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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

THE CENTER FOR INVESTIGATIVE REPORTING D/B/A REVEAL, **Petitioner** **v.** **PENNSYLVANIA DEPARTMENT OF HEALTH,** **Respondent**	**No. 227 C.D. 2023**

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. Did the Office of Open Records ("OOR") correctly find that the Department of Health ("Department") did not possess the requested aggregated data and was not required to create a new record?

Answered below in the affirmative.

Suggested answer: Yes.

II. Is the Center for Investigative Reporting ("Center") entitled to attorney fees and costs where the Department was victorious before the OOR?

Not answered below.

Suggested answer: No.

COUNTER STATEMENT OF THE CASE

This appeal involves data the Department receives on forms containing, *inter alia*, personal health information and personal identifying information. R.R 085a; 091a.

Each year, the Department issues an annual report reflecting data detailing neonatal abstinence syndrome[1] ("NAS") cases to strengthen state and local response to NAS by providing deidentified aggregate data to describe the burden of NAS in Pennsylvania, identify high incidence locations for targeted intervention and reduce the statewide incidence of NAS. R.R. 132a. Key findings from the annual report may also inform clinical care of newborns with NAS and discharge and referral practices for newborns and their families in hospitals across the state. R.R. 019a.

Included in this report is a diverse set of data that deidentifies patient information. To capture this information, the Department receives case data inputted on forms from hospitals and birthing places. R.R. 085a. Once received, the Department must create a separate program to extract the data. R.R. 087a. To create the annual report, the Department must create a record.

[1] Neonatal Abstinence Syndrome is withdrawal experienced by a newborn due to prenatal substance exposure.

Factual & Procedural History

This appeal arises from the Department's partial denial of the Center's August 5, 2022 request for records under the RTKL, 65 P.S. § 67.101, *et seq*., docketed at DOH-RTKL-MSC-166-2022, seeking:

> ***[-A]ggregate data*** held by the Bureau of Epidemiology regarding cases of [] (NAS) reported to the Bureau of Epidemiology in the years 2020 and 2021, including:
> a) Data indicating the number of reported NAS cases, on an aggregate statewide basis;
> b) Data for cases referred to ChildLine, the substance(s) to which infants were exposed, on an aggregate statewide basis;
> c) Data indicating the number of Plans of Safe Care initiated, the substance(s) to which infants were exposed, on an aggregate statewide basis; and
> e) Data indicating to whom infants were discharged, the substance(s) to which infants were exposed, on an aggregate statewide basis. [***emphasis added***] R.R. 001a.[2]

The entire request was also limited as follows:

> Pursuant to 71 P.S. § 720.305, [the Center] 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 models based on the data collected," 71 P.S. § 720.305(3), regarding NAS."[3] R.R. 001a. [***emphasis added***]

[2] The original request included subparts a), b), c), and e), as quoted above. There was no subpart for d). *See* R.R. 001a. Additionally, in the OOR's Final Determination the subparts were reclassified to 1, 2, 3, and 4 respectively. Subpart 1a is not in contention. Only subparts 2-4 (b, c, and e) are on appeal.

[3] The Disaster Declaration was not extended by the Pennsylvania General Assembly and consequently expired on August 25, 2021. The quotation referenced in the request regarding the

On August 12, 2022, the Department's Agency Open Records Officer ("AORO") mailed the Center the Department's Final Response ("Final Response"), partially granting the request by providing a link to the 2020 NAS Annual Report of the Bureaus of Family Health and Epidemiology (Annual Report).[4] R.R. 003a. In addition to providing the Annual Report, the AORO's response pinpointed where the responsive data could be located within the report:

> Request "a" is addressed on page 22. Data limitations are described on page 8 of the report and in the narrative sections on pages 13 and 20, as related to items "b", "c", and "e" of the request. Requests "b", "c", and "e" are addressed on page 34, but is not stratified to include the substances the infant was exposed to. Information on substances an infant was exposed to can be found on page 29 of the report. R.R. 003a.

The Department explained that the data for 2021 was not finalized and therefore not provided. In the Department's Final Response, the AORO explained:

> With respect to your clarification that you are seeking "limited data that the Bureau uses and/or maintains 'for any rules or actions taken…in relation to [the] disaster declaration regarding the opioid epidemic…" ***Currently the Bureau does not have any specific polices or actions specific to the disaster declaration. The NAS report that is developed yearly includes maps which are used to identify high incidence areas and therefore allow the***

Department's use of data was from August 1, 2022, nearly a year after the expiration of the declaration and therefore the statements do not correspond to actions taken in relation to the disaster declaration.

[4] The 2020 NAS annual report can be found online. Since the filing of this appeal, the 2021 NAS report has been published and can be found at the same location - https://www.health.pa.gov/topics/programs/Newborn-Screening/Pages/NAS.aspx.

> ***program to focus on specific geographic areas***. In addition to the annual NAS report, the opioid data dashboard, found at Pennsylvania Opioids PA Open Data Portal, contains information related to various datapoints related to opioid use in the Commonwealth. R.R. 004a. [***emphasis added***]

The AORO further advised that "[t]he correlation of data requested does not currently exist in any records, however, questions can be directed to the Department rather than through the RTK process." R.R. 004a.

The Center appealed the Final Response and, following unsuccessful mediation, the matter proceeded on appeal. The appeal concerns only the 2020 data identified above. R.R. 006a.

Before the OOR, the Department provided four separate affidavits. The first, from the Department's AORO, confirmed that the 2020 NAS Annual report contained the only responsive records. R.R. 097a.[5]

The Department's second affidavit, from Tara Trego ("Trego"), the Director for the Bureau of Family Health (the "Trego Affidavit"), clarified that the data underlying the 2020 NAS Annual Report is not aggregated but consists of individual case reports. R.R. 084a. Additionally, Trego confirmed that the Department does not maintain data for "any rules policies or actions taken … in relation to [the] disaster

[5] By way of background, this was the second request filed by the Center seeking essentially the same data. The first was resolved in the Department's favor without appeal to this Court. *See Walter v. Pa. Dep't of Health*, OOR Dkt. AP 2022-1553, 2022 PA O.O.R.D. Lexis 1912 (Feb. 6, 2023) (*Walter I*), attached as Attachment B.

declaration" regarding the opioid epidemic and/or any "quantitative or predicative models" based on the data. R.R. 083a. Given that the data exists as individual case reports and *not* in the aggregated form requested and given that the request *specifically* sought data used for maintaining "rules, policies, or actions taken" in reference to the opioid epidemic, the Department properly denied the request.

Trego's affidavit went further, though, and explained the entire process that led to the development of the 2020 NAS Annual Report so as to better detail how the data is captured. Specifically, Trego's affidavit attested that:

- Beginning in January 2020, NAS case reports were reported to the Bureau of Family Health; R.R. 085a.

- The NAS case report data is integrated with newborn screening data in an electronic database known as the internet case management system (iCMS); R.R. 085a.

- The iCMS NAS case report form requires 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. R.R. 085a.

- To create the annual reports, the Department has to run a customized data program to extract and analyze the raw data. R.R. 087a.

- In order to provide the data requested, the Department would need to create, compile or reorganize records in a format that the Department does not currently maintain for purposes of carrying out its public health functions. R.R. 086a.

- The Department does not have any policies specific to the 2018 opioid disaster declaration. R.R. 083a.

Crucial to the OOR's review was the fact that the Center's request was for *aggregated* data. The Trego Affidavit clearly and unequivocally stated that the 2020 NAS Annual Report is the only record reflecting *any aggregated* data. R.R. 087a.

Moreover, the Trego Affidavit clarified that the Bureau does not correlate the NAS data in the manner that the Center requested. R.R. 087a. Simply put, the Department does not have the specific aggregate data that the Center is seeking. The Department would have to create a new record to give the Center the requested records. R.R. 088a.

The OOR, in finding that the Department had met its burden, credited the Department's supporting affidavits and found that the Department would "be required to generate a custom dataset, which is not simply drawing information from its database." *In the Matter of Shoshana Walter and Reveal News from the Center for Investigative Reporting v. Pennsylvania Department of Health,* OOR Dkt. AP 2022 – 2282.[6]

The OOR ultimately affirmed the Department's partial denial and this appeal followed.

[6] The Final Determination is attached as Attachment A to this brief. It was also attached as Exhibit A to Petitioner's brief.

SUMMARY OF THE ARGUMENT

In its brief, and in all prior pleadings, the Center argues that the Department has *aggregated* data in its database which can simply be exported with the push of a button as if printing a document. The Center's argument is wrong. The process required to provide the Center with the data requested is a comprehensive, multi-step process which requires the creation of a new record.

As the OOR found, and as the Department attested, *aggregate records responsive to the Center's request* do not exist. The Center's argument, which is contrary to its admission that the Department would need to run a "custom query" to provide the records, ignores and sidesteps the affidavits the OOR found credible.

Additionally, the Center did not seek forms where the data resides. This is because the Center knows it cannot obtain the forms as the OOR has already ruled those records are not public. *See* Attachment B; R.R. 100a. Understanding that they cannot receive the raw data, the Center has changed gears and specifically sought the Department's affirmative effort to create a record so that the Center can receive a specific output. In essence, the Center wants the Department to conduct a research study for them.

The Center's entire argument is premised on a faulty assumption that there is a database to extract their custom record from. There are no responsive records. Providing the *aggregated data* would require the Department to create a record.

Finally, the Center is not entitled to a finding that the Department engaged in bad faith. The Department timely searched for records, provided a record that satisfied a majority of the request, engaged meaningfully in mediation, and was successful before the OOR. To argue now that the Department engaged in bad faith, after being both amenable to resolution and victorious in an adversarial proceeding, is incongruous.

ARGUMENT

I. THE OOR CORRECTLY FOUND THAT THE DEPARTMENT DID NOT POSSESS THE REQUESTED DATA AND WAS NOT REQUIRED TO MAKE A NEW RECORD.

As this Court is well-aware, 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 applicable burden of proof is preponderance of the evidence. 65 P.S. § 67.708(a)(1); *see also Pa. State Troopers Ass'n v. Scolforo*, 18 A.3d 435, 439 (Pa. Cmwlth. 2011) (*quoting Pa. Dep't of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Cmwlth. 2010)).

While an agency also has the burden of proving that a record does not exist, "it may satisfy its burden of proof ... with either an unsworn attestation by the person who searched for the record or a sworn affidavit of nonexistence of the record." *Hodges v. Pa. Dep't of Health*, 29 A.3d 1190, 1192 (Pa. Cmwlth. 2011); *Moore v. Off. of Open Recs.*, 992 A.2d 907, 909 (Pa. Cmwlth. 2010) (search of records and sworn and unsworn affidavits that documents were not in agency's possession are enough to satisfy burden of demonstrating nonexistence).

It is axiomatic that an agency cannot provide a record that they do not have. *Sturgis v. Department of Corrections*, 96 A.3d 445 (Pa. Cmwlth. 2014) Additionally, an agency is not required to create a record to comply with an RTKL request. 65 P.S. § 67.705. Moreover, under the RTKL an attestation or statement made under penalty of perjury is sufficient evidence that the OOR may rely on in making their decision. *See Sherry v. Radnor Twp. Sch. Dist.,* 20 A.3d 515 (Pa. Cmwlth. 2011); *Moore v. Office of Open Records*, 922 A.2d 907 (Pa. Cmwlth. 2010).

Given the above, an attestation that the Department does not have records should be accepted as true by this Court as it was by the OOR. *See generally*, *McGowan v. Pa. Dep't of Envtl. Prot.,* 103 A.3d 374 (Pa. Cmwlth. 2014) (*citing Office of the Governor v. Scolforo*, 65 A.3d 1095 (Pa. Cmwlth. 2013)).

Turning to the case at hand, the Center has not established that the Department's affidavits are inaccurate or submitted in bad faith. The OOR found them credible in two separate matters and this Court can, and should, rely on that determination.

Despite that, the Center's argument on appeal focuses on a misconception of the records in question and wholly ignores the fact that the OOR found the affidavits submitted by the Department credible. Specifically, the OOR found that complying with the request would require the Department to generate a custom dataset, which is *not* simply drawing information from its dataset.

To understand the Center's argument and to identify the misconception, the Department first notes the relevant request on appeal is very specific. The relevant request on appeal relates to merely one request: aggregated data regarding NAS cases. The request is further limited to three inclusive pieces. First, the Center wants aggregate data for cases referred to ChildLine including the substances to which infants were exposed. Second, the Center wants aggregate data indicating the number of Plans of Safe Care initiated including the substance(s) to which infants were exposed. Third, the Center wants aggregate data indicating to whom infants were discharged including the substances to which infants were exposed. R.R. 006a.[7] Finally, the Center further limited the request to just that data which is used or maintained in reference to the now expired opioid disaster declaration. R.R. 001a.[8]

The Department provided the only record available, the 2020 NAS Annual Report. No other aggregated data exists. The Department even noted in its Final

[7] To be clear, the Annual Report includes nearly everything being sought expect for the inclusion of which substances the infants were exposed to. With respect to the portion of the request seeking "[d]ata indicating the number of reported NAS cases, on an aggregate statewide basis," the total number of NAS cases reported to the Department in 2020 can be found on Page 22, Table 1 of the NAS Annual Report. R.R. 038a. According to the report there were 1,825 NAS cases, which are subdivided into 1061 "Confirmed" and 764 "Probable" cases, in 2020. The NAS Annual report also contains records responsive to part "b" of the request seeking "[d]ata for cases referred to ChildLine, the substance(s) to which infants were exposed, on an aggregate statewide basis" at Page 34, Table 13. R.R. 050a.

[8] As mentioned above, the Department does not maintain this data for "rules, policies, or actions" taken as a result of the now expired opioid disaster declaration.

Response that the data being sought has not been "stratified in the manner requested." R.R. 098a. In short, the aggregated data does not exist.

Unsatisfied with this result, the Center alleges now that the data exists within the Department's databases and can merely be exported. The Center has not provided any factual evidence to support this argument. Instead, the Center relies on the Department's affidavits to direct this Court to a printout of the iCMS form and alleges that all the data fields on the form can be pulled directly from the NAS database. This is inaccurate and based solely upon speculation and bald assertions by the Center which is insufficient to disregard the Department's affidavits. *See, e.g., Swoboda v. Pennsylvania Department of State*, No. 857 C.D. 2022, 2023 WL 6933341 n. 19 (Pa. Cmwlth. Oct. 20, 2023) ("bald assertion is far too conclusory and, therefore, insufficient…."); *Moore, supra*, at 909 (affirming denial of appeal where "sole argument" was that a statement by DOC "lead[] [requester] to believe…a record must have existed at some time").

The Department does receive the iCMS NAS case report but that is a specific form. R.R. 085a & 091a-093a. The NAS dataset in iCMS contains patient records and information *gleaned from* iCMS NAS case reports. R.R. 085a. Raw data received by the Department does not alone create a database.

In order to develop the Annual Report, the Department has to *extract* the raw data. This results in creating a new record. R.R 087a. The Annual Report is the new

record. The Center's argument relies on the notion that there is a middleman database between the iCMS NAS case reports and the Annual Report. There is not.

The Center's frustration with the Department centers on their desire to have a *custom record built* with data that is on individual forms that the Department does not have a program to build. As the Department has repeatedly stated "[t]he requested data stratified by substances of exposure ***could not be pulled directly from the existing NAS database***; the [Department] would have to create a custom query to be ***on the reports of*** all 1,825 probable and confirmed NAS cases reported to the Department with the parameters requested." R.R. 088a. The Department could not have been clearer. The requested records do not exist and the only way to provide the Center with their request is to create a new record.

The Center sidesteps the factual record developed before the OOR and focused their argument on this Court's review of RTKL cases wherein agencies were required to provide data that exists in databases. This review, while irrelevant here as the requested records do not exist, is helpful as the cases cited by the Center are distinguishable from the present facts.

In *Dep't of Env't Prot. v. Cole*, 52 A.3d 541 (Pa. Cmwlth. 2012), this Court held that drawing information from a database does not constitute creating a record. The Center relies on it for the proposition that data can be extracted from a database. However, in *Cole*, the Department of Environmental Protection had already

provided the records outside of the RTKL. *Id*, at 547. Additionally, this Court found that the request merely recommended a format that the records could be provided in as opposed to specifically seeking a specific output from the agency which would have required creating a record. *Id.*

In citing the unreported decision, *Gingrich v. Pennsylvania Game Commission*, No. 1254 CD 2011, 2012 WL 5286229 (Pa. Cmwlth. Jan. 12, 2012), this Court clarified that "an agency can be required to draw information from a database, although the information must be drawn in formats available to the agency." *Cole*, at 549.[9]

Gingrich is relevant here because the underlying data used to create the Annual Report is *not a format* available to the Center as the OOR has already ruled. *See* Attachment B; R.R. 100a. Therefore, the Center has specifically requested that the data on the individual records that they are not entitled to be aggregated for them. The only way the Center can make this argument though is if the records exist in a database, which they do not.

This Court has been very clear that the purpose of 65 P.S. § 67.705 is not merely to protect an agency from having to create a record it is to "preclude[] a

[9] An unreported panel decision of this Court, "issued after January 15, 2008," may be cited "for its persuasive value[.]" Section 414(a) of the Commonwealth Court's Internal Operating Procedures, 210 Pa. Code §69.414(a).

requester from being able to []shanghai[] government employees to create a record when one does not exist and take them away from carrying out their normal responsibilities." *Pennsylvania State Police v. McGill*, 83 A.3d 476, 481 (Pa. Cmwlth. 2014).[10]

The Center relies on a number of OOR decisions and unreported cases to support their argument that pulling data from a database does not constitute a record. However, the Center perpetuates the same mistake. All the cases cited reference data that exists in a database *not* data that exists on a form that needs to have additional calculations performed in order to create the record they seek. *See Xian v. Pa. State Police*, No. AP 2022-2545, 2023 WL 120500 (Off. of Open Recs. Jan. 3, 2023) (OOR ordered agency to extract data where there was no dispute the information existed in a database); *Brambila v. Pa. Dep't of Health*, No. AP 2017-0042, 2017 WL 971860 (Off. of Open Recs. Mar. 9, 2017) (OOR ordered agency to provide data regarding how many forms were filled out since the database could track the forms); *Wade v. Pa. Dep't of Transp.*, No. AP 2023-0505, 2023 WL 3452091 (Off. of Open

[10] In referencing the prior Right to Know Act, this Court decried the creation of records as potentially creating an environment where "anyone could come to a public agency and ask for preparation of lists for any reason, e.g., a credit card company could request a list of taxpayers whose public assessments were over a certain amount, or direct marketers could ask for a list of all people who applied for building permits to see if they needed a second mortgage. As a result, public employees would, in effect, become the "agents" of individuals seeking to "slice and dice" information for commercial purposes, taking them away from the jobs that they were hired to perform." *Scranton Times, L.P. v. Scranton Single Tax Office*, 736 A.2d 711. 713 (Pa. Cmwlth. 1999)

Recs. May 8, 2023) (OOR ordered the government to extract existing data from databases, even when doing so required programming or other forms of queries).

In fact, the OOR has consistently held that an agency is not required to create a record which does not otherwise exist. *See* 65 P.S. § 67.705; *see also PublicSource v. Pennsylvania Department of Health,* 268 A.3d 1130, *7 (Pa. Cmwlth. Nov. 9, 2021) (affirming denial of appeal where data was in a database but "the Department would have to correlate, verify, extrapolate, and code the information from death records (manually, in some cases) and present it in a different way than was available to Department employees before it could produce the information to Requesters" and noting that "[a]lthough drawing information from a database does not constitute creating a record under Section 705 of the RTKL, an agency need not manipulate the data or produce it in a specific requested or unique format, as Requesters in this case desired (i.e., by county/year)"; *Pennsylvania State Police v. McGill*, 83 A.3d 476, 483 (Pa. Cmwlth. 2014) (reversing Final Determination where certain requested information was exempt from disclosure and complying with the request would require more than "compil[ing] and examin[ing]" data from a database before release).

Notwithstanding the foregoing, the Department provided records in the form available, the NAS Annual Report. The NAS Annual Report satisfies all but one

aspect of the Center's request: a data correlation not presently performed by the Department.

It bears repeating that the records the Center seeks are the 1,825 probable and confirmed NAS case reports. However, the Center was not able to obtain those reports. The case before this Court is essentially the Center's second bite at the apple. Their efforts to identify their request as one for records which are contained in a database is merely a continuation of their fundamental misunderstanding of the records and their true desire to have the Department create a special report for their purposes.

In sum, the Department does not contain any additional responsive records and if this Court were to overturn the OOR then the Department would have to create a new record in order to comply with the request. Given that and given that the OOR found the sworn affidavits credible, this Court should uphold the OOR's Final Determination.

II. THE CENTER IS NOT ENTITLED TO ATTORNEY FEES AND COSTS WHERE THE DEPARTMENT WAS VICTORIOUS BEFORE THE OOR.

The Center's request for attorneys' fees and costs is baseless and unwarranted. Pursuant to 65 P.S. § 67.1304(a), an award of attorney fees and costs is only appropriate in the case of a deemed denial, which is inapplicable here, or *if* this Court reverses the OORs findings **and** finds one of the following applies:

> (1) the agency receiving the original request willfully or with wanton disregard deprived the requester of access to a public record subject to access or otherwise acted in bad faith under the provisions of this act; or
>
> (2) the exemptions, exclusions or defenses asserted by the agency in its final determination were not based on a reasonable interpretation of law.

65 P.S. § 67.1304(a); *Campbell v. Pennsylvania Interscholastic Athletic Association, Inc*., 268 A.3d 502, 518 (Pa. Cmwlth. 2021).

The Center's primary argument is that the Department denied its request based upon an "unreasonable interpretation" of the Court's "longstanding precedent" that if "information exists in a database, it must be provided…." Pet. Brief, p. 23. This is an oversimplification of the law and completely disregards the nature of the actual request submitted by the Center. Indeed, the Center specifically requested *aggregated* data tailored to that which "the Bureau ***uses and/or maintains 'for any rules, policies or actions taken . . . in relation to [the] disaster declaration.***'" As the OOR found, the Department unequivocally established that there is no *aggregated* data responsive to the parameters of the Center's request. Accordingly, there can be no unreasonable interpretation of the law attributed to the Department as it cannot produce records that do not exist in its possession, custody, or control. *Wishnefsky v. Pennsylvania Department of Corrections*, No. 481 C.D. 2016, 2016 WL 4820492 *1 (Pa. Cmwlth. Sept. 14, 2016).

The Center seeks to obfuscate the issue by suggesting that because there *may* be forms or raw data in a departmental database, the Department is required to provide *any* records it possesses regardless of their responsiveness to the Center's specific request and/or whether any exemptions apply. This is not correct. As an initial matter, the Center was previously denied access to underlying raw data, which contains significant privacy-related information, PHI and/or PII. *See* Attachment B (*Walter I*).

Moreover, contrary to the Center's assertion, the case law pertaining to aggregate data and databases is not well-settled and is, in fact, nuanced and fact specific. For instance, in *PublicSource v. Pennsylvania Department of Health, supra,* the court agreed with the Department's denial of a request which would have similarly required the Department to, *inter alia*, correlate, verify, extrapolate, and code information (manually, in some cases) and then present it in a different way than was available to Department employees before providing it to the Requesters. 268 A.3d at * 7 (noting that "an agency need not manipulate the data or produce it in a specific requested or unique format, as Requesters in this case desired (*i.e.,* by county/year)"; *see also Pennsylvania State Police v. McGill*, 83 A.3d 476, 483 (Pa. Cmwlth. 2014). Consistent with the foregoing, the Center's request would require extensive efforts by the Department to create a record which does not currently exist. As such, the Department's legal position is well-founded and any request for

attorneys' fees or costs should be denied. *See, e.g., Ali v. Philadelphia City Planning Commission*, 125 A.3d 92 (Pa. Cmwlth. 2015) (affirming denial of attorney fees and costs where agency's legal position was reasonable).

Nor does the Center offer any evidence of bad faith by the Department that would justify an award of attorneys' fees, costs or a civil penalty. 65 P.S. § 67.1304(a)(1); 65 P.S. § 67.1305. Notably, the only alleged bad faith is the Department's purported refusal to "search" the iCMS database. Pet. Brief p. 24. Petitioner's argument is lacking. The facts demonstrate that the Department timely searched for records, provided a record that satisfied a majority of the original request for *aggregate* data, engaged meaningfully in mediation, and was successful before the OOR which found that the Department conducted a good faith search for records. *See* Attachment A. To ignore these facts and argue that the Department's good faith legal position constitutes bad faith, after the Department was both amenable to resolution and victorious in an adversarial proceeding, is incongruous. Under similar circumstances, the court has declined to award attorneys' fees, costs or to impose civil penalties. *See, e.g., Brunermer v. Apollo Borough*, 283 A.3d 908 (Pa. Cmwlth. 2022) (upon consideration of a totality of the circumstances, court determined that attorneys' fees were not appropriate as the Borough did its best to comply with requests); *see also Campbell, supra,* 268 A.3d at 519 (despite reversal by OOR and response that "certain records do not exist," attorneys' fees and costs

were not appropriate where response was timely and search was conducted). For the reasons set forth herein, attorneys' fees, costs and/or civil penalties are not appropriate and should not be awarded to Petitioner.

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: December 18, 2023

ATTACHMENT A

pennsylvania
OFFICE OF OPEN RECORDS

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 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)).

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 Envtl. 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).

ATTACHMENT B

pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
SHOSHANNA WALTER AND REVEAL NEWS FROM THE CENTER FOR INVESTIGATIVE REPORTING	:	
Requester	:	
	:	
v.	:	**Docket No: AP 2022-1553**
	:	
PENNSYLVANIA DEPARTMENT OF HEALTH,	:	
Respondent	:	

On January 20, 2022, 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:

> [Item 1] The Neonatal Abstinence Syndrome Case Report form;
>
> [Item 2] Record layout for the department's NAS database;
>
> [Item 3] Data on substance-exposed infants from 2016 to the present, including the following, if collected: (1) the substance to which each infant was exposed; (2) the number of Plans of Safe Care and referrals to appropriate services, including a breakdown of what those services included; (3) referrals to ChildLine and whether an assessment and/or investigation was opened; (4) and to whom the baby was discharged, whether the parent, foster care or adoption.
>
> **I would prefer to receive these records electronically and in the original digital format** (such as an Excel spreadsheet, CSV data file, or other digital data format).

On January 27, 2022, the Department partially denied the Request, arguing that the information sought in Item 3 regarding Neonatal Abstinence Syndrome[1] ("NAS") reports for 2020 reflects internal, predecisional deliberations because various reports are still being finalized by hospitals and facilities and the Department has not yet analyzed and summarized the data. *See* 65 P.S. § 67.708(b)(10)(i)(A). The Department explained that this information would be available in Spring/Summer 2022 and provided a website for the 2018 and 2019 Annual Reports containing the data requested. The Department also explained that the NAS Surveillance Program began in 2018 and that collection of data though the NAS case report form on the details of infant discharge, referrals to ChildLine and initiation of Plans of Safe Care did not begin until 2020. While the hospitals and facilities self-report these data points, the Department is not able to determine if ChildLine actually received a notification or that a plan of safe care was initiated because the Department of Human Services is the agency that received that information.[2]

On February 16, 2022, the Requester appealed to the Office of Open Records ("OOR"), challenging the denial and stating grounds for disclosure. The Requester argues that the Department failed to search for and provide all responsive data in its possession. She asserts that the reports provided only contain summary statistics for two years and the information sought in Item 3 is raw data underlying the Annual Reports that must be disclosed in the format in which it exists. The OOR invited both parties to supplement the record and directed the Department to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).[3]

[1] The Department clarifies that it interpreted "substance-exposed infants" to mean any infant meeting the state's NAS case definition.

[2] The Department forwarded the Request to the Department of Human Services but noted that the Requester should file a new request with that agency to preserver her rights under the RTKL and provided the Open Records Officer's contact information.

[3] Due to a clerical error, the appeal was not docketed until June 30, 2022. When the error was discovered, the appeal was docketed with deadlines to allow for the full and fair adjudication of the appeal. *See* 65 P.S. § 67.1102(b)(3) (stating that "the appeals officer shall rule on procedural matters on the basis of justice, fairness, and the expeditious resolution of the dispute").

On July 8, 2022, the Department sought additional time to make a submission; and following communications with the parties, the OOR kept the record open for an additional five days and extended the final determination issuance date by the same amount of time. *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).").

On July 12, 2022, Shawn Musgrave, Esq.,[4] provided his statement made subject to the penalties of unsworn falsification to authorities, 18 Pa.C.S. § 4904, in support of the Requester's appeal.

On July 19, 2022, the Department submitted a position statement reiterating its grounds for denial. The Department asserts that the appeal is moot with respect to the forthcoming 2020 Annual Report on NAS. The Department also explains that it only asserted the internal, predecisional deliberations exemption with respect to "unfinished responsive data for the forthcoming 2020 Annual Report." The Department claims that the raw, facility-submitted NAS data underlying the Annual Reports is exempt from disclosure as it reflects personal health information and personal identification information, 65 P.S. §§ 67.708(b)(5)-(6).[5] The Department also claims that the raw data is protected by the confidentiality provisions of the Disease Prevention and Control Law of 1955 ("DPCL"), 35 P.S. §§ 521.1 *et seq*. and is exempt as noncriminal investigative information, 65 P.S. § 67.708(b)(17). Finally, the Department asserts that the appeal is moot as to any unfinalized data underlying the 2020 Annual Report because the Requester "clarified that the unfinished NAS data underlying the 2020 [A]nnual Report is not at

[4] Attorney Musgrave is an attorney at The Center for Investigative Reporting and represents the Requester in this matter.

[5] The Department notes that Section 708(d) Aggregated Data provides that the exemptions set forth in Section 708(b) do not apply to aggregated data, except for data protected by certain exemptions, including Sections 708(b)(5)-(6).

issue…" and explains that the Department only relied on the internal, predecisional deliberations exemption with respect to unfinished responsive data for the 2020 Annual Report.

In support of its position, the Department submitted the statements made subject to the penalties of unsworn falsification to authorities, 18 Pa.C.S. § 4904, of Tara Trego, Director, Bureau of Family Health, and Dr. Lisa McHugh, Assistant Director, Bureau of Epidemiology.

On July 20, 2022, the Attorney Musgrave submitted a supplemental response asserting that the Requester does not seek any personal identification information or any personal health information arguing that it seeks only deidentified information. He also asserts that the appeal is not moot because the Department possesses "finalized data" for 2018 and 2019 within the database format requested. He explains "[t]his appeal seeks to enforce [the Requester's] right to obtain this data 'in the medium requested if it exists in that medium; otherwise, it shall be provided in the medium in which is exists.' 65 P.S. § 67.701(a)."

On July 29, 2022, in response to the OOR's request for additional clarification, the Department submitted the supplemental statement made subject to the penalties of unsworn falsification to authorities, 18 Pa.C.S. § 4904, of Zhen-qiang Ma, Epidemiologist, who is familiar with the information implicated in this matter and the methods of data collection and storage.

1. The Department has demonstrated that certain information does not exist

The Request seeks, in part, the number of Plans of Safe Care and referrals to appropriate services, including a breakdown of what those services included; referrals to ChildLine and whether an assessment and/or investigation was opened; and to whom the baby was discharged, whether the parent, foster care or adoption for the years 2018, 2019 and 2020. Dr. Ma affirms that this information was not collected in 2018 and 2019. Ma Attestation ¶ 5. He explains that the 2018 Case Report Form used to collect data in 2018 and 2019 did not seek that information. Ma

Attestation ¶ 6. He also affirms that most of this information was collected in 2020; however, the Department does not collect data on whether an assessment or investigation was actually opened. Ma Attestation ¶7. Under the RTKL, a sworn 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. 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 the records exist, "the averments in [the statement] should be accepted as true." *McGowan v. Pa. Dep't of Envtl. 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)).

Dr. Ma has provided sufficient evidence to demonstrate that the number of Plans of Safe Care and referrals to appropriate services, including a breakdown of what those services entailed, referrals to ChildLine and whether an assessment and/or investigation was opened; and to whom the baby was discharged, whether the parent, foster care or adoption, for the years 2018 and 2019 do not exist in the Department's possession custody or control. Further, he has provided sufficient evidence to demonstrate that data regarding whether an assessment or investigation was opened does not exist for 2020.

2. The appeal is moot in part

The appeal is moot as it relates to any summary statistics for the 2020 Annual Report that have not been generated. On appeal, the Requester concedes that it "does not contest that the Department is not obligated to share any summary statistics for the 2020 annual report that have not yet been generated. However, to the extent the Department attempts to withhold any other NAS data—including facility-submitted NAS data or the Department's summary statistics underlying the published annual reports for 2018 and 2019—it cannot rely on the exemption for

predecisional deliberative records." The Department did not rely on Section 708(b)(10) of the RTKL to withhold the raw data from 2018 and 2019. Therefore, there is no controversy to be adjudicated. *See Kutztown Univ. of Pa. v. Bollinger*, 2019 Pa. Commw. Unpub. LEXIS 521 (holding that an appeal is properly dismissed as moot where no controversy remains). Insofar as the Requester seeks the "finalized data" for 2018 and 2019, the Department has demonstrated that some of that data does not exist and the remainder is addressed below.

3. The reporting forms are confidential under the DPCL

The Department identifies the responsive records as reporting forms submitted by facilities. It describes these forms as the raw, facility submitted data consists of line-level data about individual reported instances of NAS and asserts that it is protected by the DPCL

The DPCL mandates that all communicable and certain non-communicable diseases be reported to Pennsylvania's Department of Health. 35 P.S. § 521.4. Under Section 521.3(a) of the DPCL, local boards and departments of health are primarily responsible for the prevention and control of communicable and non-communicable disease, subject to guidance and supervision under the Department. 35 P.S. § 521.3(a). In addition to requiring reports of communicable diseases, *see* 35 P.S. §§ 521.4(a),(e), the DPCL provides that physicians or persons in charge of any institution for the treatment of diseases "to make reports of such diseases and conditions other than communicable diseases which in the opinion of the Advisory Health Board are needed to enable the secretary to determine and employ the most efficient and practical means to protect and to promote the health of the people by the prevention and control of such diseases and conditions other than communicable diseases. The reports shall be made upon forms prescribed by the secretary and shall be transmitted to the department or to local boards or departments of health as requested by the secretary." 35 P.S. § 521.4(d).

The reports themselves are therefore subject to the confidentiality provision of the DPCL.

Section 15 of the DPCL provides:

> (a) Except as provided under section 15.1, 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 as follows:
>
> (1) Where necessary to carry out the purposes of this act.
>
> (2) Where necessary to inform the public of the risk of a communicable disease.

35 P.S. § 521.15; *see also* 28 Pa. Code § 27.5a. The OOR has previously interpreted the confidentiality provision of the DPCL broadly. *Donnelly v. Pa. Dep't of Health*, OOR Dkt. AP 2020-1369, 2020 PA O.O.R.D. LEXIS 2963*; see also Ciavaglia v. Bucks County*, OOR Dkt. AP 2020-0761, 2020 PA O.O.R.D. LEXIS 1528 (finding local health department reports and records that show COVID-19 related deaths confidential under the DPCL); *Pattani v. Pa. Dep't of Health*, OOR Dkt. AP 2020-0995, 2020 PA O.O.R.D. LEXIS 2672 (finding communications which discuss how to coordinate public health activities between the Department and local health authorities were confidential under the DPCL). Ms. Trego affirms that NAS became a reportable, non-communicable disease covered by the DPCL following the Governor's June 10, 2018 statewide disaster declaration for the opioid epidemic.[6] Dr. McHugh and Ms. Trego affirm that NAS is a condition reportable to the Department and that hospitals and facilities utilize reporting forms to do so. Therefore, the forms used to submit the data are reports protected by the DPCL.

[6] Act 77 is only applicable while an emergency disaster declaration is in effect and the opioid disaster declaration ended August 25, 2021, after the legislature declined to extend it. *See* https://www.governor.pa.gov/newsroom/opioid-disaster-declaration-to-end-aug-25/.

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

Because these forms are submitted using an online portal, the Requester asserts that the information is in a database and can be disclosed without running new calculations or creating records but would rather just be drawing information down from the database. *PublicSource v. Pa. Dep't of Health*, 268 A.3d 1130, 2021 Pa. Commw. Unpub. LEXIS 571 (Pa. Commw. Ct. 2021). The Requester further argues that that the information can be de-identified and explicitly notes that she does not seek personal health information ("PHI") or personal identification information ("PII"). *See* Requester Submission July 20, 2022.

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 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.

Dr. Ma explains that the data from the forms is gathered into a database that "fundamentally amount(s) to a listing of individual PHI and PII under either reporting system. The Department does not maintain de-identified databases generated from NAS case reports." He explains that personal health and personal identification information is not redacted from the data within these systems – essentially, each line of information consists of data that identifies a particular mother and infant. Ma Attestation ¶ 11. Finally, Dr. Ma affirms that in order to generate the Annual Reports, epidemiology staff analyze the data from the database using a statistical software that generates summary statistics and at no point does the Department maintain a database of information gleaned from the individual reports that is aggregated or otherwise de-identified. Ma Attestation ¶¶ 11-12. He affirms that the databases and database extracts all consist of patient specific medical information. Ma Attestation ¶ 13. Dr. Ma also explains that the 2020 Annual Report was not finalized at the time of the Request and therefore the data underlying it consists of this personal information. Ma Attestation ¶ 15. Dr. Ma explains that in order to provide the requested information, the Department would be required to generate a custom, de-identified dataset reflective of that information. Ma Attestation ¶ 14.

Here, Dr. Ma's attestation demonstrates that information is not stored in any de-identified manner that could be provided to the Requester and that to de-identify it would require generating a custom dataset, which is not simply drawing information down from the database.

For the foregoing reasons, the appeal is **denied in part** and **dismissed as moot in part**, 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.[7] This Final Determination shall be placed on the OOR website at: http://openrecords.pa.gov.

FINAL DETERMINATION ISSUED AND MAILED: August 15, 2022

/s/ Erin Burlew

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APPEALS OFFICER
ERIN BURLEW, ESQ.

Sent via email to: Shoshana Walter; Shawn Musgrave, Esq.; Anna LaMano Esq.; Danica Hoopes; Shea Skinner

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

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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