



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

:

MICHAEL P. BUFFER,
Complainant

:

:

:

:

Docket No.: AP 2009-0401

v.

:

:

:

:

LUZERNE COUNTY,
Respondent

:

:

:

INTRODUCTION

Michael Buffer (the “Citizen”) filed a right-to-know request (the “Request”) with Luzerne County (the “County”) pursuant to the Right-to-Know Law, 65 P.S. § 67.101, *et. seq.* (the “RTKL”), seeking copies of health care insurance coverage/premium information for County employees. The County partially granted and partially denied the request stating that some of the records are exempted from public release under the RTKL. The Citizen filed a timely appeal with the Office of Open Records (the “OOR”).

For the reasons set forth in this Final Determination, the Citizen’s appeal is **granted** and the County is required to provide copies of the records requested with any nonpublic information redacted.

FACTUAL BACKGROUND

On March 25, 2009, the Citizen filed the Request with the County. Specifically, he sought:

- All documents and records that disclose how much the county paid in claims and fees associated with healthcare coverage for Wister Yuhas and Robert Payne
- All healthcare coverage paperwork filled out by Wister Yuhas and Robert Payne
- All documents and records that disclose the names of all persons – employees and dependents – who are receiving county employee healthcare coverage and have been covered since 2004.
- Contracts with the healthcare administrators/insurers
- All documents and records that disclose when Beth Ann Christian worked and was on a leave from working during the past four years
- Copies of paychecks issued to Beth Ann Christian in 2006, 2007, 2008, and 2009.

Sandra A. Zurek, Open Records Officer for the County, responded within the required five (5) business days on March 25, 2009 and indicated that the County would respond within thirty days. On April 24, 2009, the County partially granted the request and provided the Citizen with a number of documents. In addition, the County partially denied the request citing 65 P.S. §§ 67.703, 67.708(b), and the Health Information Portability and Accountability Act of 1996 (“HIPAA”). Specifically, the Citizen’s request for the following were denied:

- All documents and records that disclose how much the county paid in claims and fees associated with healthcare coverage for Wister Yuhas and Robert Payne
- All healthcare coverage paperwork filled out by Wister Yuhas and Robert Payne
- All documents and records that disclose the names of all persons – employees and dependents – who are receiving county employee healthcare coverage and have been covered since 2004.
- Documents and records that disclose when Beth Ann Christian worked and was on a leave form working during the past four

years (some records were provided remaining request was denied)

The County properly advised the Citizen of his right to appeal. The Citizen filed a timely appeal to the OOR on May 14, 2009.

LEGAL ANALYSIS

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. §67.503(a). The County is a local agency subject to the RTKL. *See* 65 P.S. § 67.302.

Section 102 of the RTKL, defines the term “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.”

The RTKL provides further clarity in defining a “public record” as:

“A record, including a financial record, of a Commonwealth or local agency that: (1) is not exempt under section 708; (2) is not exempt from being disclosed under any other Federal or State law or regulation or judicial order or decree; or (3) is not protected by a privilege.”

65 P.S. §67.102.

The RTKL is clear that agencies bear the burden of proving the applicability of any exceptions. Specifically § 708 in pertinent part states:

(a) Burden of proof. —

(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.

Preponderance of the evidence has been defined as "evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary 1064 (8th ed. West 2004). *See also Commonwealth v. Williams*, 615 A.2d 716 (PA. 1992); *see also Commonwealth v. Brown*, 567 Pa. 272, 786 A.2d 961 (2001)(holding preponderance of the evidence means "greater weight of the evidence").

The County stated that the request for records was not sufficiently specific under 65 P.S. § 67.703. We disagree. The Citizen's request cites specific information involving specific individuals sufficient to permit the County to determine what records were sought. As such, the County has not met its burden of proof as required by law for the exception cited.

The County also states that the requested records are exempt under § 102 of the RTKL and HIPAA. Under the RTKL, a public record is one that is not exempt from being disclosed under any other state or federal law. *See* 65 P.S. § 67.102. The County argues that it is a self insured medical provider and that HIPAA precludes the release of the requested information. However, the County did not explain how it is a self-insured medical provider or provide any evidence in support of its claim. In addition, while the County referenced HIPAA in its submission to the OOR, it failed to demonstrate how the requested records contain "protected health information" pursuant to 45 C.F.R. § 160.103. That section provides in relevant part:

Health information means any information, whether oral or recorded in any form or medium, that:

- (1) Is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and
- (2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or

the past, present, or future payment for the provision of health care to an individual.

Individually identifiable health information is information that is a subset of health information, including demographic information collected from an individual, and:

- (1) Is created or received by a health care provider, health plan, employer, or health care clearinghouse; and
- (2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and
 - (i) That identifies the individual; or
 - (ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual.

45 C.F.R. § 160.103 (emphasis added)

In this case, the Citizen requests financial information detailing what the County paid for individual insurance coverage/premiums, not what the County paid for the provision of health care to those individuals. The Citizen reiterates this in his appeal stating he “just wants to see who got benefits and how much the benefits cost.” The OOR notes that the health care coverage paperwork and applications filled out by County employees could contain identifiable health information. To the extent they do, such information is protected and can be redacted pursuant to 65 P.S. §67.706. Under the plain language of the RTKL, an “agency may not deny access to the record if the information which is not subject to access is able to be redacted.” As noted above, the County has not demonstrated or even claimed that the financial information contained within the requested health care insurance records are subject to any other exemptions under the RTKL. The OOR is sensitive to ensuring that private information is protected properly under the RTKL. Here, however, the Agency failed to meet its burden of proof and therefore blanket withholding cannot be upheld by the OOR. As such, the County is

directed to provide to the Citizen copies of the requested records with any nonpublic information redacted.

CONCLUSION

For the foregoing reasons, this appeal is **granted**. The County is directed to provide copies of the requested records with all nonpublic information redacted. The parties are advised that this is a Final Determination and is binding on the parties. Within thirty (30) days of the mailing date of this determination, either party may appeal to the Court of Common Pleas, Luzerne County. All parties must be served with notice of the appeal. The Office of Open Records also shall be served notice and have an opportunity to respond according to court rules. 65 P.S. §67.1302.

FINAL DETERMINATION ISSUED: June 10, 2009



APPEALS OFFICER
NATHANAEL J. BYERLY, Esq.