



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF:	:	
	:	
JOSEPH ROGAN,	:	
PATRICK ROGAN,	:	
Complainants	:	(Consolidated)
	:	Docket No.: AP 2009-0096
v.	:	Docket No.: AP 2009-0108
	:	
LACKAWANNA COUNTY	:	
Respondent	:	

INTRODUCTION

Mr. Joseph Rogan (“Mr. Rogan”) and Patrick Rogan filed separate right-to-know requests with Lackawanna County (“the County”), seeking copies of the same records relating to medical care at the Lackawanna County Prison pursuant to the Right to Know Law (“RTKL”), 65 P.S. §67.101, *et. seq.*. The County partially granted and partially denied the requests. Both Rogans timely appealed to the Office of Open Records (“OOR”). This consolidated Final Determination will address the appeal filed by Joseph Rogan, but is binding and determinative for both appeals as they are for the same records.

For the reasons set forth in this Final Determination, the appeal is **granted** and the County is required to release the records requested.

FACTUAL BACKGROUND

On January 1, 2009, Mr. Rogan filed a right-to know request with the County requesting records and documents relating to medical care provided at the Lackawanna County Prison. Mr. Rogan has been attempting to obtain the records since at least April, 2008. Specifically, the records requested were as follows:

1. The Spanish version of the latest English version of the *Inmate Handbook*.
2. English and Spanish versions of the *Medical Protocols* used by the staff and inmates at the prison.
3. “The pharmacy contract”
4. Accounting information on “the pharmacy contract” for the last two years

On January 8, 2009, Elizabeth Randol (“Ms. Randol”), Chief Counsel, responded to the request and provided Mr. Rogan with a copy of the current English *Inmate Handbook* and noted that there was not a Spanish translation. Ms Randol stated that this request was partially denied because it is not required to create a record that does not exist, pursuant to § 705 of the RTKL. Ms. Randol then indicated that the County would need an additional thirty days to respond to the request for the other records.

The County forwarded the request for records to a prison medical care vendor, Correctional Care, Inc. (“CCI”). The County contracts with CCI to provide medical services at Lackawanna County Prison. CCI subcontracts with other companies and entities to fulfill its contractual obligations with the County. In a letter to the County dated January 16, 2009, CCI stated that the records requested should not be released because:

1. the requestor did not have standing under the RTKL to request the records
2. they contain confidential proprietary information and trade secrets
3. they are privileged under the attorney work product privilege
4. they are privileged under the physician-patient privilege
5. the disclosure include the potential loss of Federal or State Funds

In support of these claims, CCI stated that the information if disclosed would cause substantial harm to the competitive position of CCI and “that the information sought includes programs that ‘derive independent economic value, actual work potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use’ and ‘is the subject of efforts that are reasonable under the circumstances to maintain its secrecy as a Trade Secret.’ CCI stated that the records fall under the exception set forth in § 708(b)(11) of the RTKL. CCI provided no factual basis or support for these claims.

On January 28, 2009, the County granted Mr. Rogan’s request for a copy of the English version Medical Protocols and policies, but denied his request for Spanish versions because they do not exist. The County denied Mr. Rogan’s request for a copy of Medical Protocols used by CCI for the reasons set forth in CCI’s January 8, 2009 letter.¹ The County also denied Mr. Rogan’s request for a copy of “the pharmacy contract.” The OOR notes that while Mr. Rogan’s initial request for a copy of “the pharmacy contract” seems non-specific as to which contract he seeks, Mr. Rogan’s appeal specifically mentions the Lackawanna County Prison pharmacy contract.

¹ It is unclear from the record whether Mr. Rogan initially requested these documents. Regardless, the County subsequently provided all Medical protocols as set forth in a March 16, 2009 letter.

On February 3, 2009, the County provided Mr. Rogan with additional records-
portions of minutes from September and October 2009 Lackawanna County Prison Board
meetings.²

In a February 11, 2009 letter, Mr. Rogan expressed concern with the lack of
change in Lackawanna County Prison policy, with the County's reliance upon CCI's
response as support for its denial of some of the records requested, and with the
difference in language from the policies provided to the language in the minutes.

On February 18, 2009, Mr. Rogan filed a timely appeal with the OOR. In the
appeal Mr. Rogan lists the records requested as:

1. Copies of the current *Inmate Handbook* for the Lackawanna County
Prison (LCP) in English and Spanish
2. Copies of the *Medical Protocols* used by staff at LCP in English and
Spanish
3. A copy of LCP's pharmacy contract
4. A copy of the accounting of LCP's pharmacy contract for the last two
years.

He also challenges the County's claim via CCI that the information and records
requested are confidential trade secrets.

On March 5, 2009, the OOR requested the County to confirm what records had
been provided to Mr. Rogan and to provide clarification and support for the claim that the
contract was not open to public access because it is proprietary and/or a protected trade
secret. In response, the County provided a list of records provided to Mr. Rogan and
letter summarizing its legal position. In addition, the County stated that a Spanish

² The letter states that the meetings were held in September 2009 and October 2009. It is unclear from the
minutes when the meetings were actually held.

translation of the *Inmate Handbook* was subsequently completed and is being provided to Mr. Rogan.

In summary, the County stated that it had already provided Mr. Rogan with a copy of the requested handbooks and was providing or had provided “all [medical] protocols and procedures that are provided to or used by the correctional officers.” Finally, the County stated that Mr. Rogan had requested the Lackawanna County Prison’s pharmacy contract and that such a contract did not exist. Any pharmacy contract was between CCI and a third party provider. The County stated, in the alternative, that CCI will not release the contract because it contains proprietary information that would compromise its current contract negotiations with the County. The County also reiterated that the information at issue is not generated by the County but rather by CCI, a private corporation that provides medical care for the Lackawanna County Prison.

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.

While the County’s denial does not incorporate CCI’s claim that Mr. Rogan, as president of Pax Christ of Northeastern Pennsylvania, is not a legitimate requester under the RTKL, the OOR finds it necessary to address this issue. Under section 102 of the RTKL, a requester is defined as “a person that is a legal resident of the United States and requests a record pursuant to this act. The term includes agency.” Here, Mr. Rogan filed a request under the RTKL. Neither CCI nor the County provides any evidence that Mr. Rogan is not a legal resident of the United States. Mr. Rogan’s position with Pax Christ

of Northeastern Pennsylvania is irrelevant to his request for records. Therefore, Mr. Rogan is clearly a “requester” under the RTKL.

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.

Section 708 of the law states that the burden of proof rests with the public body to demonstrate that the record is exempt. In pertinent part, section 708 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.

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).

On January 5, 2009, the County provided Mr. Rogan with copies of the English and Spanish Versions of the Inmate Handbook that are currently in use. The County subsequently provided a sworn statement that a Spanish translation of the most recent English version of the Handbook has been completed and is being provided to Mr.

Rogan. On January 28, 2009, the County provided Mr. Rogan with copies of English Versions of Medical Protocol policies used by the prison correction officers. The County stated that Spanish versions of those Protocols do not exist.

An agency cannot provide a record that does not exist and an agency is not required to create a record which does not currently exist. See 65 P.S. § 67.705. Here, certain Spanish versions are not available because they do not exist. The County has provided all available handbooks and protocols to Mr. Rogan. Therefore, the County does not possess the Spanish versions responsive to Mr. Rogan’s request. To the extent the County and Lackawanna County Prison are required by another law or regulation to maintain these records in Spanish, such an issue is beyond the purview and jurisdiction of the OOR.

The County also denied Mr. Rogan’s request for a copy of “the pharmacy contract” and the relevant accounting information surrounding that contract. Based on the language in the original request and the language in the appeal, Mr. Rogan’s request is for a copy of the Lackawanna County Prison’s pharmacy contract. While there is not a pharmacy contract between Lackawanna County Prison and a pharmacy provider, there is a contract between CCI and a pharmacy provider. While the County does not have a copy of the contract between CCI and the pharmacy provider in its possession, it’s subcontractor CCI does have a copy of the contract. Under § 506(d) of the RTKL, the County still has the responsibility to obtain and provide public records that are in the possession of a third party:

(d) Agency possession. —

(1) A public record that is not in the possession of an agency but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the agency, and which

directly relates to the governmental function and is not exempt under this act, shall be considered a public record of the agency for purposes of this act.

(2) Nothing in this act shall be construed to require access to any other record of the party in possession of the public record.

(3) A request for a public record in possession of a party other than the agency shall be submitted to the open records officer of the agency. Upon a determination that the record is subject to access under this act, the open records officer shall assess the duplication fee established under section 1307(b) and upon collection shall remit the fee to the party in possession of the record if the party duplicated the record.

The contract between CCI and the pharmacy company is a record that was created and retained in connection with a transaction, business or activity of the County. While the contract is between a sub-contractor, CCI, and another private entity (the pharmacy provider), the contract directly relates to and involves the provision of medical services by CCI at the Lackawanna County Prison for which CCI was contracted. These medical services are part of the activity and business of the County. Thus, the contract between CCI and the pharmacy provider is a public record.

In the alternative, the County argues that the contract is exempt under 65 P.S. § 67.708(b)(11) as containing confidential proprietary information. CCI has stated that release of the information would cause substantial harm to its competitive position. The OOR notes that such a contract may contain information that could harm the pharmacy provider and/or CCI in making bid proposals to the County or other companies. However, this does not permit an automatic withholding of the entire contract. While the information included in 708(b)(11) exempts certain records, the RTKL also addresses situations where records contain information that is both public and nonpublic. Section 706 of the RTKL governs these requests for records:

If an agency determines that a public record, legislative record or financial record contains information which is subject to access as well

as information which is not subject to access, the agency's response shall grant access to the information which is subject to access and deny access to the information which is not subject to access. If the information which is not subject to access is an integral part of the public record, legislative record or financial record and cannot be separated, the agency shall redact from the record the information which is not subject to access, and the response shall grant access to the information which is subject to access. **The agency may not deny access to the record if the information which is not subject to access is able to be redacted.** Information which an agency redacts in accordance with this subsection shall be deemed a denial under Chapter 9.

65 P.S. §67.706 (emphasis added).


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.” The County does not claim that the contract requested by Mr. Rogan cannot be redacted. As such, the County has not met its burden under the RTKL by showing that it is unable to produce a redacted copy of the contract. Because the County has not argued it cannot redact the documents and has failed to meet its burden, the County should provide copies of the requested contract with any nonpublic information redacted. If Mr. Rogan should disagree with any redactions made by the County, he should file a request with the County for copies of the unredacted contract and appeal any denial to the OOR.

CONCLUSION

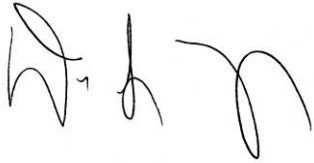
For the foregoing reasons, Mr. Rogan's appeal is **granted and the County is required to release the records requested.** This Final Determination is binding on the parties. Within thirty (30) days of the mailing date of this Determination, either party may appeal to the Court of Common Pleas, Lackawanna 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 §67.1301. The parties are

further advised that a copy of this Final Determination will appear on the Office of Open Records website, <http://openrecords.state.pa.us>

FINAL DETERMINATION ISSUED April 15, 2009



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