

**IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL DIVISION**

COUNTY OF CARBON,	:	
Petitioner	:	
	:	
vs.	:	No. 12-0526
	:	
RYAN P. BOWMAN and	:	
COMMONWEALTH OF PENNSYLVANIA	:	
OFFICE OF OPEN RECORDS,	:	
Respondents	:	
Daniel A. Miscavige, Esquire		Counsel for Petitioner
Ryan P. Bowman		Pro Se
Commonwealth of Pennsylvania		
Office of Open Records		Pro Se

MEMORANDUM OPINION

Serfass, J. - November 6, 2012

Here before the Court is the County of Carbon's "Petition for Review" of the Final Determination of the Commonwealth of Pennsylvania Office of Open Records (hereafter the "O.O.R.") directing the disclosure of "responsive public documents" requested by Ryan P. Bowman pursuant to the Pennsylvania Right To Know Law, 65 P.S. §67.101-67.304. For the reasons that follow, we will grant the County's petition and reverse the Final Determination of the O.O.R.

FACTUAL AND PROCEDURAL HISTORY

Respondent Ryan P. Bowman (hereinafter "Respondent") submitted a "Standard Right-to-Know Request Form" to the County

of Carbon (hereafter the "County) on January 25, 2012. Respondent requested certified copies of records he identified as "911 Dispatch records for Mahoning Valley Ambulance Association-EMS Station 6, for total dispatches in from 2004-2012, broken down year by year" and "'scratched' calls from 2004-2012, broken down year by year, omitt (sic) addresses, and personal information. Information complied (sic) into spreadsheet is fine."

On the same date on which Respondent submitted his request, the County, through its 9-1-1 Director, Gary L. Williams, Jr., issued a written response denying said request, citing 65 P.S. §67.705 as the grounds for the denial and stating that "[w]e are not required to create a record which does not currently exist." Respondent appealed the County's denial to the O.O.R. on January 30, 2012. In his letter of appeal, Respondent indicated that he was willing to compromise his request and would accept the "CAD (Computer Aided Dispatch) printout for the statistical data that I am seeking [...] If the above request is not required to create a record that does not exist, then I am asking for the information that is or would be furnished to Eastern EMS Council or the PA Department of Health for complying (sic) statistical data."

On February 2, 2012, County Solicitor Daniel A. Miscavige submitted to the O.O.R. the "Answer of the County of Carbon to

the Request to the Right to Know Appeal of Requester Ryan Bowman." This answer was verified by Director Williams. The County asserted therein that the response issued by Director Williams complied with all provisions of the Right-to-Know Law in that the County has no obligation to create a record that does not exist, the records requested by Respondent do not exist and the denial letter of January 25, 2012 indicated the same.

The O.O.R. issued a Final Determination on February 23, 2012 which granted Respondent's appeal. The O.O.R. found, firstly, that Respondent was not permitted to modify his request for information on appeal, pursuant to Pennsylvania State Police v. Office of Open Records, 995 A.2d 515, 516 (Pa. Commw. Ct. 2010) and Staley v. Pittsburgh Water and Sewer Authority, OOR Dkt. AP 2010-0275, 2010 PA O.O.R.D. LEXIS 256, and that, as a result, the O.O.R.'s review was confined to the initial records request as submitted by Respondent on January 25, 2012. Secondly, the O.O.R. found that the Right to Know Law does apply to requests for data such as the one submitted by Respondent. Finally, the O.O.R. determined that the County had not met its burden of proving that records responsive to Respondent's request did not exist, in that the County failed to state whether it had undertaken any search for the requested records or whether any such records existed. With respect to the third point, the O.O.R. found that since the County had not

sufficiently established a basis for the conclusion that no responsive records existed, the County was obligated to disclose any and all responsive records to Respondent. In its Final Determination, the O.O.R. noted that the County was not obligated to create any records listed in Respondent's request.

On March 8, 2012, the County appealed the Final Determination of the O.O.R. to this Court. On March 15, 2012, the Prothonotary of Carbon County received a letter from Dena Lefkowitz, the O.O.R.'s Chief Counsel, stating that the O.O.R. would rest upon its Final Determination and would not be filing a brief nor appearing for argument in this matter.¹

DISCUSSION

The Right To Know Law, 65 P.S. §67.101-67.3104, was enacted on February 14, 2008 and became effective on January 1, 2009. "The [Right To Know Law] is remedial legislation designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials, and make public officials accountable for their actions...." Bowling v. Office of Open Records, 990 A.2d 813, 824 (Pa. Cmwlth. 2010). Pursuant to 65 P.S. §67.102 and §67.302, the County is a local agency which is subject to the Right To Know

¹ Pursuant to §1303(a) of the Right To Know Law, 65 P.S. §67.1303(a), the O.O.R. has the discretion to determine whether it will respond in actions to review its final determination.

Law and, as such, must provide access to public records in accordance therewith.

"[A] reviewing court, in its appellate jurisdiction, independently reviews the OOR's orders and may substitute its own findings of fact for that of the agency." Id. at 818. "[A] court reviewing an appeal from an OOR hearing officer is entitled to the broadest scope of review;" such review is independent in nature and not limited to the rationale set forth in the OOR's written determination. Id. at 820. The record reviewed on appeal consists of "the request for public records, the agency's response, the appeal, the hearing transcript, if any, and the final written determination of the appeals officer." Id. The Right To Know Law allows the reviewing court, in conducting its review, to supplement the record through hearing or remand. Id. The reviewing court may also "review other material, including party stipulations, and also may conduct an *in camera* review of the documents at issue." Dept. of Corrections v. Office of Open Records, 18 A.3d 429, 432 n. 6 (Pa. Cmwlth. 2011).

On appeal, the County argues that the O.O.R. erred in finding as follows:

1. That the information requested by Respondent constitutes a record for the purposes of the Right To Know Law;
2. That the County is obligated to search its records for the requested data and compile it into a record;

3. That the County's denial was insufficient to establish that the record did not exist;
4. That the County's denial was insufficient to establish that the County had determined whether data responsive to Respondent's request existed;
5. That the County's denial was improper under the applicable provisions of the Right-to-Know Law; and
6. That no substantive grounds existed to support the County's denial.

We begin our analysis with the following general rule established by the Right To Know Law: "Unless otherwise provided by law, a public record, legislative record or financial record shall be accessible for inspection and duplication in accordance with this act. A record being provided to a requester shall be provided in the medium requested if it exists in that medium; otherwise, it shall be provided in the medium in which it exists." 65 Pa. Stat. Ann. §67.701. Accordingly, the County was under an affirmative obligation to provide Respondent with any requested information that constituted a public record, in the medium in which that information existed at the time of the request. The burden of proving that no responsive records exist is placed on the agency receiving that request. 65 Pa. Stat. Ann. §67.708. If the County carried its burden of demonstrating that, at the time of the request, it did not possess the requested record, a denial of the request was proper. Moore v. Office of Open Records, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010).

The Right To Know Law defines a record as "information, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency. The term includes a document, paper, letter, map, book, tape, photograph, film or sound recording, information stored or maintained electronically and a data-processed or image-processed document." 65 Pa. Stat. Ann § 67.102. Respondent's initial request² was for "911 Dispatch records for Mahoning Valley Ambulance Association-EMS Station 6, for total dispatches in from 2004-2012, broken down year by year" and "'scratched' calls from 2004-2012, broken down year by year, omitt (sic) addresses, and personal information." Without question, if within the County's possession there existed such dispatch records, the County was obligated to provide that information in the medium in which it existed. It is the position of the County that no such records exist and there has been no evidence to the contrary.

Under the Right To Know Law, a proper denial of a records request must include:

² Respondent's January 25, 2012 Right To Know Request is the only request which we will consider herein, as Respondent has not appealed that part of the O.O.R.'s Final Determination holding that Respondent could not modify his request on appeal.

1. A description of the record requested;
2. The specific reasons for the denial, including a citation of supporting legal authority;
3. The typed or printed name, title, business address, business telephone number and signature of the open-records officer on whose authority the denial is issued;
4. Date of the response; and
5. The procedure to appeal the denial of access under [the Right To Know Law]. 65 Pa. Stat. Ann. §67.903.

It is to be noted that section 903 of the Right To Know Law does not require an agency to provide a detailed explanation of its denial; it merely states that a specific reason must be provided. County of York vs. Pennsylvania Office of Open Records, 13 A.3d 594, 597 (Pa.Cmwlth. 2011).

The County's denial letter of January 25, 2012 recited the specific request that Respondent had submitted. It further stated that "The County is unable to fulfill your request; therefore your request is denied under 65 P.S. §67.705 'We are not required to create a record which does not currently exist,'" explaining that the Right To Know Law does not pertain to requests for raw information or data, but to specific existing public records. The name, title, business address, phone number and signature of Director Williams appear at the end of the letter. As previously indicated, the letter is dated January 25, 2012 and includes detailed information regarding the appeals process pursuant to 65 P.S. §67.903(5).

Furthermore, the County's Answer of February 2, 2012, which reiterated that the records requested by Respondent do not exist, contains an affidavit executed by Director Williams made subject to the penalty of perjury. We find that through submission of these documents, the County has demonstrated that the requested record does not currently exist and that the County has satisfied its responsibilities under the Right To Know Law. Clearly, the County cannot grant access to a record that does not exist. Therefore, the denial was procedurally proper under the Right To Know Law. The County had no obligation to indicate specifically what kind of search was performed; only to provide a reason and statutory authority for the denial of the request. The County did so; to wit, the request was denied because the County could not fulfill the request and was not obligated to create a record with which it would be able to do so (by, for example, compiling data into a spreadsheet as suggested by Respondent in his request).

We need not consider independently the question of whether the data requested by Respondent constitutes a record within the meaning of the Right To Know Law. The County argues that the request was not for a record as defined by the Right To Know Law because, pursuant to 65 P.S. §67.102, a record must be "created, received or retained," and the County did not create, receive or retain any information responsive to the request. Assuming that

such data would constitute a public record, we do not agree with the O.O.R.'s determination that the County failed to meet its burden of proving that the information did not exist, and so the question is moot.

The County, through Director Williams, has stated in its denial letter and verified Answer that the records requested by Respondent do not exist, and that the County would be required to create a record in order to fulfill that request. Pursuant to 65 P.S. §67.903, and in keeping with the burden of proof placed on the County by 65 P.S. §67.708, that statement and affidavit were sufficient to establish grounds for a denial of Respondent's request. See Moore v. Office of Open Records, 992 A.2d 907 (Pa. Cmwlth. 2010). Therefore, the County's denial of Respondent's request was appropriate.

CONCLUSION

For the reasons set forth hereinabove, we now reach the following conclusions in final disposition of this matter:

1. The County's denial of Respondent's January 25, 2012 Right-to-Know Request was issued in conformance with 65 Pa. Stat. Ann. §67.903;
2. The County has submitted sufficient evidence to support the denial of Respondent's request based upon 65 Pa. Stat. Ann. §67.705, as no responsive records exist and the request is therefore incapable of being fulfilled;

3. The County is not obligated to create a record that does not exist; and
4. The Pennsylvania Office of Open Records erred in granting Respondent's appeal and requiring the County to provide said Respondent with all records responsive to his Right-To-Know request.

Accordingly, we reverse the Final Determination of the Pennsylvania Office of Open Records and affirm the County of Carbon's original response and denial of Respondent's Right To Know Request dated January 25, 2012.

BY THE COURT:

Steven R. Serfass, J.

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ORDER OF COURT

AND NOW, to wit, this 6th day of November, 2012, upon consideration of the "Petition for Review" filed by the County of Carbon, the County's brief in support thereof, and following oral argument thereon, and in accordance with our Memorandum Opinion of this same date, it is hereby

ORDERED and DECREED that the Final Determination of the Commonwealth of Pennsylvania Office of Open Records granting the appeal of Respondent Ryan P. Bowman is **REVERSED** and the County of Carbon's original response and denial of said Respondent's Right To Know Request dated January 25, 2012 is **AFFIRMED**.

BY THE COURT:

Steven R. Serfass, J.