



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
HEATHER BARRETT,	:	
Requester	:	
	:	
v.	:	Docket No: AP 2021-1975
	:	(Consolidated)
	:	
DOWNTOWN AREA SCHOOL	:	
DISTRICT,	:	
Respondent	:	

INTRODUCTION

Heather Barrett (“Requester”) submitted five requests (“Requests”) to the Downingtown Area School District (“District”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking information related to exemptions granted by the District pursuant to its COVID-19 Health and Safety Plan for wearing masks. The District denied the Requests, arguing that it does not maintain responsive documents in the format requested. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **denied**, and the District is not required to take any further action.

FACTUAL BACKGROUND

On August 30, 2021, the first of the Requests was filed, seeking “all medical exemptions for masks, by school and grade, along with the doctor’s name and reason for each. Please provide the most current data when responding. I will continue to request on a weekly basis.”

On August 31, 2021, the District denied the Request, arguing that the Request is not sufficiently specific, that the some of the information is exempt under various provisions of the RTKL, and that other information is exempt under various state and federal regulations. On that same day, four additional Requests were filed, stating:

1. Please provide the number of mask exemptions submitted and number of exemptions approved in the [D]istrict for the current school year and last school year.
2. Please provide the number of mask exemptions approved in the [D]istrict for the current school year and last school year, along with a list of reasons for those exemptions.
3. Please provide the number of mask exemptions approved in the [D]istrict for the current school year and last school year, a list of reasons for those exemptions and a list of doctors/practices who wrote an exemption.
4. Please provide the number of mask exemptions approved in the [D]istrict for the current school year and last school year in each category below (added together, they should equal total mask exemptions approved).
 - Facial deformity
 - A person with a disability who cannot safely wear a mask for reasons related to the disability
 - Hearing impaired
 - Respiratory condition
 - Underlying health condition other than respiratory
 - Mental Health
 - Other

On September 8, 2021, the District denied the four Requests, arguing that the District does not maintain records responsive to the Requests. On that same day, the Requester appealed the District's August 31, 2021 denial to the OOR, challenging the denial and stating grounds for disclosure.¹

On September 16, 2021, the Requester appealed to the OOR, challenging the District's September 8, 2021 denials and stating grounds for disclosure.² The OOR invited both parties to

¹ This appeal was docketed at OOR Dkt. 2021-1797.

² The Requester filed four appeals arising from the Requests, docketed at OOR Dkts. AP 2021-1975, 2021-1976, 2021-1977 and 2021-1978. The District requested consolidation of the appeals. Because all four appeals involve the same agency, requester, and similar requests, the OOR is hereby granting the District's request and consolidating the

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

On September 30, 2021, the District submitted a position statement reiterating its grounds for its September 8, 2021 denials and arguing that the Requests do not seek documents and are, therefore, outside of the RTKL. The District also asserts that it does not maintain or compile the information in the manner requested, and, even if records did exist, the information contained therein would be exempt from disclosure under various provisions of the RTKL, as well as under the Family Educational Rights and Privacy Act (“FERPA”), 20 U.S.C. § 1232g.³ On October 1, 2021, the Requester submitted a position statement reiterating grounds for disclosure.

On October 4, 2021,⁴ the District submitted a position statement reiterating its grounds for its August 30, 2021 denial. The District argues that it does not possess records responsive to the first Request, and, even if the District had responsive records, the records would be exempt from disclosure because it would contain information relating to children 17 years of age or younger, 65 P.S. § 67.708(b)(30), as well as personal medical information, 65 P.S. § 67.708(b)(5). The District further argues that the requested information would also be exempt from disclosure under FERPA, 20 U.S.C. § 1232g, the Pennsylvania Public School Code, 24 P.S. § 1409, the Pennsylvania Department of Education Regulations, the Pennsylvania Code and the Health Information Portability and Accountability Act of 1996 (“HIPAA”), 45 C.F.R. § 164.502(a). On that same day, the Requester submitted a position statement reiterating grounds for appeal; and, after the OOR requested additional evidence, the District submitted two attestations, made subject

appeals into OOR Dkt. AP 2021-1975. *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”).

³ The record in this matter closed on September 29, 2021. Having received no response, the OOR extended the submission period until October 1, 2021.

⁴ The submission period for this appeal (OOR Dkt. 2021-1797) closed on September 17, 2021. Having received no submissions, the OOR extended the submission period until October 4, 2021.

to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities, of its Open Records Officer, Virginia Warihay.

On October 15, 2021, the OOR requested supplemental evidence clarifying the information provided in the attestations submitted by the District.⁵

On October 21, 2021 the District provided an additional position statement clarifying the District's argument that the Request in the appeal docketed at OOR Dkt. 2021-1797 seeks "information which is not maintained by [the District] in the manner in which it is requested" and that the other four Requests seek "records that do not exist."⁶

On October 25, 2021, the Requester provided a response to the additional information provided by the District, arguing that, when the District denied the August 30, 2021 Request, it did not state that the records do not exist in the format requested. The Requester argues that the stated reasons for denial were that the Request is insufficiently specific and that the requested information is protected under the RTKL⁷ and FERPA, 20 U.S.C. § 1232g. The Requester also argues that the subsequent four Requests were made in an attempt to "to protect student privacy" and that these Requests were denied by the District because it "does not maintain documents responsive to [the Requests]." Finally, the Requester reiterates grounds for disclosure.

LEGAL ANALYSIS

"The objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government." *SWB Yankees L.L.C. v.*

⁵ During the course of the appeal, the Requester afforded the OOR additional time for the issuance of the 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).").

⁶ Because all five appeals involve the same agency, requester, and similar requests, the OOR is hereby also consolidating OOR Dkt. AP 2021-1797 into OOR Dkt. AP 2021-1975. *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").

⁷ 65 P.S. §§ 67.708(b)(5), (b)(30).

Wintermantel, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law is “designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions.” *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff’d* 75 A.3d 453 (Pa. 2013).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the request” and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing is discretionary and non-appealable. *Id.* Here, neither party requested a hearing.

The District is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in the possession of a local agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.” 65 P.S. § 67.708(a)(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)). Likewise, “[t]he burden of proving a record does not exist ... is placed on the agency responding to the right-to-know request.” *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

1. The Requests seek records

As a threshold matter, the District argues that the appeal should be dismissed because the Requests do not seek records. The District argues that all five of “the [R]equests were in the form of a general question, not a request for records (or documents), as defined by Section 102 of the [RTKL] or as permitted by Sections 302(a) and 703 of the [RTKL].” 65 P.S. §§ 67.102, 302(a), 703. The District also argues that Requests 2-5 do not seek “documents, but a compilation of information or lists that [the Requester] believes can be created or compiled from data but that do not exist.”

The Requester argues that the Requests fit the RTKL’s definition of record as “any information regardless of its physical form or character that documents a transaction or activity of an agency and is created, received, or retained pursuant to law or in connection with a transaction, business or activity of an agency.” 65 P.S. § 67.102. The Requester further argues that documentation regarding mask exemptions is received by the District pursuant to its Health and Safety Plan. In support of this argument, the Requester submits an email from the District’s Assistant Superintendent, Dr. Rob Reed, explaining, among other things, the District’s process for handling mask exemption requests. The Requester argues that the email states, in pertinent part, that upon the receipt of a mask exemption request, the District has “an internal process that is

immediately prompted if [the District] receive[s] such documentation...data and information is reviewed and analyzed....”

Under the RTKL, a request must seek records rather than answers to questions. *See Walker v. Pa. Ins. Dep’t*, No. 1485 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 425 at *16 (Pa. Commw. Ct. 2012) (“The RTKL is not a forum for the public to demand answers to specifically posed questions to either a Commonwealth or local agency. In fact, there is no provision in the RTKL that requires an agency to respond to questions posed in a request”); *see also Gingrich v. Pa. Game Comm’n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38 at *14 (Pa. Commw. Ct. 2012) (noting that the portion of a request “set forth as a question” did not “trigger a response”). The presence or absence of a question mark is not determinative as to whether a request asks a question. *See Varick v. Paupack Twp.*, OOR Dkt. AP 2013-1348, 2013 PA O.O.R.D. LEXIS 766.

The RTKL imposes a two-part inquiry for determining if certain material is a record: 1) does the material document a “transaction or activity of an agency?” and 2) if so, was the material “created, received or retained...in connection with a transaction, business or activity of [an] agency?” *See Allegheny Cnty. Dep’t of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1034 (Pa. Commw. Ct. 2011). Because the RTKL is remedial legislation, the definition of “record” must be liberally construed. *See A Second Chance, Inc.*, 13 A.3d 1025; *Gingrich*, Pa. Commw. Unpub. LEXIS 38 at *13 (“[H]ow [can] any request that seeks information ... not [be] one that seeks records[?]”). In *A Second Chance*, the Commonwealth Court interpreted the word “documents” as meaning “proves, supports [or] evidences” and held that certain requested information met the first part of the definition of a record because it documented the existence of a governmental action. 13 A.3d at 1034.

Here, the District simply asserts that the Requests do not seek records but does not provide evidence that the requested information does not document a transaction or activity of the District. Further, the Requester is seeking statistical data and lists related to mask exemption requests received by the District pursuant to its Health and Safety Plan. As such, although the Requester identified the information sought rather than identifying documents, the requested information is still a record of the agency. *See* 65 P.S. § 67.102. Accordingly, the Requests seek records, and the OOR will reach the merits of the appeal. *See, e.g., Langan v. West Chester Area Sch. Dist.*, OOR Dkt. AP 2021-0723, 2021 PA O.O.R.D. LEXIS 1021; *Spigler v. City of Pittsburgh*, OOR Dkt. AP 2020-1024, 2020 PA O.O.R.D. LEXIS 2417.

2. The District proved that the records do not exist in the format requested

The District also argues that it does not maintain or compile the records requested in the manner requested; and, under Section 705 of the RTKL, the District is not required to create a record which does not currently exist or to compile, maintain, format or organize a record in a manner in which it does not currently compile, maintain, format or organize the record. 65 P.S. § 67.705.

For the first Request, the District argues that it “does not possess documents responsive to this [R]equest” and that student medical information is “not kept by school, or grade or by doctor’s name or the reasons for treatment for a particular medical condition. If a student’s medical condition would allow for a modification of a mask mandate the only place where any of that information may exist would be within a student’s Individualized Education Plans (“IEP’s”) or

504 Service Agreements[,] which are individualized...to students.”⁸ In support, Ms. Warihay

attests:

3. ...Upon receipt of the [R]equests, I conducted a thorough examination of files in the possession, custody and control of the [District] for records responsive to the [R]equest...and I specifically consulted with Meghan Dennis, Director of Pupil Services, who would be responsible for any mask exemptions relating to students. I have confirmed with Ms. Dennis, as recently as [October 4, 2021], that the...District does not keep a central repository of mask exemptions, either by [D]istrict, school or grade.
4. The exemption process is not form oriented—it is addressed through an individual student assessment based upon the medical condition of a student. If a student has a medical condition, the District will accommodate that medical condition, through, in most cases, a notation in that individual student’s [IEP] or a notation in that student’s 504 Service Agreement...
6. The IEP’s, 504 Service Agreements and other plans do not contain the identities of the student’s doctor, and the student’s medical condition is confidential.
7. Based upon the above-described search of the [District’s] files and inquiries with relevant [District] personnel, I have made the determination that the records requested, “medical exemptions” are not within the [District’s] possession, custody or control nor does the School District maintain statistical, aggregate or compiled data in a report, document or database tracking the information requested.

For Requests 2-5, the District points to the Requester’s appeal forms, which state the Requester is “not requesting ‘documents’ or individual medical information. [She is] requesting data that can be easily compiled from information the [D]istrict has.” Further, Ms. Warihay attests:

3. ...[u]pon receipt of the [R]equests, I conducted a thorough examination of files in the possession, custody and control of the [District] for records responsive to the [R]equests underlying these consolidated appeals, and I specifically consulted with Meghan Dennis, Director of Pupil Services, who would be responsible for any mask exemptions relating to students. Ms. Dennis confirmed to me in writing that that the...District does not:
 - a. maintain or compile the records requested in the manner requested, and;
 - b. maintain statistical, aggregate or compiled data in a report, document of database tracking the information identified in the [R]equests and specifically the number of mask exemptions, the number of exemptions

⁸ An IEP is a written plan for the provision of services under the Individuals with Disabilities Education Act (“IDEA”) for the education of students who are disabled or gifted. 20 U.S.C.S. § 1400 *et seq.* A 504 Service Agreement provides services to a student who may not qualify for special education services under the IDEA but has a disability that substantially limits that student’s educational performance.

approved in the [D]istrict for any school year, or a list of reasons for those exemptions or a list of doctors/practices who wrote an exemption or those exemptions listed in any category.

4. Based upon the above-described search of the [District's] files and inquiries with relevant [District] personnel, I have made the determination that the records requested are not within the [District's] possession, custody or control nor does the...District maintain statistical, aggregate or compiled data in a report, document or database tracking the information requested.

Under the RTKL, a sworn affidavit or statement made under 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 District acted in bad faith, “the averments in [the 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)).

Section 705 of the RTKL states that, when responding to a request, “an agency shall not be required to create a record which does not currently exist or to compile, maintain, format or organize a record in a manner in which the agency does not currently compile, maintain, format or organize the record.” 65 P.S. § 67.705. “An agency need only provide the information in the manner in which it currently exists.” *Commonwealth v. Cole*, 52 A.3d 541, 547 (Pa. Commw. Ct. 2012). The OOR has held that “where an agency does not maintain a list specified by a requester, the agency is not required to create such a list.” *See Bush v. Carrol Twp.*, OOR Dkt. AP 2019-1721, 2019 PA O.O.R.D. LEXIS 1783 (denying a request for a list of specific information where no such list exists); *Beaver County Times v. Beaver County*, OOR Dkt. AP 2014-1161, 2014 PA O.O.R.D. LEXIS 1041; *Miller v. Twp. of O’Hara*, OOR Dkt. AP 2012-1435, 2012 PA O.O.R.D. LEXIS 1224.

However, providing information from an agency database does not constitute the creation of a record if the requested information exists in a database. *See Cole*, 52 A.3d 541; *see also Gingrich*, Pa. Commw. Unpub. LEXIS 38 at *21. As noted in *Cole*, the Commonwealth Court in *Gingrich* found that drawing information from a database does not constitute creating a record under the RTKL. The Court explained:

In *Gingrich*, a requester sought information relating to Pennsylvania’s annual deer harvest, habitat programs, and related financial information. The requester sought information contained in the Game Commission’s database and suggested possible formats for the Game Commission to produce that information. The Game Commission denied the request on the grounds that it did not have to create a record and the information sought did not exist in the formats identified by the requester. This Court held that suggesting a possible format in which to present the requested information was not an improper request to create a record. Specifically, we held that an agency can be required to draw information from a database, although the information must be drawn in formats available to the agency. In short, *to the extent requested information exists in a database*, it must be provided; an agency cannot claim otherwise under Section 705 of the [RTKL].

Cole, 42 A.3d at 548 (emphasis added). Notably, in *Gingrich*, with respect to the portion of the request seeking “Deer Totals,” the Court determined that, while the request sought information from the Game Commission’s Deer Harvest database, the Commission demonstrated that “it does not retain deer harvest data separating antlerless and ‘button bucks’” in the database. As a result, the Court found that those particular records did not exist and, pursuant to 65 P.S. § 67.705, the Game Commission was not required to create a record in order to respond to the request. *Gingrich*, 2012 Pa. Commw. Unpub. LEXIS 38 at *20; *see also Scicchitano and The Daily Item v. Pa. Interscholastic Athletic Ass’n*, OOR Dkt. AP 2019-1504, 2019 PA O.O.R.D. LEXIS 1521 (holding that the agency proved the requested salary database did not exist, as compared to the agency being unable to extract the information from a database; therefore, agency was not required to create a database in response to a RTKL request).

In this instance, for the first Request, the District argues that the specified information sought by the Requester is not kept in a single source and requires a review of all individual student files to compile a list of information, some of which does not exist even within the individual student files. Ms. Warihay attests that the “District does not keep a central repository of mask exemptions, either by [D]istrict, school or grade” and, that the mask “exemption process is not form oriented—it is addressed through an individual student assessment based upon the medical condition of a student.” Further, Ms. Warihay attests that the individual students’ “IEP’s, 504 Service Agreements and other plans do not contain the identities of the student’s doctor.” For Requests 2-5, the Requester made it clear that she is requesting data, which she argues can be compiled or extracted from documentation the District possesses. Similar to *Gingrich* and *Scicchitano*, the District is asserting that the data points sought by the Requester, as expressed in the Requests and on appeal, are not maintained in a manner by which the District could extract them from a database, in order to provide them to the Requester. Ms. Warihay attests that the District does not “maintain statistical, aggregate or compiled data in a report, document or database tracking the information requested.”

As previously discussed, under the RTKL, an attestation or statement made under penalty of perjury may serve as sufficient evidentiary support. *See Sherry*, 20 A.3d at 520-21; *Moore*, 992 A.2d at 909. Although the Requester argues that the requested information must exist, the Requester has not submitted evidence to dispute the District’s position that it does not maintain the requested information for the first Request in a single source. The Requester also has not submitted evidence to dispute the District’s position that it does not maintain the statistical data sought in Requests 2-5 in a database from which the requested information can be extracted or broken down into the categories described in the Requests. *See Walker and LNP Media v. Mt. Joy*

Borough, OOR Dkt. AP 2021- 0379, 2021 PA O.O.R.D. LEXIS 513; *Bridge v. Pa. Dep't of Educ.*, OOR Dkt. AP 2020-1002, 2020 PA O.O.R.D. LEXIS 2458. Here, the OOR has no authority to determine whether records should exist or how they should be compiled in a way that certain stats can be extracted, only whether the District possesses them. Accordingly, based on the evidence provided, the District proved that it does not have the requested information in the format requested and providing the information would require the creation of records.⁹ See *Hodges*, 29 A.3d at 1192; *Hays v. Pa. State Police*, OOR Dkt. AP 2015-0193, 2015 PA O.O.R.D. LEXIS 294.

CONCLUSION

For the foregoing reasons, the appeal is **denied**, and the District 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 Chester County Court of Common Pleas. 65 P.S. § 67.1302(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.¹⁰ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: October 28, 2021

/s/ Erika Similo

APPEALS OFFICER
ERIKA SIMILO, ESQ.

⁹ The District also argues that even if some of the requested information is available in other formats, specifically if the information is included within individual student IEP's and 504 Service Agreements, the requested information would be exempt from disclosure under various provisions of the RTKL, as well as under FERPA, 20 U.S.C. § 1232g. However, because the District proved that the requested information does not exist within its possession, custody or control in the format requested and would require the creation of records, the OOR need not reach the District's alternative grounds for denying access. See *Jamison v. Norristown Bor. Police Dept.*, OOR Dkt. AP 2011-1233, 2011 PA O.O.R.D. LEXIS 927.

¹⁰ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

Sent to: Heather Barrett (via email only);
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