



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF :

ROBERT FENNELL, :

Requester :

v. : **Docket No: AP 2016-1512**

PENNSYLVANIA DEPARTMENT OF :

CORRECTIONS, :

Respondent :

On July 22, 2016, Robert Fennell (“Requester”), an inmate at SCI-Smithfield, filed a request (“Request”) with the Pennsylvania Department of Corrections (“Department”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking:

- (1) The price for copies for the Granted RTK Request # AP 2015-2367 and AP 2015-0213 ...
- (2) The records that reflect the termination, demotion and suspension [of] Jon D. Fisher (who was the Superintendent [of] SCI Smithfield) from Jan. 1, 2012 – Jan. 1, 2014
- (3) The records that reflect the termination, demotion and suspension from Jan. 1, 2014 – Jan. 1, 2016 of Deputy Superintendent of SCI Smithfield Jay Whitesel
- (4) The records that reflect the date of the last day of employment for Jay Whitesel and Jon D. Fisher....

On July 26, 2016, the Department invoked a thirty-day extension to respond to the Request. *See* 65 P.S. § 67.902. On August 16, 2016, the Department granted the Request in part, stating that records responsive to Items 1 - 3 of the Request do not exist and providing redacted records responsive to Item 4 of the Request.

On September 7, 2016, the Requester filed an appeal with the Office of Open Records (“OOR”), challenging the denial of Items 1 - 3 of the Request and stating grounds for

disclosure.¹ The OOR invited both parties to supplement the record and directed the Department to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On September 14, 2016, the Department submitted a statement made under penalty of perjury by Andrew Filkosky, its Open Records Officer, who attests that no records responsive to Items 1 and 2 of the Request exist within the Department's custody, possession or control. With regard to Item 3 of the Request, Mr. Filkosky states that, while there is a record of discipline for Mr. Whitesel, there is no record of a final action resulting in his demotion or discharge within the timeframe specified. Therefore, no records responsive to Item 3 of the Request exist. Under the RTKL, an affidavit 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. 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, "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)). Based on the evidence provided, the Department has met its burden of proving that no records exist for Items 1 - 3 of the Request. Accordingly, the appeal is **denied**.

For the foregoing reasons, 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 or petition for review 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. 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.² This Final Determination shall be placed on the website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: October 6, 2016

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

Sent to: Robert Fennell GW-0392;
Chase Defelice, Esq. (via e-mail only);
Andrew Filkosky (via e-mail only)

¹ Pursuant to the prisoner mailbox rule, the appeal was timely, as it was postmarked September 2, 2016. *See Commonwealth v. Jones*, 700 A.2d 423, 426 (Pa. 1997)

² *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).