

IN THE COMMONWEALTH COURT
of PENNSYLVANIA

NO. _____

CENTER FOR INVESTIGATIVE REPORTING
(D/B/A/ REVEAL),
Petitioner,

v.

PENNSYLVANIA DEPARTMENT OF HEALTH
Respondent.

PETITION FOR REVIEW

This matter arises under the Pennsylvania Right to Know Law (“RTKL”). 65 P.S. § 67.101 *et seq.* The Center for Investigative Reporting, doing business as Reveal (hereinafter “Reveal”), petitions for review of the final determination of the Pennsylvania Office of Open Records (“OOR”) in RTKL appeal number 2022-2282. In support of this petition, Reveal avers as follows.

Jurisdiction

1. Appellate jurisdiction lies with this Honorable Court pursuant to 65 P.S. § 67.1301(a), 42 Pa.C.S. § 763(a)(2), and Rule 1511 of the Pennsylvania Rules of Appellate Procedure.

Parties

2. Reveal is a nonprofit investigative news organization that publishes a weekly radio show on 600+ stations across the country and has received multiple awards for its reporting.

3. Respondent is the Pennsylvania Department of Health (“DOH,” the “Health Department,” or the “Department”), a Commonwealth agency subject to the RTKL. 65 P.S. §§ 67.102, 67.303.

Background

4. On August 4, 2022, Reveal submitted an RTKL request (the “Request”) to the Health Department.

5. The Request sought four categories of “[a]ggregate data held by the Bureau of Epidemiology regarding cases of neonatal abstinence syndrome (NAS) reported to the Bureau of Epidemiology in the years 2020 and 2021.” Specifically, the Request sought:

[Item 1] Data indicating the number of reported NAS cases, on an aggregate statewide basis;

[Item 2] Data for cases referred to ChildLine, the substance(s) to which infants were exposed, on an aggregate statewide basis;

[Item 3] Data indicating the number of Plans of Safe Care initiated, the substance(s) to which infants were exposed, on an aggregate statewide basis; and

[Item 4] Data indicating to whom infants were discharged, the substance(s) to which infants were exposed, on an aggregate statewide basis.

6. On August 12, 2022, the Health Department partially granted and partially denied the Request.

7. The Health Department directed Reveal to one record responsive to the Request: a public report entitled “Neonatal Abstinence Syndrome: 2020 Report” (the “NAS 2020 Report”). The NAS 2020 Report contains the data sought by Request Item 1 for the year 2020; it does not contain the data sought by Request Items 2, 3, or 4 for the years 2020 or 2021.

8. The NAS 2020 Report specifies that individual NAS cases are recorded and reported via the Department’s internet case management system (“iCMS”); hence, the Department possesses data responsive to Request Items 2, 3, and 4.

9. Having directed Reveal to the NAS 2020 Report, the Health Department stated that “no additional responsive records exist within the Department’s custody, possession, or control.”

10. On September 28, 2022, Reveal appealed the partial denial of the Request to the OOR.¹

11. On February 6, 2023, the OOR issued a final determination affirming the partial denial of the Request.

¹ Reveal did not appeal the Health Department’s nondisclosure of responsive records concerning 2021 data; thus, only responsive data from 2020 is now at issue.

12. A true and correct copy of the OOR's final determination is attached as Exhibit A.

13. After receiving substantially identical public records requests from Reveal, 17 other states have provided comparable stratified NAS data by extracting and compiling the requested information from existing state databases. These states include Alabama, Arizona, Colorado, Connecticut, Georgia, Kentucky, Louisiana, Maine, Maryland, Mississippi, Nebraska, New Mexico, New Jersey, Ohio, Oklahoma, Rhode Island, Virginia and Washington DC. In these jurisdictions, producing the data pursuant to Reveal's request did not constitute the creation of a new record.

14. Courts across the country have rejected the theory that the extraction and compilation of data housed in a government database constitutes the creation of a new record. To hold otherwise would deny requesters access to responsive information in existence at the time of their requests. *See, e.g., Dep't of Env't Prot. v. Cole*, 52 A.3d 541, 547 (Pa. Commw. Ct. 2012) ("[D]rawing information from a database does not constitute creating a record under the Right-to-Know Law."); *Long v. United States Immigr. & Customs Enf't*, 2020 WL 5994182, at *12 (N.D.N.Y. Oct. 9, 2020) ("[W]riting new, complex queries, or even the creation of new computer programming, may be required under FOIA if all the query or program does is 'produce[] specific requested fields or records contained within

a well-defined database structure,’ or extract, compile and sort pre-existing data.”) (quoting 6 C.F.R. § 5.4(i)(2)(ii)); *New York Times Co. v. Fed. Commc’ns Comm’n*, 457 F. Supp. 3d 266, 277 (S.D.N.Y. 2020) (explaining that writing code for a query based on the structure of the database is “closer to an automated search for responsive records than a scavenger hunt for disparate information”); *ACLU Immigrants’ Rts. Project v. United States Immigr. & Customs Enft*, 58 F.4th 643, 659 (2d Cir. 2023); *Ctr. for Investigative Reporting v. U.S. Dep’t of Just.*, 982 F.3d 668, 674 (9th Cir. 2020).

Determination for Which Review is Sought

15. Petitioners seek review of the OOR’s final determination of February 6, 2023.

Objections to the Determination

16. The OOR erred in concluding that the Health Department had met its burden of establishing that it lacked records responsive to the Request (excepting the NAS 2020 Report).

17. In particular, the OOR erred in concluding that the Health Department was not required to produce additional responsive data stored in the Health Department’s iCMS because such production would constitute the creation of a new record.

Relief Sought

WHEREFORE, Reveal respectfully requests that this Honorable Court:

- reverse the OOR's final determination of February 6, 2023; and
- order the Health Department to produce responsive data stored in the iCMS database (redacted to the extent necessary to prevent disclosure of personally identifying information).

Respectfully submitted,

Dated: March 8, 2023

/s/ Paula Knudsen Burke

Paula Knudsen Burke
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
PA ID: 87607
PO Box 1328
Lancaster, PA 17608
pknudsen@rcfp.org

Victoria D. Baranetsky*
THE CENTER FOR INVESTIGATIVE
REPORTING
1400 65th, Ste. 200
Emeryville, CA 94608
vbaranetsky@revealnews.org
*Application forthcoming for ad-
mission *pro hac vice*

Counsel for Reveal

**CERTIFICATES OF SERVICE AND
COMPLIANCE WITH PUBLIC ACCESS POLICY**

I hereby certify that I have served the foregoing document and all attachments upon the persons listed on the date and in the manner indicated below, which satisfies the requirements of Pa. R.A.P. 121:

Notification by email and first class mail addressed as follows:

Anna LaMano
Assistant Counsel, Office of Legal Counsel
Department of Health
825 Health and Welfare Building 625 Forster Street
Harrisburg, PA 17120
alamano@pa.gov

Lyle Hartranft
Appeals Officer
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101
lhartranft@pa.gov

I further certify 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.

Dated: March 8, 2023

/s/ Paula Knudsen Burke
Paula Knudsen Burke
PA ID: 87607

Exhibit A



FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
SHOSHANA WALTER AND REVEAL	:	
NEWS FROM THE CENTER FOR	:	
INVESTIGATING REPORTING,	:	
Requester	:	Docket No: AP 2022-2282
	:	
v.	:	
	:	
PENNSYLVANIA DEPARTMENT OF	:	
HEALTH,	:	
Respondent	:	

FACTUAL BACKGROUND

On August 5, 2022,¹ Shoshanna Walter and Reveal News from the Center for Investigative Reporting (collectively “Requester”) submitted a request (“Request”) to the Pennsylvania Department of Health (“Department”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking:

Aggregate data held by the Bureau of Epidemiology regarding cases of neonatal abstinence syndrome (NAS) reported to the Bureau of Epidemiology in the years 2020 and 2023, including:

1. Data indicating the number of reported NAS cases, on an aggregate statewide basis;
2. Data for cases referred to ChildLine, the substance(s) to which infants were exposed, on an aggregate statewide basis;
3. Data indicating the number of Plans of Safe Care initiated, the substance(s) to which infants were exposed, on an aggregate statewide basis; and

¹ The Request is dated August 4, 2022 but was not received by the Department until August 5, 2022.

4. Data indicating to whom infants were discharged, the substance(s) to which infants were exposed, on an aggregate statewide basis.

Pursuant to 71 P.S. § 720.305, Reveal is seeking very limited data that the Bureau uses and/or maintains “for any rules, policies or actions taken ... in relation to [the] disaster declaration” regarding the opioid epidemic, 71 P.S. § 720.305(1), and/or such “quantitative or predictive modes based on the data collected,” 71 P.S. § 720.305(3), regarding NAS....

As is clear from the request above, Reveal is not requesting any confidential or protected health information (PHI) and/or personally-identifiable information (PII), including (but not limited to): the treating facility; the mother’s and infant’s name; the mother’s and infant’s date of birth; the mother’s address, race, and ethnicity; the infant’s gender, birth weight, gestational age, and neonatal scoring information; the principal source of payment; the infant’s medications and/or therapy; laboratory testing performed; mother’s discharge plan, individual opioid use history and postpartum treatment; as well as any information about prenatal visits.

On September 12, 2022, following a thirty-day extension during which to respond, 65 P.S. § 67.902(b), the Department granted the Request in part, providing a weblink to 2020 data responsive to the Request.² The Department denied the Request in part, arguing that it “does not have any specific policies or actions specific to the disaster declaration.”

On September 28, 2022, the Requester appealed to the Office of Open Records (“OOR”), challenging the denial and stating grounds for disclosure.³ Specifically, the Requester argues that the Department “failed to prove a reasonable search was done and that records responsive to [Items 2-4] do not exist[,] unjustifiably refused to provide the requested data from existing records [and] redacting the requested information from existing case reports would not constitute the ‘creation of a record’ under the RTKL.”⁴ The OOR invited both parties to supplement the record and

² The Department indicated on what page of the Report the responsive items to the Request could be found. A copy of the report was attached as Exhibit C to the appeal.

³ The Requester granted the OOR additional time to issue a final determination. *See* 65 P.S. § 67.1101(b)(1) (“Unless the requester agrees otherwise, the appeals officer shall make a final determination which shall be mailed to the requester and the agency within 30 days of receipt of the appeal filed under subsection (a).”).

⁴ The Requester indicates that Item 1 “was fulfilled by data provided in [the] report....”

directed the Department to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On October 12, 2022, the appeal was stayed upon agreement of the parties.

On December 29, 2022, the Department submitted a position statement arguing that it conducted a good faith search, “provided all responsive aggregated data for 2020 [, and that it] does not possess additional responsive aggregated data.” The Department further argues that “providing the specific data correlation sought by Requester would require the creation of a new record.”⁵ In support of its arguments, the Department submits the attestation of Tara Trego (“Trego Attestation”), Director of the Department’s Bureau of Family Health, and Danica Hoppes (“Hoppes Attestation”), Legal Administrative Officer and Open Records Officer for the Department. The Department also submitted, as Exhibit B, the attestations of Dr. Lisa McHugh, Assistant Director of the Department’s Bureau of Epidemiology (“Bureau”), and Zhen-qiang Ma, Epidemiologist, who is familiar with the information implicated in this matter and the methods of data collection and storage.⁶

On December 29, 2022, the Requester submitted a position statement arguing, among other things, that the “data requested is not a request for new information but simply a request for disclosure of information already contained in [the Department’s] database.”

LEGAL ANALYSIS

The Department is a Commonwealth agency subject to the RTKL. 65 P.S. § 67.301. Records in the possession of a local agency are presumed to be public, unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. §

⁵ The Department argues that the “creation of a new record” has been addressed in *Walter v. Pa. Dep.t of Health*, OOR Dkt. AP 2022-1553, 2022 PA O.O.R.D. LEXIS 1912 (*Walter I*).

⁶ The attestations in Exhibit B, including an additional attestation from Tara Trego, were submitted in *Walter I*.

67.305. As an agency subject to the RTKL, the Department is required to demonstrate, “by a preponderance of the evidence,” that records are exempt from public access. 65 P.S. § 67.708(a)(1). Preponderance of the evidence has been defined as “such proof as leads the factfinder ... 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)).

1. The Department proved it conducted a good faith search and that no additional records responsive to Items 2-4 of the Request exist.

The Department contends that it provided records responsive to Items 2-4 of the Request and that it has no additional records in its possession that are responsive to the Request. In support of that position, the Hoppes Attestation states, in relevant part, as follows:

1. On August 5, 2022 [Hoppes] received this [R]equest. That same day reviewed it, logged it, and circulated the entire [R]equest to Department personnel who [Hoppes] believed most likely to possess responsive records.
2. This initially included personnel from the Bureau of Epidemiology as well as members of the office Legal Counsel.
3. [Hoppes] attached a copy of the [R]equest, and included the following in the email: [...]
4. The week after the email was circulated, a recipient from the [Bureau] raised points for discussion and also suggested that the email be forwarded to Department personnel within the Bureau of Family Health since the NAS reporting had been transitioned to that Bureau.
5. Several individuals from the Bureau of Family Health then joined in on the discussion regarding interpretation of the [R]equest and potentially responsive records.
6. Once a consensus was reached about the scope of the [R]equest and the potentially responsive records in the Department’s possession, [Hoppes] was advised by the Deputy Secretary for Health Promotion and Disease Prevention within the Bureau of Family Health that the 2021 data was not finalized.

7. [Hoppes] reviewed responses to the above-described email as well as the records provided in response to this email.
8. [Hoppes] was advised that the 2020 NAS Annual Report of the Bureaus of Family Health and Epidemiology (Annual Report) contained the only responsive records in the Department's possession.
9. It was further explained that the data contained in the Annual Report was "not stratified to include to substances the infant was exposed to."
10. There was no indication that any additional records existed and none of the recipients of the email suggested additional custodians of records beyond those discussed above.
11. Accordingly, based on the inter-bureau discussions and information provided to [Hoppes], [Hoppes] concluded that the Annual Report was the only responsive record in the possession of the Department.
12. [Hoppes] included a link to the Annual Report in the Department's final response to the RTKL request, which [Hoppes] sent to the [R]equester on September 12, 2022. [Hoppes] also explained that the 2020 data was not stratified in the manner requested, and that the 2021 data was not finalized was therefore not available.
13. [Hoppes has] no information or reason to believe that the Department is possession of responsive records beyond those already provided to the [R]equester.

The Trego Attestation states, in relevant part:

1. The 2020 NAS Annual report constitutes the aggregated version of the data sought by the [R]equester, i.e., it provides the total number of cases, the total number of plans of safe care initiated, the total number of ChildLine referrals, and the total number of each category of discharge plan. The Bureau does not have additional aggregated data reflecting these categories of information.
2. The 2020 NAS Annual report is the only record in the Bureau's possession reflecting the aggregated data requested for 2020.
3. Other than the 2020 NAS Annual Report, the Bureau does not maintain an aggregated or de-identified set of data containing the requested information for the year 2020.

Under the RTKL, an attestation 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.

Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any evidence that the Department has acted in bad faith or that additional responsive records exist, “the averments in [the supplemental attestation] should be accepted as true.” *McGowan v. Pa. Dep’t of Env’tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

In response to a request for records, “an agency shall make a good faith effort to determine if ... the agency has possession, custody or control of the record[.]” 65 P.S. § 67.901. While the RTKL does not define the term “good faith effort,” in *Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr.*, the Commonwealth Court stated:

As part of a good faith search, the open records officer has a duty to advise all custodians of potentially responsive records about the request, and to obtain all potentially responsive records from those in possession... When records are not in an agency’s physical possession, an open records officer has a duty to contact agents within its control, including third-party contractors ... After obtaining potentially responsive records, an agency has the duty to review the records and assess their public nature under ... the RTKL.

185 A.3d 1161, 1171-72 (Pa. Commw. Ct. 2018) (citations omitted), *aff’d*, 243 A.3d 19 (Pa. 2020). An agency must show, through detailed evidence submitted in good faith from individuals with knowledge of the agency’s records, that it has conducted a search reasonably calculated to uncover all relevant documents. *See Burr v. Pa. Dep’t of Health*, OOR Dkt. AP 2021-0747, 2021 PA O.O.R.D. LEXIS 750; *see also Mollick v. Twp. of Worcester*, 32 A.3d 859, 875 (Pa. Commw. Ct. 2011).

Here, the Hoppes Attestation states that the Department’s Open Records Officer circulated an email of the Request to relevant Department personnel, including personnel from the Bureau of Epidemiology as well as members of the Legal Counsel. The Hoppes Attestation further states that records that were deemed responsive were provided to the Requester and that “[t]here was no

indication that any additional records existed and none of the recipients of the email suggested additional custodians of records beyond those discussed [in the Hoppes Attestation].” Therefore, a review of the evidence, including the “Neonatal Abstinence Syndrome: 2020 Report” reflecting the responsive data to Items 2-4 (page 34 of the Report)⁷ and the Department’s Open Records Officer’s attestation stating that records responsive to the Request have been provided and that no further records responsive to the Request exist within the possession of the Department, the Department has met its burden that no additional records responsive to the Request exist within its possession, custody or control. *Hodges*, 29 A.3d at 1192; *see also Pa. Dep’t of Health v. Mahon*, __A.3d__, (Pa. Commw. Ct. 2022) (an affidavit of open records officer who was advised that no records exist was found sufficient to prove nonexistence of records).

2. The Department is not required to create a record that does not exist

The Requester asserts that additional information responsive to Items 2-4 already exists because “the Department publicly acknowledged it collects data submitted by individual health facilities reporting all confirmed and probable NAS cases in infants across the state of Pennsylvania and ... this information is compiled and stored on an electronic database that the Department refers to as its Internet Case Management System (iCMS).” The Department maintains that it “does not possess responsive aggregated data correlating individual substance(s) to which infants were exposed for each of the subparts of the [R]equest beyond that contained in the NAS Annual Report.

Under the RTKL, an agency is not required to create a record which does not otherwise exist. *See* 65 P.S. § 67.705; *see also 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

⁷ Information on substances an infant was exposed to can be found on page 29 of the Report.

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).

The Commonwealth Court has held that while an agency cannot be made to create a record that does not exist, “drawing information from a database does not constitute creating a record under the Right-to-Know Law.” *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010); *see also Commonwealth v. Cole*, 52 A.3d 541, 549 (Pa. Commw. Ct. 2012)); *Gingrich v. Pa. Game Comm’n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38, *21 (Pa. Commw. Ct. 2012) (“[P]ulling information from a database is not the creation of a record”). “To hold otherwise would encourage an agency to avoid disclosing public records by putting information into electronic databases.” *Cole*, 52 A.3d at 549. “An agency need only provide the information in the manner in which it currently exists.” *Id.* at 547. 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.” *Id.* at 549 n.12.

In support of its argument that it would be required to create a record, the Trego Attestation states, in relevant part, as follows:

6. With respect to the information requested in [Items 1-4] of the [R]equest for 2020, the aggregated statewide data reflecting the number of neonatal abstinence syndrome (“NAS”) cases, the number of cases referred to ChildLine, number of Plans of Safe Care initiated and data regarding discharge plans can be found in the 2020 NAS Annual Report.

7. Because this is where the responsive aggregated data are located, [Trego] advised the [Departments AORO] to provide the 2020 NAS Annual Report in response to the above-referenced RTKL [R]equest.
8. Any information beyond the NAS Annual Report, specifically including the data underlying the reports that are maintained by the Department (NAS Database) are not aggregated but rather consist of individual case reports of NAS.
- ...
11. Beginning on January 1, 2020, NAS case report data have been reported to the Bureau of Family Health, where case data are integrated with newborn screening data reported to the Bureau, in an electronic database known as the internet case management system (iCMS).
12. In response to the above-referenced [R]equest, the Department provided the 2020 NAS Annual Report, prepared jointly by the Bureaus of Family Health and Epidemiology.
13. The 2020 NAS Annual Report contains aggregated, de-identified statistics generated using the raw, self-reported data submitted by reporting facilities in the attached form, referred to as the iCMS NAS report form
14. The iCMS NAS case report form required highly granular, patient-specific information including mothers' and infants' full names, sex, dates of birth, medical tests performed, test results, symptoms, treating physician information, and information about discharge plans.
15. The Bureau of Family Health receives the completed iCMS NAS case report forms containing data for each of these fields.
16. AS a result, the NAS dataset in iCMS consists of thousands of individual patient records consisting of detailed biographical, demographic, and medical information gleaned from individual iCMS NAS case report forms.
17. In order to provide the Requester with data that are more granular than what is contained in the 2020 NAS Annual Report while still upholding patient confidentiality, records in the NAS database would have to be completely reconfigured. This would amount to generating new custom dataset that would ultimately omit or redact much of the information that is collected on the NAS case report form and maintained by the Bureau within the Department.
18. To provide the underlying data rather than the requested statewide aggregated data would require the Department to create, compile, or reorganize records in

a format that the Bureau does not currently maintain for purposes of carrying out its public health functions.

19. While the Bureau of Family Health uses NAS database to generate Annual Reports that further public health objectives, the instant [R]equest asks the Bureau to generate an *additional* custom record that provides a greater level of detail than is necessary to meet the Department's public health responsibilities. The aggregated data have already been provided in the form of the 2020 NAS Annual report; providing the underlying facility-submitted data as simply is not possible without disclosing the detailed biographical, demographic and medical information contained in the iCMS NAS case report form.

...

24. The [R]equester now asks that NAS data for 2020 be correlated in a manner that is not presently done, specifically the [R]equester would like each of the three categories of requested information to be further broken down by specific substance(s) to which the infant(s) were exposed.
25. The Bureau does not presently correlate the NAS data in that manner. An accurate correlation of these categories of information is not currently necessary for purposes of the Department's designated public health response to the reports of NAS within the Commonwealth. All NAS probable and confirmed cases reported to the Bureau were exposed to an opioid, barbiturate, benzodiazepine, or some combination of the same, consistent with the Department's NAS case definition. While other substances may be reported on the NAS case report form, exposure to those substances is not further verified. Another limitation of the data is that data are self-reported by hospitals and information received by the Bureau of Family Health regarding notifications to Childline and initiation of plans of safe care has not been verified by the Department of Human Services.
26. The requested data stratified by substances of exposure could not be pulled directly from the existing NAS database; the Bureau would have to create a custom query to be run on the reports of all 1,825 probable and confirmed NAS cases reported to the Department with the parameters requested.
27. Providing aggregate results to correlate to the substances to which infants were exposed, as requested in [Items 2-4] is also complicated by the fact that frequently more than one substance is reported.⁸

⁸ Under the RTKL, an affidavit may serve as sufficient evidentiary support. *Sherry*, 20 A.3d at 520-21; *Moore*, 992 A.2d at 909.

Here, the Trego Attestation demonstrates that the “requested data stratified by substances of exposure could not be pulled directly from the existing NAS database [...]” and to do so the “Bureau would have to create a custom query [...]” Thus, the Department would be required to generate a custom dataset, which is not simply drawing information from its database. Accordingly, the Department is not required to create a record which does not otherwise exist. *See* 65 P.S. § 67.705.

CONCLUSION

For the foregoing reasons, the 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. 65 P.S. § 67.1303. 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.⁹ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: February 6, 2023

/s/ Lyle Hartranft

APPEALS OFFICER
LYLE HARTRANFT, ESQ.

Sent via portal to: Shoshana Walter; Dara Gray; Danica Hoppes, AORO;
Anna LaMano, Esq.

⁹ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).