



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

**IN THE MATTER OF**

**BRIAN BUSH,  
Requester**

**v.**

**MERCER COUNTY,  
Respondent**

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**Docket No: AP 2019-2211**

### INTRODUCTION

Brian Bush (“Requester”) submitted a request (“Request”) to Mercer County (“County”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking a list of dog license records. The County denied the Request, arguing that the Request would require the creation of a record, and the Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted in part** and **denied in part**, and the County is required to take further action as directed.

### FACTUAL BACKGROUND

On November 1, 2019, the Request was filed, seeking:

...the list of licensed dog[s] in MERCER COUNTY with the following details:

- 1) License #
- 2) Dog’s Name
- 3) Dog’s Age
- 4) Breed
- 5) Owner’s Name
- 6) Address
- 7) Email Address

On November 4, 2019, the County denied the Request, arguing that the information “does not exist in our records and [Section 705 of the RTKL] does not require an agency to create a record which does not currently exist or compile, maintain, format or organize a record...” 65 P.S. § 67.705.

On November 14, 2019, the Requester appealed to the OOR, arguing that he should be provided with whatever information the County is able to download from its database. The OOR invited both parties to supplement the record and directed the County to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On November 19, 2019, the County submitted the verification of Ann Morrison, the County’s Agency Open Records Officer, who attests that she contacted the contractor serving as Treasurer and was informed that the information sought could not be produced from the Dog License software without “creating a custom query.”

On December 10, 2019, the County notified the OOR that it had changed contractors and asked the new contractor to determine whether any of the information sought by the Requester could be produced from the database.

On December 13, 2019, the County treasurer submitted a letter to the OOR arguing that release of the requested information could promote the theft of dogs.

### **LEGAL ANALYSIS**

“The objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government.” *SWB Yankees LLC v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law 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. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff’d* 75 A.3d 453 (Pa. 2013).

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 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 sought a hearing; however, the OOR has the necessary information and evidence before it to properly adjudicate the matter.

The County is a local agency subject to the RTKL that is required to disclose public records. 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. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(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(a). Preponderance of the evidence has been defined as “such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence.”

*Pa. State Troopers Ass'n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Pa. Dep't of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

**1. The Request does not require the County to create a new record**

The County denied the Request as a whole, arguing that it would necessitate the creation of a record under Section 705 of the RTKL, which states that “[w]hen responding to a request for access, an agency shall not be required to create a record which does not currently exist or to compile, maintain, format or organize a record in a manner in which the agency does not currently compile, maintain, format or organize the record.” 65 P.S. § 67.705. In support of this argument, the County submitted the verification of Ann Morrison, the County’s Agency Open Records Officer, who attests that:

3. Upon receipt of the [R]equest, I conducted a thorough examination of files in the possession, custody and control of the Agency for records responsive to the [R]equest underlying this appeal, specifically reviewing with the Mercer County Treasurer what data is available via the Dog License software that does not need to be compiled, formatted or organized pursuant to the detail requested.

4. Additionally, I have inquired with relevant Agency personnel and, if applicable, relevant third-party contractors as to whether the requested records exist in their possession, specifically the reports are not available from the Dog License software without creating a custom query to extract the line item detail.

Under the RTKL, an affidavit may serve as sufficient evidentiary support for the nonexistence of records. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any competent evidence that the County acted in bad faith, “the averments in [the affidavit] should be accepted as true.” *McGowan v. Pa. Dep't of Env'tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

However, this attestation fails to establish that the requested information does not exist. Although the County has demonstrated that it does not keep all of the information sought in a single location, it has not demonstrated that it is unable to produce at least some of that information by drawing it from the database. *See Commonwealth v. Cole*, 52 A.3d 541, 549 (Pa. Commw. Ct. 2012) (“[D]rawing information from a database does not constitute creating a record under the Right-to-Know Law”).<sup>1</sup> Furthermore, an attestation that a “custom query” would be required to provide information is insufficient to allow the OOR to determine whether an agency is capable of reasonably providing the information or not.<sup>2</sup> Therefore, the County has not proven that it is unable to extract the requested information from its database.

## **2. The County may withhold names and home addresses**

The Request specifically seeks the names and addresses of the owners of the registered dog licenses.<sup>3</sup> The Pennsylvania Supreme Court has held that an individual possesses a constitutional right to privacy in certain types of personal information. *Pa. State Educ. Ass’n v. Commonwealth*, 148 A.3d 142 (Pa. 2016). When a request for records implicates personal information not expressly exempt from disclosure under the RTKL, the OOR must balance the individual’s interest in informational privacy with the public’s interest in disclosure and may release the personal information only when the public benefit outweighs the privacy interest. *Id.*; *see also Pennsylvania State Univ. v. State Employees’ Retirement Bd.*, 935 A.2d 530 (Pa. 2007) (employing a balancing test with respect to home addresses sought under the former Right-to-Know Act).

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<sup>1</sup> The OOR sought additional information from the County regarding the capabilities of its database; however, the County was unable to provide the OOR with a detailed affidavit prior to the issuance of this Final Determination.

<sup>2</sup> Queries are commonly used to access information in databases. See “What Is the Definition of a Database Query?”, explaining that “[a] database query extracts data from a database and formats it into a human-readable form.” (<https://www.lifewire.com/query-definition-1019180>, last accessed December 30, 2019.)

<sup>3</sup> The license application, which is available on the County’s website, asks each applicant to provide this information. See <https://www.mcc.co.mercer.pa.us/treasurer/Forms/Annual.Dog.License.pdf> (last accessed December 11, 2019).

Although the Pennsylvania Supreme Court did not expressly define the types of “personal information” subject to the balancing test, the Court recognized that certain types of information, including home addresses, by their very nature, implicate privacy concerns and require balancing. *Pa. State Educ. Ass’n*, 148 A.3d at 156-57; *see also Tribune-Review Publ. Co. v. Bodack*, 961 A.2d 110, 117 (Pa. 2008) (finding telephone numbers to constitute personal information subject to the balancing test); *Pa. State Univ.*, 935 A.2d at 533 (finding home addresses, telephone numbers and social security numbers to be personal information subject to the balancing test); *Sapp Roofing Co. v. Sheet Metal Workers’ International Assoc.*, 713 A.2d 627, 630 (Pa. 1998) (plurality) (finding names, home addresses, social security numbers, and telephone numbers of private citizens to be personal information subject to the balancing test). Furthermore, home addresses may be confidential even when they are not attached to information, such as names, which would lead to the identification of the resident. *Chester Hous. Auth. v. Polaha*, 173 A.3d 1240, 1252 (Pa. Commw. Ct. 2017) (“[W]e hold that the constitutional privacy protection applies when home addresses are requested, regardless of whether names or the resident’s identity are attached.”). Therefore, the OOR must conduct a balancing test to determine if home addresses should be provided.

The OOR must also determine whether the names of licensed dog owners are the type of record in which an individual has any reasonable expectation of privacy. *See Butler Area Sch. Dist. v. Pennsylvanians for Union Reform*, 172 A.3d 1173 (Pa. Commw. Ct. 2017). To discern whether a party may have a privacy interest in the release of their name, the OOR assesses whether the information is traditionally public, whether an individual has a cognizable interest in the status of the records, and whether the record is personal, such that an individual has a reasonable expectation of privacy. *Id.*

First, the right to privacy has been applied to the names of private individuals in previous cases where the identity of the individual was submitted for the purposes of licensure, and in which there is only nominal public benefit in publication. *See Hartman v. Dep't of Conservation & Natural Res.*, 892 A.2d 897 (Pa. Commw. Ct. 2006). Courts have traditionally recognized a limited personal interest in connection with a person's name alone, and names may be provided in cases where there is a more significant public interest, or where the name will not give rise to some other injury to security or reputation. *See Times Publishing Co. v. Michel*, 633 A.2d 1233, 1240 (Pa. Commw. Ct. 1993). In this case, the names of dog owners have not been specifically made public or protected by any statute, but the County argues that the names of licensees, in connection with the breed and number of dogs owned, may significantly increase the danger that a dog will be targeted for theft.

Next, the OOR must determine if the information sought is sufficiently personal in nature to trigger an interest in disclosure. Only individuals in a private capacity have a right to privacy under the state constitution – while business information may still be exempt under the RTKL generally, it is not a constitutional concern. *See, e.g., Mission Pa., LLC v. McKelvey*, 212 A.3d 119, 133 (Pa. Commw. Ct. 2019); *Butler Area Sch. Dist. v. Pennsylvanians for Union Reform*, 172 A.3d 1173, 1185 (Pa. Commw. Ct. 2017) (“The constitutional right to informational privacy only inures to individuals”). Here, there is no doubt that the name of a resident can be personal in nature.

Finally, the OOR must examine whether the individual has a reasonable expectation of privacy in their name and ownership of a dog, which depends primarily upon the reason the agency possesses the information. The Court has held that:

...[C]ertain factors are constant when evaluating a privacy interest in information. One is an individual's reasonable expectation that the information is of a personal

nature... When information is public as a matter of statute, it is unreasonable for a person to expect that it is of a personal nature... Another factor is how the agency obtained the information: when an individual voluntarily submits information, it may be disclosed...; whereas, information obtained by an agency premised on statutory confidentiality is protected... Also, the context holds additional significance, as does where the information is an essential component of a public record.

*Butler Area Sch. Dist.*, 172 A.3d at 1184.

When information is submitted as part of an application, it must be evaluated in the context of that application. Here, the records at issue consist of information from dog licenses, submitted on forms created by the Pennsylvania Department of Agriculture pursuant to the Pennsylvania Dog Law, which provides statutory requirements for the information on the form and the amount of money collected. 3 P.S. § 459-101 *et seq.* The Dog Law does not make this information expressly confidential or public, and the form furnished by the Department makes no mention of whether information will be released. Therefore, applying for a dog license is unlikely to give rise to a heightened expectation of privacy, but a reasonable person could expect the information to remain confidential. Because the name of a dog registrant is personal information in which a reasonable person could have an expectation of privacy, the OOR will balance the affected interests.

To determine whether the constitutional right to privacy precludes disclosure of an individual's personal information, the OOR must apply the balancing test enunciated in *Denoncourt v. Pa. State Ethics Comm'n*, 470 A.2d 945 (Pa. 1983), and applied in the public records context in *Times Publ. Co., Inc. v. Michel*, 633 A.2d 1233, 1237 (Pa. Commw. Ct. 1993), "weighing privacy interests and the extent to which they may be invaded, against the public benefit which would result from disclosure." In sum, the question is this: is the public benefit in releasing the requested dog license information greater than the owner's privacy rights? Here, the Requester has not articulated any public purpose or benefit to the release of the requested records, whereas

the Pennsylvania Supreme Court has stressed the importance of privacy in residential home addresses.<sup>4</sup> *See, e.g., Murray v. Pa. Dep't of Health*, OOR Dkt. AP 2018-0461, 2017 PA O.O.R.D. LEXIS 1361 (absent a compelling reason to provide home addresses, they should be withheld). Had the Requester demonstrated a public benefit, the outcome may have differed. As he did not do so, the County is not required to provide the home addresses of the dog owners.<sup>5</sup>

Likewise, since no argument has been made outlining a compelling public interest or benefit in the disclosure of the names of the dog owners and no challenge has been made to the security concerns raised by the County, the County is permitted to withhold the names of dog license registrants in this case.<sup>6</sup>

Conversely, however, there is no right to privacy regarding the address of business or commercial entities. Therefore, to the extent the any responsive record is known to refer to a business address rather than the address of a private dwelling, it must be provided. *See Manry v. Shrewsbury Borough*, OOR Dkt. AP 2019-0387, 2019 PA O.O.R.D. LEXIS 498 (stating that while the names of private citizens are subject to the right to privacy, the names of business entities are not protected); *Swart v. West Goshen Twp.*, OOR Dkt. AP 2019-0659, 2019 PA O.O.R.D. LEXIS 640 (granting an appeal in part where the agency did not show that all responsive addresses were of residents).

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<sup>4</sup> On December 19, 2019, the OOR asked the Requester to articulate any compelling public interest in the requested information, but the Requester did not respond.

<sup>5</sup> The OOR notes that the Requester seeks email addresses, and that the County's dog license application contains a line for prospective licensee to submit an email address. However, the County was unable to confirm that such email addresses are in its database, and it did not raise Section 708(b)(6) of the RTKL. 65 P.S. § 67.708(b)(6)(i). As such, the OOR will not specifically address the issue of email addresses.

<sup>6</sup> Although the County does not raise the matter, the OOR takes notice of the fact that the County's website offers a functionality to look up a dog owner's identity using the dog's license number. *See* <https://www.mcc.co.mercer.pa.us/treasurer/DogOwnerSearch/default.htm> (last accessed, 12/23/19). Therefore, the OOR will not order the County to provide the dog license number.

## CONCLUSION

For the foregoing reasons, Requester's appeal is **granted in part** and **denied in part**, and the County is required to provide responsive information, except that it may withhold dog license numbers, registrant names and home addresses. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal or petition for review to the Court of Common Pleas of Mercer County. 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 Section 1303 of the RTKL. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.<sup>7</sup> This Final Determination shall be placed on the website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: December 30, 2019**

/s/ Jordan C. Davis  
Jordan C. Davis, Esq.  
Appeals Officer

Sent to: Brian Bush (via email);  
Ann Morrison (via email)

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<sup>7</sup> *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).