



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

**IN THE MATTER OF**  
**JOSEPH PILCHESKY,**  
**Complainant**

v.

**LACKAWANNA COUNTY,**  
**Respondent**

:  
:  
:  
:  
:  
:  
:  
:  
:  
:  
:

**Docket No. AP 2010-0623**

## **INTRODUCTION**

Joseph Pilchesky (the “Requester”) submitted a right-to-know request to Lackawanna County (the “County”), pursuant to the Right-to-Know Law, 65 P.S. §§67.101, *et seq.*, (“RTKL”), seeking records supporting seizure, disposition or confiscation by the Sheriff’s Office for funds or property. The County advised that responsive records do not exist. The Requester timely appealed the fees to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **denied** and the County is not required to take further action.

## **FACTUAL BACKGROUND**

On June 18<sup>th</sup>, the Requester submitted a request seeking in pertinent part, for 1995-2005, any and all documents that support confiscation seizure or collection and attendant disposition by the Office of the Sheriff of: (1) all funds; and (2) all goods, products or wares “confiscated, seized and/or otherwise collected from any and all kinds of vendors that sold goods, products or wares in violation of any and all local, county or state codes or regulations, or court ordered injunctions that prohibited the sales of such goods, products and wares by said vendors in, or in close proximity outside of concerts in [the County]” (the “Request”).

Maria Elkins of the County timely responded advising that such records do not exist and cited Section 705, arguing there is no obligation to create a responsive record (the “Response”).

The Requester timely appealed, challenging non-existence because he had conversations with deputies of the Office of the Sheriff that merchandise and cash has been confiscated for the last 20 years, and does not believe a diligent search was conducted (“Appeal”).

The County supplemented the record with an affidavit of Dominick Manetti, the Chief Deputy Sheriff, made under penalty of perjury as set forth in 18 Pa. C.S. §4904 (“Affidavit”). Sheriff Manetti attested that records responsive to the Request do not exist and no records were located upon a search and investigation for such records. He also attested “[t]here have been no such arrests and confiscations of funds or products from vendors.”

### **LEGAL ANALYSIS**

The RTKL 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. OOR*, 990 A.2d 813, 824 (Pa. Commw. 2010). 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.” 65 P.S. §67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing or not hold a hearing is discretionary and non-appealable. *Id.*

The law also states that an appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* Here, neither party requested a hearing, the facts are undisputed, and the OOR has the necessary, requisite information and evidence before it, presented through sworn, written testimony, to properly adjudicate the matter. The County is a local agency subject to the RTKL and required to disclose public records. *See* 65 P.S. §67.302. Records in 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. However, an agency cannot provide a record that does not exist within its possession, custody or control.

The County's Affidavit established that responsive records do not exist. The Commonwealth Court has held that such evidence is sufficient to establish non-existence, and meets the agency's burden of proof. *See Moore v. OOR*, 992 A.2d 907 (Pa. Commw. 2010). Therefore, the County met its burden of proving the non-existence of responsive records.

### CONCLUSION

For the foregoing reasons, the appeal is **denied**. 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 as per Section 1303. This Final Determination shall be posted on the website at: <http://openrecords.state.pa.us>.

**FINAL DETERMINATION ISSUED AND MAILED: August 6, 2010**



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

Sent to: Joseph Pilchesky; Maria Elkins for County