pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
THEODORE SCHELL,	:	
Requester	:	
	:	
v.	:	**Docket No.: AP 2016-1606**
	:	
PENNSYLVANIA DEPARTMENT OF	:	
CORRECTIONS,	:	
Respondent	:	

On August 25, 2016, Theodore Schell ("Requester"), an inmate at the State Correctional Institution at Graterford ("SCI-Graterford"), 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 documents bearing a time stamp, date, and Court, ordering his detention and any court order, ordering the department to detain Requester in custody. On September 7, 2016, after invoking a thirty-day extension of time to respond pursuant to 65 P.S. § 67.902, the Department granted the Request, providing the court commitment forms and stating that the Department does not possess any other responsive records.

On September 22, 2016, the Requester appealed to the Office of Open Records ("OOR"), stating that the records must exist. On September 28, 2016, the Department submitted a position statement and the affidavit of the Records Supervisor at SCI-Graterford, who attests that a search was conducted and that no other responsive records exist in the Department's possession, custody or control. The Requester did not submit any evidence to challenge the Department's affidavit.

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 Department acted in bad faith or that the records exist in the possession of the Department, "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 the records requested do not exist in the Department's possession, custody or control.[1] 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 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 19, 2016

/s/ Charles Rees Brown

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Charles Rees Brown
Chief Counsel

Sent to: Theodore Schell (AF 7923) SCI-Graterford;
Chase Defelice, Esq. (via e-mail only);
Andrew Filkosky (via e-mail only)

[1] While the Department does not possess the requested records, there exists a common law right of access to judicial records. *Commonwealth v. Upshur*, 924 A.2d 642 (Pa. 2007). The common law right of access to public judicial records and documents arose from the presumption that judicial proceedings will be open to the public. As the Supreme Court has stated, "[i]t is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." *Nixon v. Warner Communications, Inc*., 435 U.S. 589, 591 (1978) (footnotes omitted). The Pennsylvania Supreme Court has viewed the common law right of access as compelled by many of the considerations that underlie the presumption of public trials. *See Commonwealth v. Fenstermaker*, 530 A.2d 414, 417-18 (Pa. 1987). The records sought, if they exist, may be requested from the issuing court.
[2] *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n. 5 (Pa. Commw. Ct. 2013).