pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
MATTHEW SISLER,	:	
Requester	:	
	:	
v.	:	**Docket No: AP 2024-0571**
	:	
PENNSYLVANIA DEPARTMENT OF CORRECTIONS,	:	
Respondent	:	

On January 31, 2024, Matthew Sisler ("Requester"), an inmate at SCI-Laurel Highlands, submitted a request ("Request") to the Pennsylvania Department of Corrections ("Department"), pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq*., seeking "Department [], SCI Laurel Highlands Staffing Reconciliation Reports for the dialysis unit between 10/1/23 and 12/31/23." On February 1, 2024, the Department denied the Request, arguing that the records do not exist at the current time.

On February 23, 2024, the Requester mailed an appeal to the Office of Open Records ("OOR"), challenging the denial and stating grounds for disclosure.[1] Specifically, the Requester argues that the records did exist at one time. In support, he included a similar request made by another individual in 2010, along with staffing reconciliation records from the dialysis unit at SCI-Laurel Highlands. The OOR invited both parties to supplement the record and directed the

[1] The Requester provided the OOR with additional time to issue a final determination in this matter. *See* 65 P.S. § 67.1101(b)(1).

Department to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On March 11, 2024, the Department submitted a position statement, reiterating its grounds for denial. In support, the Department included a statement made under the penalty of unsworn falsification to authorities by Deputy Open Records Officer Kimberly Grant ("Grant Attestation").

The Grant Attestation provides:

> 5. In response to [the R]equest, I contacted Donna Platt, Corrections Superintendent's Assistant ("CSA") for SCI Laurel Highlands who in turn reached out to the Correction Healthcare Administrator, who would likely possess the requested information if it exists.
>
> 6. I was informed by Ms. Platt that there is no such thing as staffing reconciliations. Accordingly, the Department does not maintain any documents that are responsive to the Request.
>
> 7. Thus, I can state that after conducting a good faith search of the Department's records that no records responsive to the Request currently exist within the Department's possession.

"The burden of proving a record does not exist ... is placed on the agency responding to the right-to-know request." *Hodges v. Pa. Dep't of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011). An attestation by the individual who searched for responsive records is sufficient to meet an agency's burden of proving the nonexistence of a record. *Id.*; *see also Pa. Dep't of Health v. Mahon*, 283 A.3d 929, 936 (holding that, when there is evidence that a record does not exist, "[i]t is questionable to what degree additional detail and explanation are necessary…."); *Campbell v. Pa. Interscholastic Athletic Ass'n*, 268 A.3d 502 (Pa. Commw. Ct. 2021) (noting that an agency need only prove the nonexistence of records by a preponderance of the evidence, the lowest evidentiary standard, and is tantamount to a "more likely than not" inquiry). Under the RTKL, an affidavit or statement made under penalty of perjury may serve as sufficient evidentiary support. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Off.*

of Open Records, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any evidence that the Department has acted in bad faith, "the averments in the [attestation] should be accepted as true." *McGowan v. Pa. Dep't of Env't Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Off. of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

However, in response to a request for records, an agency is required to "make a good faith effort to determine if … the agency has possession, custody or control of the record." 65 P.S. § 67.901. While the RTKL does not define the term "good faith effort" as used in Section 901 of the RTKL, the Commonwealth Court has held that a good faith search obligates an open records officer "to advise all custodians of potentially responsive records about the request, [] obtain all potentially responsive records from those in possession [and] review the records and assess their public nature…." 185 A.3d 1161, 1171-72 (Pa. Commw. Ct. 2018) (citations omitted), *aff'd*, 243 A.3d 19 (Pa. 2020).

In *Mack v. Pa. Dep't of Corr.*, the Commonwealth Court concluded that the Department had failed to conduct a good faith search where the open-records officer only inquired of one individual who was "likely" to have responsive records and relied on that individual's statement that the records did not exist. 302 A.3d 1271 (Pa. Commw. Ct. 2023) (unpublished) (citing *Uniontown Newspapers, Inc. v. Pa. Dep't of Corr.*, 185 A.3d 1161, 1171-72 (Pa. Commw. Ct. 2018) (citations omitted)), *aff'd*, 243 A.3d 19 (Pa. 2020) ("*Uniontown I*").

Here, the evidence provided by the Department is nearly identical to the insufficient evidence in *Mack*.[2] Furthermore, the basis of Ms. Grant's conclusion that no records exist is that

[2] In *Mack*, on appeal before the OOR, the Department produced records on appeal that it had originally alleged did not exist. The Court noted that "[a]fter-discovered records are a type of evidence from which a court may discern bad faith." *Mack*, 302 A.3d 1271 (quoting *Uniontown Newspapers*, 185 A.3d at 1170-71). While there is no evidence at the present time of after-discovered records in the instant record, and the Requester has not sought a finding of bad faith, there is evidence that the *exact* records requested did exist at one time. The OOR cautions the Department that a reviewing court may consider the Department's conduct to rise to the level of bad faith, especially in light of the Department's repeated failure to conduct adequate searches. *See Mack*, 302 A.3d 1271; *Uniontown Newspapers, Inc.*

she was told by Ms. Platt, who was in turn told by an unnamed individual, that the Department does not maintain such records. Not only is such third-hand evidence questionable, but the Department's only explanation for why records no longer exist is an unsworn statement that the records produced by the Requester were from 14 years ago and pertain to different service providers. There is no evidence that the Department conducted a sufficient search; as such, it has failed to meet its burden of proving that no records exist in its possession, custody, or control. *See Hodges*, 29 A.3d at 1192.

For the foregoing reasons, the appeal is **granted**, and the Department is required to conduct a good faith search and provide any responsive records discovered thereby within thirty days, or if no records exist, it must produce an affidavit or attestation detailing the search and affirming the nonexistence of responsive records. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Commonwealth Court. 65 P.S. § 67.1301(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 of the RTKL, 65 P.S. § 67.1303, but as the quasi-judicial tribunal that adjudicated this matter, the OOR is not a proper party to any appeal and should not be named as a party.[3] All documents or communications following the issuance of this Final Determination shall be sent to oor-postfd@pa.gov. This Final Determination shall be placed on the website at: http://openrecords.pa.gov.

v. Pa. Dep't of Corr., 197 A.3d 825 (Pa. Commw. Ct. 2018), *aff'd*, 243 A.3d 19 (Pa. 2020) ("*Uniontown II*") (awarding the requester's petition for fees in the amount of $ 118,458.37 due to the Department's bad faith). Section 1304(a) of the RTKL states that a court "may award reasonable attorney fees and costs of litigation … if the court finds … the agency receiving the … request willfully or with wanton disregard deprived the requester of access to a public record … or otherwise acted in bad faith…" 65 P.S. § 67.1304(a). Similarly, Section 1305(a) authorizes a court to "impose a civil penalty of not more than $1,500 if an agency denied access to a public record in bad faith." 65 P.S. § 67.1305.

[3] *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

FINAL DETERMINATION ISSUED AND MAILED: April 25, 2024

/s/ Blake Eilers
Blake Eilers, Esq.
Appeals Officer

Sent to: Matthew Sisler, QC3568 (via regular mail);
Andrew Filkosky and Ralph Salvia, Esq. (via E-File Portal)