

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Daniel Schwartz,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 481 M.D. 2021
	:	Heard: March 15, 2022
Pennsylvania State Police,	:	
	:	
Respondent	:	

BEFORE: HONORABLE ELLEN CEISLER

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE CEISLER

FILED: August 24, 2022

Before the Court is Daniel Schwartz’s (Requester) Petition for Enforcement of Final Determination (Enforcement Petition) and the Pennsylvania State Police’s (PSP) Answer in opposition thereto. Requester seeks an order from this Court directing PSP to comply with the June 22, 2021 Final Determination of the Office of Open Records (OOR), as well as attorney fees and costs and the imposition of a civil penalty due to PSP’s purported violations of the Right-to-Know Law (RTKL).¹ PSP, for its part, argues that the Enforcement Petition is now moot because PSP has fully complied with the OOR’s Final Determination, and that sanctions are not warranted because PSP did not act in bad faith.

Background

The pertinent facts are as follows. On March 24, 2021, Requester, a freelance investigative journalist based in Colorado, submitted a request to PSP pursuant to

¹ Act of February 14, 2008, P.L. 6, 65 P.S. §§ 67.101-67.3104.

the RTKL seeking correspondence, including text and voice messages, related to the Mariner East Pipeline (Request). While the Request contained two parts, only the second part is at issue herein and states:

PART TWO:

Please provide any and all text messages and voice messages received by the work-issued cell phones of Lt. James Hennigan as well as [sic] Lt. Stephen J. U'Selis III about the Mariner East pipeline or the activities of state residents as they may related [sic] to the pipeline or its construction. Please limit your search to the timeframe of February 2017 to the date this request is completed. These search terms may help: "Sunoco," "Energy Transfer," "Mariner," "suspicious activity," "protesters," "pipeline," "construction." For text messages, please also include any and all attachments.

Finally, I am requesting emails between Lt. U'Selis and Sunoco, Energy Transfer, and associates of those groups, such as Tiger Swan, Zorion, or Hillard Heintze, as well as emails that concern the Mariner East Pipeline. To this end, please conduct a keyword search of Mr. U'Selis['] email account for the words or phrases "Sunoco" and "Energy Transfer" and "Mariner" and within the timeframe of February 2017 to the date this request is completed. Please be sure to also provide any and all associated records, such as email attachments, as well as a Vaughn Index justify [sic] any redactions your office may deem necessary.

Enforcement Pet., Ex. B.

On April 30, 2021,² PSP issued a response to Requester granting in part and denying in part the Request. Enforcement Pet., Ex. C. Specifically as to Part Two, PSP provided Requester with a compact disc containing responsive emails sent between and among the identified individuals from February 2017 to the date of the

² By letter dated March 31, 2021, PSP notified Requester that it needed additional time to respond to the Request and that it was invoking the 30-day extension of time to do so pursuant to Section 902(b)(2) of the RTKL, 65 P.S. § 67.902(b)(2). *See* Enforcement Pet., Ex. B.

Request. The emails were heavily redacted, including redactions of personal identification information pursuant to Section 708(b)(6) of the RTKL, 65 P.S. § 67.708(b)(6).

PSP denied Part Two of the Request in part, claiming some of the responsive records were exempt from disclosure as criminal investigative records under Section 708(b)(16) of the RTKL, 67 P.S. § 67.708(b)(16), and because their disclosure would violate the Criminal History Record Information Act (CHRIA), 18 Pa.C.S. §§ 9101-9183. Of particular note herein, as to the text and voice messages received by the work-issued cell phones of the two identified PSP officers, the response stated that “PSP determined it does not have any records in its possession, custody, or control that respond to your request.” Enforcement Pet., Ex. C. PSP also provided Requester with the unsworn verification of Kim Grant, PSP’s Deputy Agency Open Records Officer, indicating that PSP did not have any records in its possession, custody, or control responsive to the request for text and voice messages.

Requester appealed to the OOR, which invited both parties to supplement the record and directed PSP to notify any third parties of their ability to participate in the appeal. Enforcement Pet., Ex. A, OOR Final Determination at 3. PSP submitted a position statement but failed to provide an affidavit as the OOR requested. Neither party requested a hearing and none was held before the OOR.

In its Final Determination issued on June 22, 2021, the OOR granted in part and denied in part Requester’s appeal. *Id.* at 1. Notably, the OOR held that PSP failed to provide sufficient evidence in support of its assertions that records do not exist, are criminal investigative records, or are protected by CHRIA. *Id.* at 5. Regarding PSP’s search for responsive records, the OOR noted that Section 901 of the RTKL provides that “an agency shall make a good faith effort to determine if . .

. the agency has possession, custody[,] or control of the record[.]” *Id.* at 6 (quoting 65 P.S. § 67.901). As this Court has noted

Section 901 also includes the duty to perform a reasonable search for records in good faith. *Dep’t of Labor & Indus. v. Earley*, 126 A.3d 355 (Pa. Cmwlth. 2015). As part of a good faith search, the open records officer has a duty to advise all custodians of potentially responsive records about the request, and to obtain all potentially responsive records from those in possession. *Breslin v. Dickinson Twp.*, 68 A.3d 49 (Pa. Cmwlth. 2013)].

Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr., 185 A.3d 1161, 1171-72 (Pa. Cmwlth. 2018) (*Uniontown II*), *aff’d*, 243 A.3d 19 (Pa. 2020). The OOR held that here, while PSP provided Requester with a verification along with its response, that verification failed to sufficiently describe the search for records such that the OOR could determine that no text or voice messages exist. Enforcement Pet., Ex. A, OOR Final Determination at 6-7. Therefore, the OOR concluded that PSP failed to meet its burden of proof with respect to Part Two of the Request. The Final Determination states:

[] PSP is therefore directed to conduct a good faith search for records as set forth in [Section 901 of the RTKL,] 65 P.S. § 67.901[,] and provide any records discovered as a result of that search. If no records are located as a result of this search, [] PSP shall inform the Requester of such in writing.

Id. The Final Determination gave PSP 30 days in which to comply. Neither party appealed the Final Determination.

Enforcement Petition

Requester filed the instant Enforcement Petition on December 20, 2021, approximately six months after the Final Determination was issued. Requester admits that PSP partially complied with the Final Determination by producing 350

pages of emails, which were largely unredacted aside from certain information that was properly withheld as personal identification information. Enforcement Pet. ¶ 25. Requester claims, however, that PSP failed to timely produce the text and voice messages responsive to Part Two of the Request, or provide an affidavit as required by the Final Determination. *Id.* ¶¶ 4, 26. Requester alleges that PSP acted in bad faith by failing to comply with the Final Determination and that this Court should award Requester attorney fees and costs of litigation and impose a civil penalty against PSP, citing Sections 1304(a)(1) and 1305(a) of the RTKL respectively, 65 P.S. §§ 67.1304(a)(1) & 67.1305(a).

PSP filed an answer with new matter to the Enforcement Petition, admitting that it failed to provide either the text and voice messages or the requisite affidavit within the prescribed time period, but denying that it acted in bad faith. Answer ¶ 4. Along with its answer, PSP submitted the sworn affidavit of William A. Rozier, PSP's Agency Open Records Officer (AORO Rozier), email correspondence between counsel for the parties, and the sworn affidavit of PSP's RTKL Counsel who prepared the agency's response to Requester following the OOR's Final Determination. In these filings, PSP explains that its failure to fully comply with the OOR's directive was due to an oversight by RTKL Counsel, which was unintentional and not done in bad faith or in wanton disregard of the Final Determination. Moreover, PSP avers that Requester did not raise an objection to PSP's initial response when it was received in July 2021, and that PSP did not become aware of the deficiency until Requester filed his Enforcement Petition in December 2021.

In his sworn affidavit, AORO Rozier detailed PSP's search for records responsive to Part Two of the Request, including the agency's attempts to track down

the two cell phones at issue and the Lieutenants who used them, and AORO Rozier's search of PSP and Commonwealth databases to which he had access. Answer, Ex. 1. AORO Rozier further explained that PSP's RTKL Section contacted now-Captain Hennigan who relayed that he did not have any text or voice messages relating to the Request and that he was no longer in possession of the phone or phone number used during the time period at issue, as he has since been promoted to the Bureau of Liquor Control Enforcement.

Notably, AORO Rozier also specifically stated that PSP contacted the Pennsylvania Office of Administration (OA), Public Safety Unified Telecommunications Section regarding the two work-issued cell phones. OA Telecommunication Services Supervisor Jason Bearden related to PSP that he could not obtain voice or text messages from the cell phones at issue and that a subpoena to Verizon, with whom OA contracted for services, "would be necessary to search for any voice or text messages to begin an inquiry." Answer, Ex. 1. Given all of these facts, AORO Rozier again "determined that [] PSP does not have any records such as Requester described in its possession, custody[,], or control." *Id.*

Simultaneously with its answer, PSP filed an application for relief in the form of a Motion to Dismiss, asserting that the Enforcement Petition is now moot. PSP explains that it has now provided Requester with all of the responsive records in its possession, custody, or control, as well as the sworn affidavit of AORO Rozier explaining that the agency does not have any responsive text or voice messages. PSP argues that the Enforcement Petition should be dismissed as moot, or in the alternative denied, because PSP has now fully complied with the OOR's Final Determination. In addition, attorney fees, costs, and civil penalties are inappropriate because PSP did not act in bad faith.

In his Answer in opposition to the Motion to Dismiss, Requester argues that AORO Rozier's sworn affidavit does not render the Enforcement Petition moot because it fails to demonstrate that PSP conducted a good faith search for responsive records. Requester cites to this Court's decision in *Uniontown II* for the proposition that PSP had a duty to reach out to all custodians or agents within its control, including third-party contractors such as Verizon, to obtain the responsive agency records. Requester maintains that because PSP's pleadings fail to show that it made any inquiry with Verizon directly to obtain the text and voice messages responsive to the Request, PSP failed to conduct a good faith search. Requester further claims that PSP's continuing failure to abide by its requirements under the RTKL means there is still a live controversy and the matter is not moot. In the alternative, Requester asserts that, at the very least, the issue of attorney fees, costs, and civil penalties is not moot because the Court has not yet resolved the allegation that PSP acted in bad faith.

A hearing on Requester's Enforcement Petition and argument on PSP's Motion to Dismiss were held on March 15, 2022, at which AORO Rozier and PSP's RTKL Counsel both testified. The Court finds both witnesses credible based on their demeanor and their candid responses, as well as the consistency of their testimony. AORO Rozier and RTKL Counsel testified in support of the averments made in PSP's Answer to the Enforcement Petition and its Motion to Dismiss regarding PSP's search for responsive documents and its determination that the agency did not have responsive text or voice messages in its possession, custody, or control. Specifically, AORO Rozier testified that PSP does not keep or store phone records, they go to the OA. Moreover, AORO Rozier and PSP's RTKL Counsel both stated that PSP does not have a contract with Verizon for communication

services; rather, the contract is between Verizon and the OA. Both AORO Rozier and PSP's RTKL Counsel confirmed that shortly after the Request was received, PSP reached out to OA, the third-party contractor here, in an attempt to search for responsive records. Based on all of the above, both AORO Rozier and PSP's RTKL Counsel determined that PSP did not have any responsive records in its possession, custody, or control.

By order dated that same day, the Court denied PSP's Motion to Dismiss and directed the parties to submit post-hearing briefs. On March 16, 2022, after the hearing on his Enforcement Petition but prior to the submission of post-hearing briefs, Requester filed what was captioned as a notice of supplemental authority. Requester claims that after the hearing he was able to obtain through the Office of the State Treasurer's website a contract purportedly between Verizon and the Commonwealth of Pennsylvania, acting through OA, covering the provision of wireless communications including voice messages and data. Requester asserts that the RTKL applies to this contract and the language therein proves Verizon is obligated to provide the Commonwealth, upon request, with records within its possession.

In its response in opposition to Requester's notice of supplemental authority, PSP notes that the contract Requester points to is between Verizon and OA. PSP is not a party to that contract, cannot attest to what it means, and is not bound thereby. PSP further states that it reached out to Verizon directly given the questions raised during the hearing, in particular whether an order could be issued to Verizon to produce any responsive text and voice messages. PSP attached to its response the letter it received from Verizon on March 18, 2022, in which Verizon explains that a subpoena or valid criminal search warrant may be necessary for it to release

customer text messages, and that Verizon must comply with the federal Stored Communications Act, 18 U.S.C. §§ 2701-12, and applicable regulations when responding to requests for customer telephone records. PSP's Response to Notice of Supplemental Authority, Attachment A. PSP notes that based on its communications with Verizon, the responsive text and voice messages Requester seeks "do not exist and cannot be produced" given the very short periods of time any such records might be retained by Verizon. PSP's Response to Notice of Suppl. Auth. at 3.

In its post-hearing brief, PSP maintains that it acted in good faith in conducting its search for responsive materials and provided an adequate, albeit slightly late response through AORO Rozier's affidavit. PSP argues that the record demonstrates that it did not have possession, custody, or control of the requested records, and neither did OA. PSP further asserts that OA is the third party here, not Verizon, and that PSP satisfied its obligations under the RTKL by reaching out to OA regarding the Request. There was no basis for AORO Rozier to believe that text or voice messages could be obtained from Verizon given what he was told by OA. Moreover, there is no mechanism in the RTKL for PSP to subpoena records from another party, such as Verizon, especially when that party is not performing a governmental function on behalf of PSP.³

Conversely, Requester argues that PSP's repeated refusal to comply with the RTKL and the OOR's Final Determination constitutes bad faith. Requester argues

³ PSP also argues that even if Verizon was performing a governmental function on behalf of PSP and the requested records directly related to that function, the record would be exempt from access under federal law, namely the Stored Communications Act. Requester maintains that because PSP failed to raise this exemption issue before the OOR and did not appeal the OOR's Final Determination, this issue has been waived. *See Levy v. Senate of Pennsylvania*, 94 A.3d 436, 442 (Pa. Cmwlth. 2014). Given the outcome of this matter, the Court need not reach these issues.

that PSP was required under the RTKL to contact Verizon because it qualifies as a third-party contractor with access to the requested records. Further, PSP improperly relied on the statement of an OA Telecommunication Services Supervisor who advised that a subpoena to Verizon would be necessary to search for text or voice messages. *See Uniontown Newspapers, Inc. v. Pa. Dep't of Corr.*, 243 A.3d 19, 28 (Pa. 2020) (*Uniontown III*) (open records officer cannot “fulfill[] his or her obligation simply by relying on the representations of others without inquiring as to what investigation was made and without reviewing the records upon which the individual responding to the request relied”). Requester also maintains that PSP’s lack of diligence throughout the OOR and this Court’s proceedings supports a finding of bad faith, pointing to, among other things, PSP’s failure to meet the 30-day compliance deadline, and its alleged failure to conduct a good faith search for responsive records until motivated by this litigation.

Discussion

Given that this is an enforcement action and neither party appealed the Final Determination, we do not question the OOR’s resolution of the merits. *Uniontown Newspapers, Inc. v. Pa. Dep't of Corr.*, 151 A.3d 1196, 1202 (Pa. Cmwlth. 2016) (*Uniontown I*). The first issue the Court must address is whether PSP has complied with the OOR’s Final Determination ordering PSP to conduct a good faith search for records and to provide any records discovered as a result of that search, or a statement describing the search and that no responsive records exist, within 30 days. While Requester bears the burden to prove that PSP did not comply, *id.* at 1203, PSP as the responding agency “bears the burden of providing that no additional responsive records exist,” *id.* at 1208.

As this Court explained in *Uniontown II*,

[u]pon receipt of a request, an open records officer must make a good faith effort to determine whether: (1) the record is a public record; and, (2) the record is in the possession, custody, or control of the agency. Section 901 also includes the duty to perform a reasonable search for records in good faith. As part of a good faith search, the open records officer has a duty to advise all custodians of potentially responsive records about the request, and to obtain all potentially responsive records from those in possession.

When records are not in an agency's physical possession, an open records officer has a duty to contact agents within its control, including third-party contractors.

185 A.3d at 1171-72 (internal citations and quotations omitted).

Section 506(d)(1) of the RTKL specifically pertains to agency possession and third parties, and provides:

[a] public record that is not in the possession of an agency but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the agency, and which directly relates to the governmental function and is not exempt under this act, shall be considered a public record of the agency for purposes of this act.

65 P.S. § 67.506(d)(1). As we have explained, Section 506(d) of the RTKL “may reach records that are not in an agency’s possession, custody[,] or control provided the third party in possession has a contract with the agency to perform a governmental function, *and* the information directly relates to the performance of that function.” *Allegheny Cnty. Dep’t of Admin. Servs. v. Parsons*, 61 A.3d 336, 340 (Pa. Cmwlth. 2013) (emphasis in original).

With this legal framework in mind, and based upon the evidence of record, the Court finds that PSP has now complied with the OOR’s Final Determination by conducting a good faith search for the responsive records. The parties agree that, at this point in time, the only potentially responsive records that have yet to be turned

over are the text and voice messages. AORO Rozier's sworn affidavit and testimony during the hearing demonstrate that PSP's efforts included searching multiple databases, attempting to track down the cell phones at issue, and contacting the potential custodians of those records, namely the two Lieutenants to whom the cell phones were assigned. PSP was unable to obtain responsive records from Lieutenant U'Selis because he is now retired and no longer in possession of the cell phone. Moreover, now-Captain Hennigan relayed to PSP that he did not have any text or voice messages relating to the Request and that he was no longer in possession of the phone or phone number used. The detailed, sworn affidavit, along with the credible testimony of AORO Rozier and PSP's RTKL Counsel, establish that PSP conducted a good faith search and that the agency does not have any responsive records in its possession, custody or control. *See Uniontown I*, 151 A.3d at 1208-09 (agency may satisfy its burden that it does not possess a requested record with sworn affidavit); *see also Campbell v. Pa. Interscholastic Athletic Ass'n*, 268 A.3d 502 (Pa. Cmwlth. 2021) (*en banc*).

Requester's attempt to invoke Section 506(d)(1) of the RTKL to require PSP to obtain records directly from Verizon as a third-party contractor falls short. Despite Requester's argument to the contrary, the contract it relies upon is not between PSP and Verizon, but between OA and Verizon. *See Parsons*, 61 A.3d at 340 (third party must have a contract with the agency to perform a governmental function for Section 506(d) to apply). The evidence presented in this matter, in particular the credible testimony of AORO Rozier and PSP's RTKL Counsel, establish this fact. It is notable that PSP has continuously maintained – throughout the OOR's proceedings and before this Court – that it does not have a contract with Verizon. Further, PSP followed the applicable requirements of RTKL by reaching

out to the OA, the third-party here, at the outset of this matter to determine if responsive records exist and how they might be obtained.⁴

This does not end our inquiry, however, since the Enforcement Petition also alleges that PSP acted in bad faith throughout the OOR and this Court's proceedings and that attorney fees, costs, and penalties should be imposed. Bad faith may constitute grounds for an award of attorney fees and costs or the imposition of civil penalties under Sections 1304(a) and 1305 of the RTKL respectively, 65 P.S. §§ 67.1304(a) & .1305. *See Uniontown I*. As is the case here, the RTKL permits recovery when the receiving agency determination is reversed, including when it is reversed by the OOR and no appeal was taken. *See Uniontown III*, 243 A.3d at 34. Requester bears the burden of proving that PSP acted in bad faith. *Uniontown I*. "In the RTKL context, 'bad faith' does not require a showing of fraud or corruption. The lack of good faith compliance with the RTKL and an abnegation of mandatory duties under its provisions rise to the level of bad faith." *Uniontown II*, 185 A.3d at 1170.

Based upon the facts and circumstances of this case, the Court finds that PSP's actions do not amount to bad faith. PSP candidly admits that it did not fully comply with the OOR's Final Determination within the 30-day deadline. Specifically, PSP's response to Requester following the OOR's Final Determination failed to include either the responsive text and voice messages or a sworn affidavit regarding their non-existence. However, it is clear from PSP's filings and the frank testimony of its RTKL Counsel that this was the result of human error and not an attempt to withhold

⁴ At this point in time, it is evident from PSP's search for the records and the information received from Verizon that any responsive text or voice messages are no longer accessible. Therefore, even if Verizon was a third-party contractor, any attempts to obtain the records from Verizon would be futile.

records or avoid the agency's responsibilities. Requester admittedly did not notify PSP that its responsive was deficient, and PSP did not learn of the deficiency until the Enforcement Petition was filed. PSP provided Requester with AORO Rozier's sworn affidavit within a reasonable amount of time after learning of the deficiency. Moreover, given our discussion above, we reject Requester's argument that PSP acted in bad faith by failing to conduct a good faith search.

Accordingly, the Enforcement Petition is denied, including Requester's request for attorney fees, costs, and civil penalties.



ELLEN CEISLER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Daniel Schwartz,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 481 M.D. 2021
	:	
Pennsylvania State Police,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 24th day of August, 2022, Petitioner Daniel Schwartz's Petition for Enforcement of Final Determination is DENIED in its entirety.



ELLEN CEISLER, Judge