

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Charles R. Gingrich,	:	
Petitioner	:	
	:	
v.	:	No. 1254 C.D. 2011
	:	Submitted: October 28, 2011
Pennsylvania Game Commission,	:	
Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge  
HONORABLE ROBERT SIMPSON, Judge  
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION  
BY JUDGE SIMPSON**

**FILED: January 12, 2012**

This appeal concerns the Right-to-Know Law (RTKL).<sup>1</sup> Charles R. Gingrich (Requester) contends the Office of Open Records (OOR) erred in denying his appeal from the Pennsylvania Game Commission's (Commission) denial of his request for records relating to deer harvest and habitat, and for related financial information. Requester argues the OOR erred in concluding that he requested information as opposed to records and that he asked the Commission to create records that did not exist, and it erred in permitting the Commission to alter its response to his request on appeal. Further, Requester contends the OOR erred in finding the Commission's affidavits probative of non-existence and in not opening the record for more evidence. Upon review, we affirm in part and reverse in part.

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<sup>1</sup> Act of February 14, 2008, P.L. 6, 65 P.S. §§67.101-67.3104, which repealed the former Right-to-Know Law, Act of June 21, 1957, P.L. 390, as amended, formerly 65 P.S. §§66.1-66.4.

## I. Background

In March 2011, Requester submitted a 20-part request (Request) to the Commission using the OOR's uniform request form. In the attachment to the form, relating to "Records Requested," Requester stated that he seeks:

the following information/records which ... are supporting data for summary data shown in your Annual Financial Reports or information/records in your Deer Harvest Data Base. Although I have attached suggested reporting formats, they are not required.

Reproduced Record (R.R.) at 2a. Specifically, Requester sought, in pertinent part:

1. The [Commission's] Annual Reports for the Fiscal Years shown below indicates the amount of Federal Aid that was received.

(a) 2009-2010 = \$15,337,054; (b) 2008-2009 = \$14,183,895; [and,] (c) 2007-2008 = \$11,068,733

For each fiscal year please identify the specific programs, associated dollar amounts, program restrictions and the amount allotted to specific programs/projects (Federal Aid).

2. Does your accounting system recognize transfer of labor/time charges between programs? For example ... If the accounting system recognizes the transfer of labor/time charges please provide the date requested in the attached [] for the Fiscal Years 2005/2006-2009/2010. In addition, if your accounting system does recognize the transfer of labor/time charges, please provide a copy of the chapter/section [i]n the Accounting Manual/Instructions that describes the process for making the transfers.

3. Identify which Program Area, shown on pages 26 & 27 ([] Annual Report) of the January 2011 Pennsylvania Game News that the expenditure for "Payments to local municipalities in-lieu-of taxes" is charged to. Also please provide a copy of

chapter/section in the Accounting Manual/Instructions that describes the accounting for Payments to local municipalities in lieu-of-taxes.’

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6. Deer Harvest Report Cards you received from hunters contain data by WMU, County, Township, and Sex and is imputed to your deer harvest data base [1]. [By Township within WMU 2G, for 2005/2006-2010/2011:]

(a) the total deer (antlered, antlerless and button buck‘ separately), *harvested and reported by hunters on report cards*. Your Deer Aging Team (DAT) also collect deer harvest data by WMU, County, Township, and Sex[;]

(b) the total deer (antlered, antlerless and button buck‘ separately) examined by the (DAT)[;] and[,]

(c) the total deer (antlered, antlerless and button buck‘ separately), that were both examined by the (DAT) AND *reported by hunters* [1].

The deer harvest data should be reported in a format similar to the [attached]. [1] See pages 55-57 of the Publication Management and Biology of White-Tailed Deer in Pennsylvania 2009-2018, Dated December 2009.

7. At the **State Wide level**, for Fiscal Years 2005/2006-2010/2011, [provide:]

(a) the total number of deer (antlered, antlerless and button buck‘ separately) harvested AND *reported by hunters on report cards*[;]

(b) the total number of deer (antlered, antlerless and button Buck‘ separately) *examined by the (DAT)*[; and,]

(c) the total number of deer (antlered, antlerless and button Buck‘ separately) *examined by the (DAT) AND G. reported by hunters*.

A suggested format for reporting this data is shown in the attached [].

8. Provide the number of antlerless deer harvested, with a DMAP coupon, and included in your published Official Annual Deer Harvest Report for the Fiscal Years 2005/2006-2010/2011.

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10. I would like to verify all the State Game Lands (SGL) that are totally or partially in WMU-26. [Sets forth SGLs by identification number.]

11. Provide, on a State Wide basis, for the fiscal years 2005/2006-2009-2010, food plot data for deer, elk, other species and combined species [suggests format].

12. Provide, on a State Wide basis, for the fiscal years 2005/2006-2009-2010, data for Deer Deterrent Fencing, in a format similar to [attached].

13. Provide, on a State Wide basis, for the fiscal years 2005/2006-2009-2010, data for all type of [Commission] Timber Sales, in a format similar to [attached].

14. Provide, on a State Wide basis, for the fiscal years 2005/2006-2009-2010, data for Programs To, Eliminate Mountain Laurel and Ferns, in a format similar to [attached]. [Suggests format.]

15. Provide, on a State Wide basis, for the fiscal years 2005/2006-2009-2010, food plot data for deer, elk, other species and combined species. Use a format similar to [attached].

16. Provide, by SGL within WMU 2G, for the fiscal years 2005/2006-2009/2010, data for Deer Deterrent Fencing in a format similar to [attached].

17. Provide, by SGL within WMU 2G, for the fiscal years 2005/2006-2009/2010, data for all type of Timber Sales, in a format similar to [attached].

18. Provide, by SGL within WMU 2G, for the fiscal years 2005/2006-2009/2010, data for Programs to Eliminate Mountain Laurel and Ferns, in a format similar to [attached]. [Suggests format.]

19. If available, please provide a map of each SGL in WMU 2G.

20. For the fiscal years 2005/2006-2009/2010 identify the projects, funds or resources that were transferred or loaned from the [Commission] to DCNR.

R.R. at 1a–5a (Request) (emphasis in original). Requester attached a number of sample tables as suggested formats for the data sought.

The Commission denied the majority of the Request, asserting that the Request sought “information” rather than records, that it pertained to records that did not exist or that it required creation of responsive documents (Response). Specifically, the Commission challenged specificity as to No. 1, Nos. 11 through 18 (Data requests) and No. 20, and advised the Request would entail creation of a record under Section 705 of the RTKL as to No. 1, part of No. 2, No. 3, Nos. 6 and 7 (Deer Totals), and the Data requests. With regard to part of No. 2, No. 10 and No. 20, the Commission asserted the Request constituted a question, not a request triggering a response under the RTKL. The Commission provided records partially responsive to Nos. 7 and 8 and advised the maps sought in No. 19 are available electronically on its website.

Requester timely appealed to the OOR, arguing that the majority of the Request sought financial records and asserting he provided sufficient specificity given his explanation. Requester noted that he did not require the response to be in a specific format, but merely suggested formats to the Commission. Requester asserted the RTKL may be interpreted to require answers to inquiries. He also challenged the claimed non-existence of any accounting manual/instructions and argued the Commission has data responsive to Nos. 6, 7 (Deer Totals) and the Data requests. With regard to the maps (No. 19), Requester argued an electronic copy is not satisfactory.

On appeal, the Commission submitted affidavits of Dorothy Derr, Director of the Bureau of Administrative Services and Christopher Rosenberry, Supervisor of the Deer and Elk Section of the Commission. The OOR did not conduct an evidentiary hearing. The OOR found that both affidavits affirm that the Commission conducted a search for responsive records, and concluded no responsive records exist.

The OOR determined Requester is not entitled to answers to questions, and found that all the parts of the Request, except for Nos. 6, 7 (Deer Totals) and 19 (map), and parts of Nos. 2 and 3 seek information rather than ~~records.~~” The OOR also determined that the Commission established the records sought in the remaining parts of Nos. 2 and 3, (Accounting Manual/Instructions), and the Deer Totals (sought in Nos. 6 and 7) do not exist. Further, the OOR ruled the Commission is not required to create records sought in Nos. 2, 3 or the Deer Totals (Nos. 6 and 7). Since the Commission provided a copy of the map sought in No. 19, the OOR dismissed that part of the appeal as moot. The OOR’s Final Determination denied the remainder of the appeal in its entirety.

Requester filed a petition for review<sup>2</sup> with this Court appealing the OOR's Final Determination.<sup>3</sup>

## II. Discussion

Under the RTKL, records in the possession of a Commonwealth agency are presumed to be public unless they are: (1) exempted by Section 708 of the RTKL, 65 P.S. §67.708; (2) protected by privilege; or (3) exempted under ~~any~~ other Federal or State law or regulation or judicial order or decree." Section 305 of the RTKL, 65 P.S. §67.305. The agency bears the burden of proving a record is exempt from disclosure. Dep't of Health v. Office of Open Records, 4 A.3d 803 (Pa. Cmwlth. 2010).

### A. Requester's Contentions

Requester argues that the OOR erred in finding that all the information requested, except for that sought in Nos. 6, 7 (Deer Totals) and 19 and parts of 2 and 3 are demands for information rather than records. He argues that ~~requests~~" are defined in the RTKL as requests for information, not specific records, and that his Request is sufficiently specific to enable the agency to ascertain what he wants.

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<sup>2</sup> Requester does not set forth the insufficiency of the Commission's response to No. 8 in his petition or in his brief. Accordingly, that issue is waived. See Pa. R.A.P. 2119.

<sup>3</sup> In reviewing a final determination of the OOR, this Court ~~independently~~ reviews the OOR's orders and may substitute its own findings of facts for [those] of the agency." Bowling v. Office of Open Records, 990 A.2d 813, 818 (Pa. Cmwlth. 2010) (en banc), appeal granted in part, \_\_\_ Pa. \_\_\_, 15 A.3d 427 (2011). As we are not limited to the rationale offered in the OOR's decision, we enter findings and conclusions based on the evidence and we explain our rationale. Id.

Requester asserts he is entitled to answers to his questions posed in Nos. 2 and 10 of the Request. He further claims that suggesting formats for providing the deer harvest data requested is not the same as asking for creation of a record that does not exist, and that the OOR erred in so finding. Requester contends the deer harvest information exists and that the Commission has sufficient detail to provide responsive records. For these reasons, Requester argues the OOR committed errors of law in denying his appeal. In his appeal to this Court, Requester does not challenge the dismissal of his appeal as to No. 19, nor the sufficiency of the response provided for No. 8.

### **B. Commission's contentions**

The Commission asks this Court to affirm the Final Determination. The Commission argues the Request is improper to the extent it asked factual questions, and to the extent it sought records, the Request is insufficiently specific under Section 703. The Commission asserts that Requester should have asked for records by name, and that to the extent the Request sought discernable records, responsive records do not exist as established by affidavits. The Commission also contends Requester seeks creation of records in specific formats, which is impermissible under Section 705 of the RTKL, 65 P.S. §67.705.

### **III. Analysis**

This opinion is limited to the OOR's denial of Requester's appeal. As Requester did not challenge the OOR's dismissal of No. 19 as moot, it is not addressed in this opinion, and the OOR's dismissal in part thus remains undisturbed.



Of the 20-part request, based on the record developed,<sup>4</sup> the OOR found that only Nos. 2, 3, 6, 7 and 19 triggered a response under the RTKL and upheld the Commission's denial of access to the remaining information sought.

In reviewing the evidence submitted to the OOR, and the record on appeal, we hold the OOR committed errors of law. Specifically, the OOR erred in concluding the Request did not trigger a response, other than as to Nos. 6, 7, 19 and parts of Nos. 2 and 3. Also, the OOR erred in concluding the Request entailed creation of responsive records. We find credible the factual allegations set forth in the affidavits submitted by the Commission. However, to the extent the affidavits set forth conclusions, they are disregarded.

We make the following findings and conclusions:

- (1) The majority of the Request is proper in that it seeks information from the Commission, and the OOR erred in failing to so find;
- (2) Inquiries are not requests for records and do not trigger a response under Chapter 9 of the RTKL;
- (3) Use of the word “identify” in a right-to-know request does not automatically convert a proper right-to-know request into an inquiry;
- (4) Part of No. 2, starting “Does” and ending in a question mark, and No. 10 constitute inquiries that do not trigger a response;
- (5) Nos. 1, 3, 6, 7, the part of No. 2 following the sentence starting “Does,” the Data requests and No. 20 all seek information of an agency, triggering a response under the RTKL;

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<sup>4</sup> Requester challenges the limited extent of the record. An appeals officer has discretion in developing a record. Section 1102(a)(2) of the RTKL, 65 P.S. §67.1102(a)(2). The Court finds no abuse of that discretion here.

- (6) A requester is not required to name specific documents requested to satisfy Section 703;
- (7) Given the format and language of the Request, the Commission should have been able to discern the records requested in No. 1, the Data requests (Nos. 11-18) and No. 20;
- (8) Offering and suggesting formats for providing data requested does not equate to seeking creation of a record under Section 705;
- (9) The Data requests (Nos. 11-18) seek ~~data~~” which is a type of information that may be sought through a right-to-know request; and
- (10) The Commission is not required to create records to respond to any RTKL request, and the Data requests do not require creation of a record.

Our rationale for the above findings and conclusions addresses each of the legal grounds asserted for denying the appeal below in turn.

#### **A. “Request” for records**

The Request sought a number of records in multiple parts. As an initial matter, since Requester used the OOR’s uniform form, the Commission knew to recognize the Request as one being made pursuant to the RTKL. The OOR committed legal error in concluding that Nos. 1, 11 through 18 and 20 ~~–demand information, rather than records.~~” OOR Final Determination at 6.

The RTKL defines ~~–record~~” as ~~–information,~~” thus begging the question of how any request that seeks information is not one that seeks records. See Section 102 of the RTKL, 65 P.S. §67.102. As the RTKL does not define ~~–Request,~~” we construe the RTKL to give effect to its remedial purposes of ensuring access to existing information. Bowling v. Office of Open Records, 990

A.2d 813, 818 (Pa. Cmwlth. 2010) (en banc), appeal granted in part, \_\_\_ Pa. \_\_\_, 15 A.3d 427 (2011).

The RTKL offers a process through which citizens obtain records documenting government transactions and activities. Bowling. Questions within right-to-know requests are not proper right-to-know requests. See Murphy v. Pa. Turnpike Comm'n, 15 A.3d 1294 (Pa. Cmwlth. 2011) (affirming OOR denial of appeal, including that questions do not trigger response under RTKL). “Information” as used in the definition of “record” refers to information in any number of forms. The examples set forth in the definition show that the information sought must exist within some form, and must only be provided to a requester in its existing form. 65 P.S. §67.102; see also 65 P.S. §67.705 (records must be provided in existing form). Requester’s request for “data” in Nos. 11 through 18 seeks information that is in database form. Thus, the request for “data” seeks records.

The OOR was correct in concluding that No. 10 and the first sentence of No. 2 constitute inquiries that do not trigger a response under the RTKL. As phrased, the Requester posed a question in No. 2. Indeed, the first part of No. 2 is set forth as a question complete with question mark. He then asked the Commission to verify certain information, which may involve research, in order to provide the information sought in No. 10. The information is not described in a manner that suggests a record. We reject Requester’s contention that the RTKL is designed to be broad enough to encompass answers to questions that may require agencies to research the answers. Therefore, the OOR’s decision is affirmed to the extent it deemed these parts of the Request did not trigger a response.

Requester seeks ~~in~~“information/ records” that support the Commission’s annual financial reports or that exist within the Deer Harvest database. In this context, the use of the word ~~to~~“identify” in Nos. 1, 3 and 20, does not constitute a question. This is because the parameters for responsive records are set forth, and research is not required.

For these reasons, we conclude the Request is proper with the exception of No. 10 and part of No. 2.

### **B. Specificity**

The Commission challenged Nos. 1, 11 through 18 and 20 as insufficiently specific under Section 703 of the RTKL. No additional grounds may be raised beyond those asserted in an agency’s denial. Signature Info. Solutions, Inc. v. Aston Twp., 990 A.2d 510 (Pa. Cmwlth. 2010). Notably, the Commission did not deny access to the Deer Totals (Nos. 6 and 7) as insufficiently specific. Therefore, any denial based upon specificity as to the Deer Totals is waived. Id. Section 703 of the RTKL provides:

A written request should identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested ....

65 P.S. §67.703.

The RTKL must be construed to maximize access to government records. Bowling. In looking at these parts of the Request, we conclude they are sufficiently specific. The Request describes the information with enough detail to inform the Commission about the records sought.

With regard to the Data requests (Nos. 11-18), the Request seeks data from a certain database on certain subjects for specified fiscal years. Requester provided examples of tables that show the information he seeks in order to further inform the agency. The fact that Requester provided examples to illustrate to the agency the information sought does not render his Request insufficiently specific. With regard to No. 1, Requester seeks records showing the breakdown of figures listed in the Commission's Annual Report for specified years. With regard to No. 20, Requester seeks records showing the composition of the transfer/loan to the Department of Conservation and Natural Resources for specified fiscal years.

Requester is not required to identify the records by name as the Commission contends. Nor is Requester required to specify a type of record beyond the database identified for Nos. 11 through 18, and data supporting the Annual Financial Reports. A requester cannot be expected to know the names of records, or even the specific types of records like ~~man~~“manuals,” as the Commission suggests. Cf. Pennsylvania State Police v. Office of Open Records, (George), 995 A.2d 515 (Pa. Cmwlth. 2010) (holding the phrase ~~any~~“any and all” does not provide sufficient detail to permit an agency to respond to a request except as limited to types of record like manuals).

It appears that the OOR did not include critical language of the Request in its analysis, and thus erred in finding the Request consisted solely of the explanations in Nos. 1 through 20. In its determination, the OOR quoted only Nos. 1 through 20, omitting the preceding description of the records. Further, the OOR did not appear to consider the Request in its entirety, including that the Requester suggested format options for disclosure.

### C. Non-existence and Creation of Records

The Commission submitted two notarized affidavits regarding the Request: one signed by Director of Administrative Services Derr regarding “Account Manual/Instructions” sought in Nos. 2 and 3; and, one signed by Supervisor Rosenberry regarding data sought in Nos. 6 and 7. Derr attests that she is responsible for administrative services and knows that no “Account/Manual Instructions” exists. Rosenberry attests that he supervises the Deer and Elk Section of the Commission, and no responsive records exist as to Nos. 6 and 7.

We accept the notarized affidavits as sufficient evidence of the facts alleged therein. Moore v. Office of Open Records, 992 A.2d 907 (Pa. Cmwlth. 2010). Both affiants agree with the Commission’s characterization of the existence of responsive records. Both affiants affirm the non-existence of the records.

In addition, in its Response to Nos. 6 and 7, the Commission alleged the Request sought creation of a record, which is impermissible under Section 705. Section 705, entitled “Creation of record” provides:

When responding to a request of access, an agency shall not be required to create a record which does not currently exist or to compile, maintain, format or organize the public record in a manner in which the agency does not currently compile, maintain, format or organize the record.

65 P.S. §67.705. Pursuant to this plain language, an agency is not required to create or format a record in a manner specified by a requester. Rather, an agency need only provide the information in the manner in which it currently exists. Id.

The affidavits are limited in part to the facts set forth in the Response, as both defer to the Commission's characterization of existence. Notably, in response to No. 7, the Commission provided a responsive record including some of the information sought. Therefore, it is not accurate to interpret the affidavits as substantiating the "non-existence" of any responsive records. Rather, the information does not exist in the compilation or formatting requested.

With regard to the Deer Totals (Nos. 6, 7), the Request seeks information from the Deer Harvest database that does not exist because "button bucks" are not separated from antlerless deer. The Commission explained that "button bucks" are included with the antlerless figures. From the explanation and Rosenberg's affidavit, it is apparent that the information, separated by antlerless and button-bucks, does not exist. As the Commission does not retain deer harvest data separating antlerless and "button bucks," we find the Commission does not have responsive records to provide with respect to the Deer Totals sought.

With regard to parts of Nos. 2 and 3, Derr's affidavit establishes that no record entitled Accounting Manual/Instructions exists to provide. Accordingly, the Commission cannot be compelled to provide the requested record. Moore.

Requester advises the Commission's response to the first part of No. 3 does not satisfy the Request as it is inconsistent with its annual report. The OOR did not address this part of Requester's appeal. To correct this oversight, we find the Commission did not provide any responsive records showing from which program the pay-out to municipalities in-lieu-of-taxes is made. As the Commission did not substantiate non-existence of this payment information, the Commission must disclose it. See 65 P.S. §67.102 (financial records are public).

Unlike the Deer Totals, the Commission provides no explanation or substantiation of the non-existence of records responsive to the Data requests. Therefore, this Court analyzes whether these requests require ~~ereation~~ of a record.” Based upon the record and arguments submitted, we find they do not.

The Request specifically seeks data from the Deer Harvest Data Base. In the Data requests, the Request specifies the fiscal years and the subject-matter. The Commission asserts that any request that seeks ~~data~~” is insufficiently specific and requires compilation into a specific format. As discussed above, that a requester suggests a format or provides examples of the records sought in a certain format does not mean that a requester seeks special compilation. Requesters may provide suggestions or examples in order to better inform an agency about the information requested, and we have no desire to discourage that practice. In this case, Requester advised that the formats were suggested rather than required. Requester thus placed the Commission on notice of his preferences— no more, no less.

Providing data from an agency database does not constitute creating a record. This Court holds that information contained in a database must be accessible to requesters and provided in a format available to the agency. To the extent that the data exists in some format, the Commission must provide it. See 65 P.S. §67.305 (any record in possession of an agency is public unless exempt, as proven by the agency). Accordingly, the Commission must disclose data responsive to the Data Requests (Nos. 11-18) in any format in which the information exists.



#### **IV. Conclusion**

The Commission did not assert any exemptions from disclosure in its Response or in its brief. This Court is constrained by the grounds asserted in the Response. See Signature Solutions; Section 903 of the RTKL, 65 P.S. §67.903.

In sum, the Final Determination of the OOR is affirmed in part and reversed in part. In accordance with our partial reversal of the OOR's Final Determination, the Commission shall disclose responsive information to Requester.

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ROBERT SIMPSON, Judge

