



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

**IN THE MATTER OF**

**JOSEPH ROGAN,  
Complainant**

**v.**

**LACKAWANNA COUNTY,  
Respondent**

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**Docket No. AP 2009-0611**

## **INTRODUCTION**

Joseph Rogan, President of Pax Christi NEPA, (the “Citizen”) submitted a request to Lackawanna County (“County”) seeking an unredacted pharmacy contract and detailed financial accounting of the pharmacy at the County Prison, pursuant to the Right-to-Know Law, 65 P.S. §§67.101 *et seq.*, (“RTKL”). The County responded that all responsive records within the County’s possession had been supplied, and noted that the County has attempted to obtain additional documents from Correctional Care Inc., the contractor providing medical services at the County Prison. The Citizen filed a timely appeal with the Office of Open Records (“OOR”).

For the reasons set forth in this Final Determination, the Citizen’s appeal is **granted**, and the County is required to take further action as directed.

## **FACTUAL BACKGROUND**

On or about June 23, 2009, the Citizen requested a copy of the unredacted County Prison pharmacy contract and “a detailed financial accounting for the last three years” (the “Request”).

After obtaining an extension to respond from the Citizen, on June 30<sup>th</sup>, Maria Elkins, Chief of Staff who serves as the Open Records Officer (ORO) for the County responded that the

County is not in possession of an unredacted contract or a detailed financial accounting for the last three years and has been working to obtain that information from the third-party contractor, Correctional Care, Inc., the vendor for prison medical services (the “Denial”).

The Citizen filed a timely appeal with the OOR on July 13, 2009. In support of his appeal, he advises that he had filed a separate appeal regarding the County Prison’s pharmacy contract and accounting of that contract, which was decided in his favor in *Rogan v. Lackawanna County*, OOR Dkt. AP 2009-0096/108 (consol.), and appealed to the Lackawanna County Court of Common Pleas on May 13, 2009. The Citizen advises that he repeatedly requested the information, and on June 8<sup>th</sup> asked for an unredacted copy of the contract and a more detailed accounting (the “Appeal”). Despite the number of records requested by the Citizen, the only records at issue in this Appeal are the unredacted copy of the pharmacy contract and more detailed copy of accounting of the contract for the last three years.

The OOR requested supplementation regarding the status of the records at issue, and the County’s arguments regarding lack of possession in particular. In response, the County advised that according to the contract between Correction Care Inc. (CCI) and the County, the type of services being provided is the furnishing of medical care (the “CCI Contract”). A copy of the CCI Contract was attached. The Solicitor for the County pointed out that Paragraph 23 of the CCI Contract shows that the relationship of CCI to the County is that of an independent contractor; Paragraph 14 of the CCI Contract stated that CCI would provide a pharmacy. The County contends that the contract between CCI and a private company is not a “public record.” The County explained that the pharmacy contract, which is a contract by and between Correction Care and its third-party contractor, does not qualify as a “record” as that term is defined in the RTKL because it does not document a transaction or activity of an agency. The County noted that CCI eventually provided a redacted copy of the pharmacy contract, which the Citizen has.

The County appended to its submission copies of correspondence it directed to CCI in which it seeks to compel CCI to provide the requested records in accordance with the OOR's Final Determinations regarding, among other records, the pharmacy contract and accounting for the pharmacy for 2007 and 2008. Correspondence from the County Solicitor to CCI counsel dated May 22, 2009, advises that all legal remedies are being pursued to compel the County to provide the requested records by June 1<sup>st</sup>. CCI counsel responded by letter dated May 29, 2009, advising the accounting information requested had been provided by e-mail on May 14<sup>th</sup> and that CCI believed all responsive information had been supplied to the County. A redacted copy of the contract was supplied to the OOR. No additional material was submitted.

At issue in this Appeal are the redactions from the pharmacy contract that is by and between CCI and an unidentified third-party provider (the "Pharmacy Contract"). According to the Citizen, the disputed redactions from the Pharmacy Contract include "the provider's name, all price terms, insurance information and other select data." There is no dispute that the County is required to provide medical care to prisoners at the County Prison and that "pharmacy" is part of the CCI Contract, which service has been subcontracted in accordance with Section 7.

### **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 that is required to disclose public records. 65 P.S. §67.302. Records of a local agency are presumed to be "public" unless the record is: (1) exempt under Section 708(b); (2) protected by a privilege; or (3) exempt from disclosure under any other Federal or State law or regulation or judicial order or decree. 65 P.S. §67.305. The County contends that it has undertaken efforts to obtain the records requested here, and that the records sought do not qualify as a record "of" the County as they are records of a third-party contractor. The contractor raised Section 708(b)(11) to support its redactions.

The County contends that it lacks possession over the unredacted Pharmacy Contract and notes that CCI performed the redactions. The OOR has consistently held that an agency has possession over a record if the record is within the agency's control. Further, pursuant to Section 506(d), when the record sought is a record incident to performing a governmental function on behalf of the agency, the record is deemed a "public record *of the agency* for purposes of this act." 65 P.S. §67.506(d)(1)(emphasis added). The County attempted to comply in obtaining records from the third-party contractor CCI, and ultimately is deemed to have control over CCI pursuant to Section 506(d)(1) as the OOR determined in *Rogan, supra*, OOR Dkt. AP 2009-0096 and 0108. The CCI Contract for a governmental function provides that the pharmacy services are included among the services CCI provides. *See* CCI Contract, Sec.14.

Section 7 of the CCI Contract provides that CCI "may, at its sole discretion, subcontract with appropriate medical specialists needed to provide the services under this agreement." CCI Contract, Sec. 7. Therefore, the County permitted CCI to subcontract for services comprised as part of the governmental function the County provides. As the provision of medical services to prisoners is part of the County's governmental function which has been delegated to CCI via contract, likewise, the provision of pharmacy services is reachable through Section 506(d)(1). Therefore, the County is required to submit a copy of the pharmacy services contract with only those redactions that are defensible under applicable law, with citation to legal authority. The County did not supply legal grounds for the redactions from the pharmacy contract.

From review of the redacted pharmacy contract, the following parts have been redacted: the provider name and identity of signator; the fees for services from Section 5; and, the substance of Section 6, which notes CCI maintains a right to audit and invoice. The provider identity is not patently protected under the RTKL, and the identity of a subcontractor performing a governmental function on behalf of the County cannot be withheld as non-public information.

Based upon the record submitted in this Appeal, the OOR finds that the redactions of the provider's identity and Section 6 have not been substantiated. Section 5, entitled "Fees" contains the amount of the fees charged that may be construed as "financial information." The sole exception asserted with regard to the financial information contained in the pharmacy contract is Section 708(b)(11). To overcome the presumption of openness under Section 708(a), the County must show that its claimed exception applies by a "preponderance of the evidence," meaning by the "greater weight of the evidence." *Com. v. Brown*, 567 Pa. 272, 786 A.2d 961 (2001).

Section 708(b)(11) protects the release of "a record that constitutes or reveals a trade secret or confidential proprietary information." 65 P.S. §67.708(b)(11). "Confidential proprietary information" is defined in Section 102 of the RTKL as follows:

Confidential proprietary information: Commercial or financial information received by an agency: (1) which is privileged or confidential; **and** (2) the disclosure of which would cause substantial harm to the competitive position of the [one] that submitted [it].

CCI advised in correspondence to the County with regard to the prior Rogan appeal that it would suffer substantial competitive harm were the financial data within records including the pharmacy contract disclosed. Fees and charges within a contract with a private party may qualify as the type of "confidential proprietary information" that is protected by Section 708(b)(11) as the OOR recognized in the prior Rogan appeal. However, in this Appeal, CCI failed to substantiate its basis for asserting that the fees redacted from Section 5 of the Pharmacy Contract are protected under this definition. Pursuant to Section 706, the County has an obligation to support the grounds for any redaction in accordance with Chapter 9, as is required for any denial of access. The County did not support its redactions and explain the reason for non-disclosure other than by asserting its non-possession. Therefore, the County is required to provide a copy of the Pharmacy Contract without redaction of Section 5.

The two years worth of financial accounting that had been submitted to the Citizen in response to an earlier request consisted of an “Account Quick Report” from which the name and memo/description portions were redacted. The Account Quick Report consisted of a single page showing dates for each month from May 2007 to April 2009, check numbers for each date, and a corresponding amount to which the check amount was added for a balance. The balance reflected a total of \$537,050.92. The Citizen deemed this Account Quick Report deficient to satisfy his Request for “detailed financial accounting for the last three years.” Neither the County nor CCI provided any basis for not supplying the more detailed financial accounting of the pharmacy. According to Section 15 of the pharmacy contract, CCI is entitled to access to books and records of the provider to, in part, “verify the nature and extent of the cost of services provided hereunder.” Pharmacy Contract, Sec. 15. Based upon the record, CCI reserves the right to audit and has access to the records and books of its subcontractor/provider pursuant to Section 6 of the Pharmacy Contract. From the non-redacted portions of Section 6, the subcontractor/provider is required to provide CCI with documents supporting the calculation of its invoices and CCI has a right to audit. The records contemplated under Section 6 provide a more detailed financial accounting of the Pharmacy Contract as requested. Therefore, the records can be obtained by CCI, and CCI has an obligation as a contractor for a governmental function to provide such records to the County upon request.

The detailed financial accounting, to reflect the fees obtained and paid for the services, and to include the description of services for the amounts on the Account Quick Report are public records of the County that must be disclosed in response to the Request.

## CONCLUSION

For the foregoing reasons, the Citizen's Appeal is **granted**. The Pharmacy Contract redactions had not been supported as required by Section 706 and Chapter 9 of the RTKL, and therefore it must be provided. The detailed financial accounting of the pharmacy must also be supplied for the last three years, from the records to which CCI has access in Sections 6 and 15 of the Pharmacy Contract. The County is directed to reveal the provider's identity, obtain from CCI an unredacted copy of the Pharmacy Contract and a detailed financial accounting as described above and provide them to the Citizen within thirty (30) days.

This Final Determination is binding on the parties. Within thirty (30) days of the mailing date of this Final Determination, either party may appeal to the Lackawanna 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 according to court rules. This Final Determination shall be placed on the website at: <http://openrecords.state.pa.us>.

**FINAL DETERMINATION ISSUED AND MAILED: August 12, 2009**



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**LUCINDA GLINN, ESQ.**  
**APPEALS OFFICER**

Sent to: Joseph Rogan; John R. O'Brien, Esq., Solicitor for Lackawanna County