pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF **BENNET GOLDSTEIN,** **Requester** **v.** **PENNSYLVANIA DEPARTMENT OF HUMAN SERVICES,** **Respondent**	: : : : : : : : : : :	**Docket No.: AP 2016-1287**

INTRODUCTION

Bennet Goldstein ("Requester") submitted a request ("Request") to the Pennsylvania Department of Human Services ("Department") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq*., seeking records relating to his deceased sister. The Department denied the Request, asserting that the records are confidential under federal law. The Requester appealed to the Office of Open Records ("OOR"). For the reasons set forth in this Final Determination, the appeal is **denied**, and the Department is not required to take any further action.

FACTUAL BACKGROUND

On June 10, 2016, the Request was filed, seeking "copies of any records [the Department] may have concerning" his "sister, Bonni Gross, [who] was confined to Pennhurst in the 1940's and died there in the 1950's."

On June 15, 2016, the Department extended its deadline to respond to the Request by thirty days. *See* 65 P.S. § 67.902. As the Department did not respond to the Request by July 17, 2016, the Request was deemed denied on that date. *See* 65 P.S. § 67.901. On July 18, 2016, the Department purported to deny the Request, asserting that the records are records of an individual's receipt of medical and social services, 65 P.S. §§ 67.708(b)(5), (b)(28), and are confidential under the Health Insurance Portability and Accountability Act ("HIPAA") and protections afforded to Medicaid and Medical Assistance recipients. *See* 42 U.S.C. § 1320b-7(a)(5) & (b); 42 U.S.C. § 1396a(a)(7); 42 C.F.R. §§ 431.300-431.307; 45 C.F.R. § 205.50; 62 P.S. § 404; 55 Pa. Code §§ 105.1, 105.3 & 105.4.

On August 1, 2016, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the Department to notify any third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

On August 10, 2016, the Department submitted a position statement made under penalty of perjury by Angela Fortney, the Director of the Division of Operations of the Department's Office of Developmental Programs. Ms. Fortney attests that a thorough search has been conducted, and the Department was unable to locate the requested records.

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 L.L.C. 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. 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 requested a hearing; however, the OOR has the necessary, requisite information and evidence before it to properly adjudicate the matter.

The Department is a Commonwealth agency subject to the RTKL that is required to disclose public records. *See* 65 P.S. § 67.301. Records in possession of a Commonwealth agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. 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. 65 P.S. § 67.708(b).

Section 708 of the RTKL clearly 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)). "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).

Here, Ms. Fortney has testified, under penalty of perjury, that a thorough search was conducted and that the Department was unable to locate the requested records. Under the RTKL, an affidavit may serve as sufficient evidentiary support to sustain an agency's burden of proof. *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 evidence that the Department has acted in bad faith or that the records do, in fact, exist, "the averments in [the affidavit] should be accepted as true." *McGowan v. Pa. Dep't of Envtl. 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)). Accordingly, the Department has sustained its burden of proving that no records exist.

CONCLUSION

For the foregoing reason, Requester's appeal is **denied**, and the Department is not required to take any further action. 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 as per 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.[1] This Final Determination shall be placed on the OOR website at: http://openrecords.pa.gov.

FINAL DETERMINATION ISSUED AND MAILED: August 29, 2016

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

Sent to: Bennet Goldstein, Esq.;
Andrea Bankes (via e-mail only);
Aaron Haynes (via e-mail only)

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