907, 909 (Pa. Cmwlth. 2010). In the absence of any evidence that the Department has acted in bad faith, “the averments in [the verification] should be accepted as true.” *McGowan v. Pa. Dep’t of Env’tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Cmwlth. 2014) (citing *Off. of the Gov. v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Cmwlth. 2013)).

**a. The requested records are prohibited from disclosure by the DPCL and therefore are not public records under the RTKL.**

Section 102 of the RTKL excludes from the definition of “public records” records that are exempt from disclosure under “state law or regulation.” *See* 65 P.S. § 67.102. Additionally, the presumption that agency records are “public” does not apply if the records are exempt from disclosure under state law or regulation. 65 P.S. § 67.305(a)(3).

Under the DPCL, the Department is strictly prohibited from releasing *any* information it acquires in the course of furthering the DPCL. Section 15 of the DPCL provides, in relevant part:

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 regulation, to any person who is not a member of the Department or of any local board or department of health except where necessary to carry out the purposes of this Act.

35 P.S. § 521.15 (emphasis added).<sup>2</sup>

To be clear, this confidentiality provision protects any and all records maintained pursuant to the DPCL, except under limited circumstances. *Id.* Since there is an exemption from disclosure under state law, the records are not presumed

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<sup>2</sup> The DPCL was amended in November 2020, after this matter was decided by the OOR. However, the amendment did not substantially alter the confidentiality provision.

to be public. *Id.* at § 67.305(a)(3). Simply put, in this case there is no presumption that the records are public.

The Department is permitted to disclose otherwise confidential information only when it determines that disclosure would further the purpose of the DPCL. 35 P.S. § 521.15. To determine when disclosure is appropriate, the question turns to whether disclosure will aid in the prevention and control of the spread of disease. *Id.*

PublicSource’s May 21, 2020 request sought “...copies of public records that show pneumonia and influenza deaths in Pennsylvania by county and date . . . .”<sup>3</sup> Records responsive to PublicSource’s request are maintained by the Department as a result of investigating diseases or conditions reportable under the Communicable and Non-Communicable Disease Regulations promulgated pursuant to the DPCL. *See* 35 P.S. §§ 521.2(k) (definition of “reportable disease”), 521.3 (relating to responsibility for disease prevention and control), 521.4 (reports) and 521.5 (control measures); *see also* 28 Pa. Code § 27.21a (reporting of cases by health care practitioners and facilities); *see also* Affidavit of Dr. Nambiar, R.025a-028a.

In support of the determination that the records responsive to PublicSource’s request are exempt under the DPCL, the Department submitted the affidavit of Dr.

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<sup>3</sup> On appeal to the OOR, PublicSource asserted the request was for aggregate data; however, such language does not appear in the initial request letter dated May 21, 2020.

Atmaram Nambiar, epidemiologist manager. R.025a-028a. Dr. Nambiar attested, under the penalty of perjury, that the records requested relate to reports of communicable and non-communicable diseases. R.025a. Dr. Nambiar further attested that the records requested are records pertaining to the Department's epidemiological investigation regarding a disease or condition reportable under the DPCL. R.027a. As such, the information requested constitutes records received, created, and maintained by the Department pursuant to its authority under the DPCL and are therefore confidential. *Id.*

As noted above, the Department may only release otherwise confidential information under the DPCL when disclosure will aid in the prevention and control the spread of disease. 35 P.S. § 521.15. Further, Dr. Nambiar attested that the Department determined the release of any additional records to PublicSource, outside of what was already provided in response to the initial request, is not necessary to prevent and control the spread of influenza or pneumonia. R.028a.

In short, the records requested by PublicSource are confidential under the DPCL, and the release of any additional records to PublicSource would not aid in the prevention and control of the spread of influenza or pneumonia. This is established by the attestation of Dr. Nambiar, the epidemiological manager. Such attestation, which is absent of any showing of bad faith on behalf of the Department,

should be accepted as true. *McGowan*, 103 A.3d at 382-83. Therefore, the records requested by PublicSource are expressly exempt from disclosure under the DPCL.

**b. Act 77 of 2020 is not applicable to the appeal as Act 77 was not in effect at the time of appeal and there is a strong presumption against the retroactive application of statutes.**

PublicSource's attempts to raise, for the first time, an argument that disclosure of the requested records is required by Act 77 of 2020. On July 27, 2020 House Bill 2463 became law. *See* Act of Jul. 27, 2020, P.L. 702, No. 77. Act 77 amended the RTKL, providing for certain categories of records to be deemed public during periods of disaster declaration. *See* 71 P.S. §§ 720.301 – 720.306. Of importance here is the fact that Act 77 was not signed into law and effective until July 27, 2020. PublicSource's request for records pursuant to the RTKL was received by DOH on May 21, 2020, and PublicSource appealed DOH's determination to the OOR on July 21, 2020. Both events occurred before Act 77 was signed into law, and there is a strong presumption against the retroactive application of statutes in the Commonwealth. *See* 1 Pa.C.S § 1926 ("No statute shall be construed to be retroactive unless clearly and manifestly so intended by the General Assembly.").

Section 306 of Act 77, entitled, "Applicability," describes the application of Act 77 to requests received by a Commonwealth agency after the disaster declaration of March 6, 2020:

This article shall apply as follows:

(1) For the duration of any disaster declaration or any renewal of a disaster declaration . . . .

(2) In addition to the provisions of paragraph (1), for the disaster declaration issued by the Governor on March 6, 2020, published at 50 Pa.B. 1644 (March 21, 2020), all requests for records received by a Commonwealth agency since March 6, 2020, shall be treated as if the request for the record had been received by the agency on the effective date of this section.

71 P.S. § 720.306. The plain language of this section evidences that the General Assembly “clearly and manifestly” intended Act 77 to apply retroactively to *requests* that were pending at the time of its enactment. However, the Act is silent as to whether the General Assembly intended for the Act to apply to *appeals* that were pending before the OOR at the time of enactment.

When considering the plain language of Act 77 in light of 1 Pa.C.S § 1926, it is apparent that the General Assembly intended for the Act to apply to all *requests* received since March 6, 2020 that had not been responded to or *appealed* as of July 27, 2020; as well as *requests* made subsequent to the effective date of the Act, for the duration of the disaster declaration. Therefore, as PublicSource’s appeal was pending before the OOR when Act 77 was enacted, the Act does not apply retroactively to the instant appeal.

**c. The requested records relate to DOH's noncriminal investigations and are therefore exempt under 65 P.S. § 67.708(b)(17).**

Additionally, the Department denied PublicSource's request for records on the basis that they were not subject to disclosure under the noncriminal investigation exemption under §67.708(b)(17) of the RTKL. Section 708(b)(17) prohibits access to the following records related to an agency's noncriminal investigation: (1) complaints submitted to an agency; (2) investigative materials, notes, correspondence, and reports; (3) a record that includes the identity of a confidential source; (4) work papers; and (5) a record that would disclose the institution, progress or result of an investigation. *See* 65 P.S. § 67.708(b)(17).

For this exemption to apply, an agency must demonstrate that "a systematic or searching inquiry, a detailed examination, or an official probe" was conducted regarding a noncriminal matter. *See Pa. Dep't of Health v. Off. of Open Recs.*, 4 A.3d 803, 810-11 (Pa. Cmwlth. 2010). Further, the inquiry, examination, or probe must be "conducted as part of an agency's official duties." *Id.* at 814; *see also Johnson v. Pa. Convention Ctr. Auth.*, 49 A.3d 920 (Pa. Cmwlth. 2012).

An official probe only applies to noncriminal investigations conducted by agencies acting within their legislatively granted fact finding and investigative powers. *Pa. Dep't of Pub. Welfare v. Chawaga*, 91 A.3d 257 (Pa. Cmwlth. 2014).

The Bureau of Epidemiology (Bureau) is established within the Department to assist in meeting the Department's assigned statutory obligations under the DPCL. In the performance of this duty, the Bureau is responsible for carrying out a multi-faceted program that involves: (1) surveillance for diseases and conditions of public health significance; (2) investigations designed to determine the cause of disease and injury; (3) consultation to health professionals and the public; and (4) the making of science-based recommendations respecting disease control and prevention. R.026a. The Bureau directly conducts or indirectly supervises hundreds of disease outbreak investigations per year. R.027a.

The Department's authority to conduct an epidemiological investigation is found in the DPCL and the Administrative Code of 1929, 71 P.S. § 532(a) and (b). *See Aamodt v. Dep't of Health*, 502 A.2d 776 (Pa. Cmwlth. 1986) (Court affirmed Department's denial of access to records related to a study conducted by the Department following the March 28, 1979 accident at the Three Mile Island Nuclear Generating Station (TMI) to review the effects of the TMI accident on pregnancy outcomes in the vicinity of TMI on the basis that they related to an investigation conducted by the Department.).

The Department is required to conduct a systematic and searching inquiry in response to a report of a communicable or non-communicable disease, this includes reports of pneumonia and influenza. Since this investigatory power of the Bureau is

provided by statute, the DPCL, the investigation is undoubtedly “conducted as part of an agency’s official duties.” *Dep’t of Health*, 502 A.2d at 814.

PublicSource attempts to argue that the Department has failed to prove that there was an “official probe” or other investigation related to influenza and pneumonia death records. PublicSource provides no evidence in support of this argument, however. To the contrary, the Department has shown that pursuant to the DPCL it must undertake a systematic and searching inquiry in response to a report of a communicable or non-communicable disease, which includes influenza and pneumonia. Accordingly, any records the Department maintains pertaining to influenza and pneumonia deaths are records created because of an investigation into the diseases. Therefore, records relating to the request of PublicSource are undoubtedly the result of an investigation by the Department pursuant to its official duties as set forth under the DPCL. As such, the records requested relate to the Department’s noncriminal investigation and are exempt under 65 P.S. § 67.708(b)(17).

## **II. THE OOR PROPERLY DETERMINED THAT REQUIRING DOH TO RELEASE THE 2019 AND 2020 RECORDS WOULD RESULT IN REQUIRING THE DEPARTMENT TO CREATE A RECORD.**

Section 705 of the RTKL provides: “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. An agency cannot be made to create a record that does not exist. *Moore v. Off. of Open Recs.*, 992 A.2d 907, 909 (Pa. Cmwlth. 2010).

On appeal before the OOR, the Department indicated that while the link to the CDC data it provided in its response contains weekly data, EDDIE contains a breakdown of data by county. R.013a. At the time of the appeal to the OOR, no data had yet been compiled and entered into EDDIE for the years 2019 and 2020. As of the filing of the instant brief, the 2019 data is accessible via EDDIE. The 2020 data has not been compiled and entered into the EDDIE database.

To produce the records requested for 2020, the Department would have to correlate and aggregate the information by manually coding and verifying the information from death records to produce the aggregated information. Put simply, there is no database currently in existence that contains the records requested for the year 2020.

This Honorable Court has previously held that “drawing information from a database does not constitute creating a record under the [RTKL].” *Cmwlth. v. Cole*, 52 A.3d 541, 547 (Pa. Cmwlth. 2012) (citing *Gingrich v. Pa. Game Comm’n*, No. 1254 C.D. 2011, 2012 WL 5286229 (Pa. Cmwlth. 2012)). In *Cole*, the request sought various data that was provided to the Department of Environmental Protection (DEP) in rebate applications. Before the OOR, DEP argued that it was not required

to create a record in response to a request where the data sought existed only in an electronic database and was not organized in the manner requested. *Id.*, at 545. DEP further argued that it would have to manipulate the data to provide it to the requester. The OOR granted the appeal and ordered DEP to produce the records. *Id.*, at 546. DEP appealed and argued that it could not be compelled to sift through raw data and organize it in the manner preferred by the requester. *Id.* This Honorable Court rejected DEP's argument and held that:

Requiring the [DEP] to provide these "records" does not violate Section 705 of the [RTKL], which excuses an agency from creating a new record or reorganizing existing records. An agency need only provide the information in the manner in which it currently exists . . . .

[The requester] did not request the creation of a record or a unique format. She requested the [DEP]'s Sunshine Program information and noted that she believed it would be easiest, for all those involved, if the information was provided electronically. The [DEP] must provide [the requester] this information but only in the format in which it is available.

*Id.* 547-48.

Here, unlike in *Cole*, the request does not merely require pulling information from an existing database and providing it to the requester in the format available to agency personnel. Instead, the request would require the Department to collect data, manipulate it, and present it in a different way than it is currently available to Department employees. While querying and pulling data from a database does not

constitute the creation of a record, the Department is not required to “compile, maintain, format or organize . . . record[s] in a manner in which the agency does not currently compile, maintain, format or organize . . . record[s].” 65 P.S. § 67.705.

The OOR recognized the distinction between *Cole* and the case at hand and determined that complying with PublicSource’s request in this instance would constitute and require the creation of a record. To establish that the Department could not simply pull information from a database, the Department presented the affidavit of Audrey Marrocco, the Director of the Bureau of Health Statistics and Registries (BHSR). The BHSR is the custodian of the Commonwealth’s vital statistic records. R.029a. The records request of PublicSource relates, in part, to cause of death statistics which fall under the jurisdiction of the BHSR. *Id.* Pursuant to the authority given to the BHSR under the VSL, the BHSR collects and maintains vital records, including records relating to vital events such as deaths. R.30a; *see also* 35 P.S. §§ 450.201 – 450.202.

The BHSR uses Data Application for Vital Events (DAVE) to maintain an electronic registry database for these vital records. *Id.* Electronic death reports can be entered directly into DAVE using the Electronic Death Registry System (EDRS), but paper reports are also received in the mail and require both manual review and data entry by the BHSR. R.31a. The data entry and review of reports is conducted

over the course of several months before death record data is finalized for statistical health reporting purposes. *Id.*

On an annual basis, the BHSR, with assistance from the Pennsylvania Office of Administration's Office of Information Technology (OAoIT), issues reports through EDDIE. R.32a. Regarding the preparation of information for the EDDIE database, Marrocco attested that:

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>4</sup>

...

20. To obtain consistent ICD-10 coding, and in accordance with national standards, the Bureau shares the 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>5</sup>

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<sup>4</sup> ICD-10 stands for 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>5</sup> On August 19, 2020, the requester argued before the OOR that this raw data would be responsive to the request. However, DOH explained this 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.

25. ... after the ICD-10 codes are completely applied and the aggregate report is generated, the Bureau provides the information to OAOIT to incorporate into EDDIE.

26. The Bureau provides its aggregate data, which includes a breakdown by county, only after the 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 cause of death. A manual nosology coding and verification process would be required.

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

R.032a-034a.

As evidenced by the attestation of Marrocco, compiling this information is unlike the scenario in *Cole* where DEP was able to merely pull this information from a database. Here, DOH cannot simply pull this information from a database. Rather, as further evidenced by the attestation, producing the records for the year 2020 would require DOH to correlate and aggregate the information by manually coding and verifying information from death records to produce the aggregated information.

This distinction is important because, as noted by Marrocco's affidavit, 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. DOH would have to create a record, as the 2020 data has not been compiled, coded, and aggregated for the EDDIE database.

PublicSource argues compliance with the request would not have required DOH to correlate and aggregate death information to create a responsive record. PublicSource asserts that it merely 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.” This argument is misplaced in that it fails to acknowledge that there is no way to provide information on pneumonia and influenza related death statistics for the year 2020 until coding has been applied. As Marrocco noted in her affidavit, the 2020 information will be coded and compiled into EDDIE in 2021, although the release date has not yet been scheduled. R.034a. There are currently no public records for the year 2020 responsive to the request.

PublicSource asserts that it sought data from the raw death information that is sent to the CDC. *See* Petitioner’s Brief, 19. However, it is not possible for DOH to provide this information as it is raw data. This raw data that gets sent to the CDC is not responsive to the request as it contains no data fields. Until the information has the ICD-10 codes applied to it, death records cannot be compiled and aggregated into a report based on cause of death. The raw information sent to the CDC is not responsive to a request for records based on cause of death.

Therefore, the OOR correctly held that production of the requested information for the data not yet accessible via EDDIE would require DOH to create a record, which is not required under 65 P.S. § 67.705.

### **III. THE OOR CORRECTLY HELD THAT THE 2020 REQUESTED RECORDS IN CURRENT FORM ARE VITAL STATISTICS AND ARE CONFIDENTIAL UNDER THE VSL.<sup>6</sup>**

Even if DOH was required compile the documents for the year 2020 in a manner that would be responsive to PublicSource’s request, these records are confidential under the VSL, 35 P.S. §§ 450.101 – 450.1003. The information sought by PublicSource’s request for 2020 currently is only contained in the individual death records. These death records are confidential under the VSL and therefore are exempt from disclosure under the RTKL. *See* 65 P.S. § 67.102.

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**

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<sup>6</sup> The OOR also found that the 2019 information was confidential in its current form under the VSL. However, after the OOR’s Final Determination, the 2019 data was compiled and released on EDDIE. Therefore, any issue regarding the 2019 information is moot.

**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 (emphasis added).

In short, the VSL prohibits the disclosure of vital statistic records for an expressly proscribed time period. Section 804 of the VSL sets out specific procedures and parameters for the release of vital records during the confidentiality period. Specifically, Section 804 provides:

Except for records described in sections eight hundred two and eight hundred three of this act, 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).

The death records are used to create the aggregate data that gets released on EDDIE pursuant to the manner described above, as set out by Marrocco’s affidavit. Once the information for 2020 is compiled and entered into EDDIE, the information is no longer confidential, as that data is no longer maintained as part of a vital

statistic. As mentioned earlier the 2019 data regarding deaths caused by influenza and pneumonia is available on EDDIE. Thus, the only records left to be sought by PublicSource are the 2020 death statistics, which have not yet been compiled and loaded into the EDDIE database.

The records requested for the year 2020 in current form are vital statistics as defined under the VSL, as they are the result of the compilation of data pertaining to deaths. As such, the information is subject to the confidentiality provisions of 35 P.S. § 450.801. Thus, the information can only be released if it meets one of the three criteria set out under the VSL for disclosure, which are otherwise inapplicable here.

PublicSource attempts to argue that the OOR's reliance on the affidavit of Marrocco was erroneous. In support of this argument, PublicSource relies primarily on a prior OOR determination, *Klaproth v. Dep't. of Health*, OOR Dkt. AP 2020-1102.<sup>7</sup> PublicSource misconstrues this Final Determination in its argument. See Petitioner's Brief, 14-15. The OOR's Final Determination in *Klaproth* determined that the Department did not provide sufficient evidence that the records were exempt. However, *Klaproth* involved a request which the Department determined was not sufficiently specific and was therefore unable to identify the responsive records. *Id.* The affidavit in *Klaproth* acknowledged that fact. *Id.*

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<sup>7</sup> This Final Determination is currently on appeal before this Court at Docket No. 1069 CD 2020.

PublicSource misconstrues the OOR's Determination in *Klaproth* by stating that "[t]he OOR held that the affidavit stated that the 'records requested are potentially maintained by the Department as a result of investigating the COVID-19 pandemic.'" *Id.* PublicSource's brief goes on to state that the OOR determined 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.'" *See* Petitioner's Brief, 15 (emphasis added). In essence, PublicSource is arguing that the affidavit in *Klaproth* is the same affidavit in this matter. This argument is wrong for several reasons.

First, the *Klaproth* Final Determination found that the Department's affidavit did not provide sufficient evidence that a noncriminal investigation was conducted. *Klaproth*, OOR Dkt. AP 2020-1102 Pg. 9. Unlike in the *Klaproth* Final Determination, however, the OOR in this case determined that the affidavit was sufficient. PublicSource has misconstrued the facts of *Klaproth* in an attempt to make that case more favorable to its position in the instant case.

This Honorable Court has established that an affidavit may serve as sufficient evidence in support of an exemption from public access. *Sherry*, 20 A.3d at 520-21. Here, Marrocco's statements were contained in affidavit sworn to under the penalty of perjury, and therefore can serve as sufficient evidence in support of exemption of records. Thus, the OOR's reliance on Marrocco's statements was not erroneous.

In short, the records for the information relating to the year 2020 are confidential under the VSL, as the information exists as part of vital statistics. None of the three limited exceptions for disclosure under the VSL have been met here. Therefore, the OOR was correct in holding that releasing the records for the year 2020 in its current form would be a violation of the VSL, as the information is confidential.

**CONCLUSION**

WHEREFORE, for the foregoing reasons, DOH respectfully requests this Honorable Court to affirm the Final Determination of the OOR.

Respectfully submitted,

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Date Filed: 4/19/2021

**CERTIFICATE OF COMPLIANCE**

Undersigned counsel hereby certifies that this filing complies with the provisions of the CASE RECORDS PUBLIC ACCESS POLICY OF THE UNIFIED JUDICIAL SYSTEM OF PENNSYLVANIA that require filing confidential information and documents differently than non-confidential information and documents.

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**CERTIFICATE OF SERVICE**

I hereby certify that I am this day serving the foregoing brief upon the person(s) and in the manner indicated below, which service satisfies the requirements of Pa. R.A.P. 121:

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Date Filed: 4/19/2021