

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Docket No. 1021 CD 2020

PUBLICSOURCE and NICOLE BRAMBILA,
Petitioners,

v.

PENNSYLVANIA DEPARTMENT OF HEALTH,
Respondent.

**BRIEF OF AMICUS CURIAE THE PENNSYLVANIA NEWSMEDIA
ASSOCIATION IN SUPPORT OF PETITIONERS**

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

Respectfully submitted by:

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INTEREST OF AMICUS CURIAE

The Pennsylvania NewsMedia Association (“PNA”) is a Pennsylvania nonprofit corporation with its headquarters located in Harrisburg, Pennsylvania. The Association represents the interests of over three hundred (300) daily and weekly print and digital news organizations and other media organizations across the Commonwealth of Pennsylvania, in ensuring that the press can gather information and report to the public. A significant part of the Association’s mission is to defend the media’s statutory rights of access to public records in Pennsylvania.

The present case raises important issues regarding public access to records under Pennsylvania’s Right to Know Law, including the nature and extent of access to aggregated data. The final determination below negatively impacts the public’s ability to access raw data and electronic records in the possession of government agencies.

Amicus seeks to participate pursuant to Rule 531 of the Pennsylvania Rules of Appellate Procedure to stress the legal and policy considerations that mandate an interpretation of the Right to Know Law in favor of public access and consistent with the law’s expanded access provisions governing aggregated data.

No party, person or entity other than the PNA financed or authored this brief.

SUMMARY OF THE ARGUMENT

The Right to Know Law (“RTKL”) is remedial legislation intended to increase public access to government records and in turn, provide accountability to an informed, actively involved citizenry. In passing the RTKL, the General Assembly recognized that government functions best when it is aided by and accountable to a fully and accurately informed citizenry. In recognition of the law’s intent, the presumption of access guarantees that records held by government agencies are presumed public and must be provided, unless an applicable exemption applies. The presumption of access and the remedial nature of the law are negatively impacted if agencies are permitted to condition access to aggregated data based on the agency’s discretionary timetable for its use. The RTKL is clear: the presumption of access attaches to records at the moment of creation or receipt by agency and an agency must provide access to information in the same form in which it is available to agency personnel at the time of the request.

Further, the law provides expanded access to aggregated data like the records requested in this case. Most of the exemptions in the RTKL do not apply to aggregated data. On the contrary, the law provides expanded access to this category of information because it does not present the same issues that accompany non-aggregated information. The Right to Know Law, and its exemptions, must be

interpreted consistent with its remedial intent and with the statute's plain language providing expanded access to aggregated data.

Additionally, the law must be construed in a manner that allows the public to access and utilize aggregated data in the same manner as government agencies. The law is clear that public information must be provided in the format in which is available to agency personnel, which puts the public on equal footing in understanding the information and obtaining accountability for its use. The fact that an agency makes multiple uses of information on various timelines cannot prejudice the public's ability to obtain the information in accordance with the presumption of access enshrined in the law.

Finally, the Right to Know Law requires a full and accurate evidentiary record in order to preserve the cornerstones and fundamental remedial nature of the law. The record in this case contains contradictory information presented by the Department of Health. Accordingly, the Court should expand the record or remand for further proceedings before the Office of Open Records.

ARGUMENT

Initially, *Amicus* notes that it fully supports the legal arguments put forth by the Petitioners in the Principal Brief and limits its participation to the issues addressed below in compliance with the underlying intent of Pa.R.A.P 531.

I. The Right to Know Law must be construed to provide maximum access to data in the possession of public agencies.

The Right to Know Law² (RTKL) was enacted as remedial legislation intended to improve public access and accountability in the Commonwealth. Bowling v. Office of Open Records, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010) (*en banc*), *aff'd*, 621 Pa. 133, 75 A.3d 453 (Pa. 2013) (holding RTKL “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”); *see also* Office of Dist. Att’y of Phila. v. Bagwell (Phila. DA), 155 A.3d 1119, 1130 (Pa. Commw. Ct. 2017) (“the RTKL is remedial in nature ...”).

Pennsylvania appellate Courts have also recognized that provisions of the RTKL evidence:

“a legislative purpose of expanded government transparency through public access to documents. The Commonwealth Court has aptly recognized that courts should liberally construe the RTKL to effectuate its purpose of promoting “access to official government information in

² 65 P.S. § 67.101, *et seq.*

order to prohibit secrets, scrutinize actions of public officials, and make public officials accountable for their actions.”

Levy v. Senate of Pennsylvania, 65 A.3d 361, 381 (Pa. 2013) (*quoting Allegheny County Dept. of Admin. Services v. A Second Chance, Inc.*, 13 A.3d 1025, 1034 (Pa. Cmwlth. Ct. 2011)).

In addition to the remedial scope of access generally available under the RTKL, the General Assembly also included an expanded access mechanism for aggregated data that requires public access above and beyond that which is normally available under the law. 65 P.S. § 67.708(d).³ This expanded access provision illustrates the clear intent of the General Assembly to remove most of the potential obstacles to accessing data in the possession of public agencies and to affirmatively require access to aggregated data in most circumstances, including the present case.

For the aggregated data provision to maintain its expanded remedial intent, the law must be interpreted to facilitate access to raw data on influenza and pneumonia deaths in the Department of Health’s (DOH) possession.

II. The information requested in this case is “aggregated data” and DOH’s reliance on 708(b) exemptions is unreasonable.

³ This expanded access provision states that “[T]he exceptions set forth in subsection (b) shall not apply to aggregated data maintained or received by an agency, except for data protected under subsection (b)(1), (2), (3), (4) or (5).” 65 P.S. § 67.708(d).

DOH raises several grounds for denial, but its reliance on sections 708(b)(17), (b)(5) and (b)(6) are not based on a reasonable interpretation of the law or the language of the request.

First, the request seeks the number of pneumonia and flu deaths by county and date as reported to the Centers for Disease Control over a designated time frame. R.R. 1a. Although the request did not use the term “aggregated data” the request is clearly seeking access to such information.

“Aggregated data” is defined as “[a] tabulation of data which relate to broad classes, groups or categories so that it is not possible to distinguish the properties of individuals within those classes, groups or categories.” 65 P.S. § 67.102. The number of pneumonia and influenza deaths in Pennsylvania fits squarely within this definition. It is not possible to distinguish properties of individuals within the data and the number of deaths per county in no way identifies the deceased. Additionally, this Court has recognized in the RTKL context that “providing cumulative data from which identifiers are removed allows disclosure in a form that affords sufficient confidentiality to the subjects of the disclosure.” Pa. Dep't of Revenue v. Wagaman, 2021 Pa. Commw. LEXIS 162 (Cmwlth. Feb. 19, 2021) at 23 *quoting* Lyft, Inc. v. Pa. Pub. Util. Comm'n, 145 A.3d 1235 (Pa. Cmwlth. 2016) (*en banc*) (allowing disclosure of trip summaries as aggregate data in trade secret/customer list context).

Moreover, in an abundance of clarity, the Petitioner noted that the request did not seek “any personal information.” R.R. 8a.

Because the requested information is “aggregated data” under the RTKL, DOH cannot rely on section 708(b)(17)⁴, the non-criminal investigation exemption, as a basis for denial. Section 708(d) as noted above, requires expanded access to aggregated data, and clearly states “[T]he exceptions set forth in subsection (b) *shall not apply to* aggregated data maintained or received by an agency, except for data protected under subsection (b)(1), (2), (3), (4) or (5).” 65 P.S. § 67.708(d) (emphasis added). DOH cannot apply the non-criminal investigation exemption to a request for aggregated data because section 708(d) renders it inapplicable under its plain terms. 65 P.S. § 67.708(d).

Similarly, section 708(b)(6), which applies to personal identification information⁵ is also wholly inapplicable to aggregated data under the plain language of section 708(d). Moreover, the definition of aggregated data itself categorically

⁴ 65 P.S. § 67.708(b)(17)

⁵ Section 708(b)(6) only applies to:

“(A) 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.

(B) A spouse's name, marital status or beneficiary or dependent information.

(C) The home address of a law enforcement officer or judge.”

65 P.S. § 67.708(b)(6).

excludes “properties of individuals” and cannot be construed in a manner that would allow section 708(b)(6) to apply to the records requested in this case. 65 P.S. §67.102.

Further, DOH’s reliance on section 708(b)(5) is also misplaced. By its plain terms, section 708(b)(5) is limited to:

“A record of *an individual's* medical, psychiatric or psychological history or disability status, including an evaluation, consultation, prescription, diagnosis or treatment; results of tests, including drug tests; enrollment in a health care program or program designed for participation by persons with disabilities, including vocation rehabilitation, workers' compensation and unemployment compensation; or related information that would disclose *individually identifiable* health information.

65 P.S. § 67.708(b)(5)(emphasis added).

This exemption only applies to records that would disclose “an individual’s” medical record or “individually identifiable health information.” *Id.* Again, the raw number of flu and pneumonia deaths does not trigger the exemption because it does not disclose an individual’s medical record nor does it disclose health information for any identifiable individual.

Finally, it is worth noting that DOH’s reliance on these exemptions is inconsistent with the plain letter and intent of the RTKL and amounts to an unreasonable interpretation. As remedial legislation, the RTKL exemptions must be narrowly construed. Bowling v. Office of Open Records, 990 A.2d 813 (Pa. Cmwlth. 2010). Despite this requirement, DOH’s position does the opposite by seeking expansive

interpretations of RTKL exemptions that would negate the plain, limiting terms of the law and erect unjustifiable barriers to access. An agency's response must be firmly grounded in the presumption of access enshrined as the cornerstone of the law to avoid unwarranted limits on public access and accountability for basic agency function. DOH's construal of and reliance on these exemptions is not based on a reasonable interpretation of the request itself or the law.

III. The RTKL requires agencies to provide records in the manner in which they exist.

The law is clear that "[A] 'record' subject to disclosure under the RTKL includes information *regardless of form.*" Commonwealth v. Cole, 52 A.3d 541, 547(Pa. Cmwlth. 2012) (emphasis added); see also Kutztown Univ. of Pa. v. Bollinger, 217 A.3d 931, 2019 Pa. Commw. Unpub. LEXIS 521, 2019 WL 4390513. Moreover, while section 705 of the RTKL "excuses an agency from creating a new record or reorganizing existing records," "[a]n agency need only provide the information *in the manner in which it currently exists...*" Cole at 547 (emphasis added). This Court has held that "while an agency is not required to compile information in a certain way, the information contained in databases that is subject to disclosure under the [RTKL] must simply be provided to request[ers] in the same format that it would be available to agency personnel." Cole at 549 & n.12.

DOH gathers information about deaths and uses that information for various purposes, including supplying death data daily to the CDC. R.R. 33a. The Petitioner

expressly sought access to the pneumonia and flu death data provided to the CDC. The fact that DOH uses this raw data for other purposes is largely irrelevant. The data DOH gathers from various sources and provides to the CDC must be made available to the Petitioner in the same form in which it is available to DOH personnel.

Moreover, DOH's reliance on application of ICD-10 codes and its later use of the data as part of EDDIE system as a basis for denial ignores the foundational requirement of the law. The data becomes presumptively public when it comes into the possession, custody or control of the DOH, and the law requires public access in the absence of an applicable exemption or affirmative confidentiality requirement in other law. 65 P.S. § 67.305. It bears noting that the burden of proving an exemption to disclosure falls squarely on the agency. Pa. Dep't of Revenue v. Wagaman, 2021 Pa. Commw. LEXIS 162, at 10 (Cmwlth. Feb. 19, 2021) *citing* Jones v. Off. of Open Records, 993 A.2d 339 (Pa. Cmwlth. 2010). As explored more fully above, the RTKL does not provide an applicable exemption and DOH has not met the burden of proof imposed by law.

Additionally, the Petitioner's referral to the EDDIE system⁶ on appeal cannot be interpreted as limiting the request to information available within the EDDIE framework. This Court has held when "a Petitioner suggests a format or provides

⁶ R.R. 8a

examples of the records sought in a certain format” it “does not mean that a Petitioner seeks special compilation.” Gingrich v. Pa. Game Comm'n, 2012 Pa. Commw. Unpub. LEXIS 38 (Cmwlth. Jan. 12, 2012). Further, Petitioners “may provide suggestions or examples in order to better inform an agency about the information requested...” Id. The Petitioner’s reference to the EDDIE system was purely illustrative and cannot be used to narrow the request or limit DOH’s responsibilities under the law.

Further, the data does not trigger confidentiality provisions in other law, including the Vital Statistics Law (VSL). 35 P.S. §§ 450.804-450.806. Raw death data sought in this case is purely factual and distinct from records from which it is culled and into which it is incorporated under the VSL. For example, when a doctor reports a flu death, the fact that there was a flu death becomes a raw number, and it remains separate and distinct from the specific records from whence it was divined or into which it has been or will be compiled. The request only seeks access to the raw data DOH extracts from various sources and provides to the CDC, it does not seek access to specific records DOH creates with raw data or the comprehensive records from which it is derived.

IV. The Court should expand the record or remand the case to the Office of Open Records for further evidentiary proceedings.

With regard to confidentiality provisions in other law and the evidence that must be analyzed, this case is similar to the dispute recently resolved by this Court

in Pa. Dep't of Revenue v. Wagaman, 2021 Pa. Commw. LEXIS 162 (Cmwlth. Feb. 19, 2021). In Wagaman, this Court granted access to cumulative tax revenue records broken down by type of tax, showing tax totals for each type of tax in the Allentown Neighborhood Improvement Zone (NIZ). The Department of Revenue had denied access to this information based on broad confidentiality provisions found in the Fiscal and Tax Codes⁷ which are similar to the broad confidentiality provisions in the Vital Statistics Law. See 72 P.S. §731 (The Fiscal Code); *see also* Sections 274, 353(f) and 408(b) of the Tax Code, 72 P.S. §§7274, 753(f) and 7408(b). In evaluating broad confidentiality provisions and granting access, this Court noted that “[A]scertaining the type of information at issue is essential to analyzing its public or exempt status under the RTKL.” Wagaman at 11. Amicus respectfully suggests that such a detailed analysis of the information in this case has not occurred.

For example, DOH states that “the data is not broken down by county *or disease* until it is entered into the EDDIE system” and therefore cannot be provided outside the disclosure timeframes under the EDDIE system. R.R. 33a-34a (emphasis added). This statement is belied by the fact that raw death data DOH provides to the

⁷ The various provisions of the Tax and Fiscal Code cited by the Department of Revenue say contain essentially the same broad confidentiality provision:

“Any information gained . . . as a result of any returns, investigations, hearings or verifications required or authorized under the statutes of the Commonwealth imposing taxes or . . . providing for [their] collection. . . shall be confidential except for official purposes”

Wagaman at 16.

CDC every day contains information about specific causes of death. A cursory review of the CDC website reveals that the data contains discernable pneumonia and flu death counts and the CDC website updates this information on a weekly basis.⁸ It is illogical to suggest that data provided to and made public by the CDC is non-public from the Pennsylvania agency that supplied it. This inconsistency also illustrates a fundamental flaw in the record that should be explored so that the Petitioner and the Court can fully and accurately ascertain the nature of the records.

Finally, based on the above inconsistency, it is not clear how pneumonia and flu death data is organized in the daily CDC data or whether there is a means to distinguish it by county or date. But the CDC website makes clear that information responsive to the request, i.e. pneumonia and flu death data, is provided by DOH. Similarly, it is not clear whether the requested data is comingled with non-responsive data as DOH suggests, but that does not permit DOH to deny access. As the Office of Open Records has noted repeatedly, there is no exemption under the RTKL which permits an agency to deny access to public information in a responsive record simply because the information is non-responsive. See e.g. Hoyer v. York County, OOR Dkt. AP 2019-1692, 2019 PA O.O.R.D. LEXIS 1387; *see also* Kerr v. North Huntingdon Twp., OOR Dkt. AP 2014-1080, 2014 PA O.O.R.D. LEXIS 1031. The fact that pneumonia and flu death data may be comingled with non-responsive public

⁸ See <https://gis.cdc.gov/grasp/fluview/fluportaldashboard.html>, last visited March 13, 2021.

data, or that the data may be difficult to distinguish into categories, does not render it non-public. DOH must provide access to the information “in the same format that it would be available to agency personnel” and allow the Petitioner to review it. Cole, *supra* at 549.

CONCLUSION

For all the foregoing reasons, *Amicus Curiae* 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 to the OOR for a full evidentiary hearing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this filing complies with the word count limit set forth in Pennsylvania Rule of Appellate Procedure 2135(a)(1). Based on the Microsoft Word program word count function, the body of the brief contains less than 3,300 words.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Amicus 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.

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of March 2021, I caused a true and correct copy of the foregoing Amicus Brief to be served on the following, as required by Pennsylvania Rule of Appellate Procedure 121:

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