



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
OMAR RICHARDSON,	:	
Requester	:	
	:	
v.	:	Docket No: AP 2022-1799
	:	
CITY OF PHILADELPHIA DISTRICT	:	
ATTORNEY’S OFFICE	:	
Respondent	:	

INTRODUCTION

Omar Richardson (“Requester”), an inmate at SCI-Huntingdon, submitted a request (“Request”) to the City of Philadelphia’s District Attorney’s Office (“Office”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking misconduct-related records concerning certain named officers. The Office denied the Request, arguing that the records requested do not exist. 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 Office is not required to take any further action.

FACTUAL BACKGROUND

On June 9, 2022, the Request was filed, seeking:

[a]ny [o]fficial documents containing any information of misconduct against the following Philadelphia Police Officer[s], such as filing false reports, committing perjury, any complaint of excessive force, any [Office] list these officers may be on, any information of any conviction these officers may have, any complaints of

these officers coerced [sic] any illegal statements, made any false arrests, any I.A. files that the [Office] may have concerning these officer[s].

James Donahue
Victor Davila
Janes Johnson
Sgt. Gessner
Detective Michael Walter
Detective Goldman

After invoking an extension of time to respond, 65 P.S. § 67.902(b), the Office, on July 18, 2022 denied the Request, contending that it does not possess any responsive records. The Office advised the Requester that it maintains a “Police Misconduct Database” in which “instances of misconduct by members of Philadelphia law enforcement agencies are entered.” However, according to the Office, none of the detectives/officers listed in the Request were located in the Database. The Office directed the Requester to contact the Philadelphia Police Department for the records requested.

On August 1, 2022, the Requester appealed to the OOR, challenging the denial of the Request and stating grounds for disclosure.¹ The OOR invited both parties to supplement the record and directed the Office to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On August 11, 2022, the Office submitted argument reiterating its position that no records responsive to the Request exist. In support of its position, the Office submitted an attestation from Josh Niemtow, Esq., the Office’s Open Records Officer. On August 15, 2022, the Requester filed a statement in support of his position.

¹ As part of his appeal, the Requester claims that the Office failed to respond to the Request by July 15, 2022, the date by which the Office indicated, in its extension letter, that it would respond. The date of July 15, 2022 appears to be an inadvertent miscalculation of the thirty-day extension period, however. The extension letter also indicates that the Office would be utilizing a thirty-day extension under Section 902 of the RTKL to respond. *See* 65 P.S. § 67.902(b). Because the extension period was invoked on June 16, 2022, the thirty-day deadline to respond to the Request would not have expired until July 18, 2022. Regardless, the appeal in this matter was timely filed and the fact that the Office did not respond to the Request by July 15, 2022 does not alter the outcome of this matter.

On September 12, 2022, the OOR sought additional information from the Office concerning its search for the requested records and whether there were any other files or locations within the Office that responsive records might exist. On September 16, 2022, the Office submitted a supplemental attestation in response to the OOR's inquiry.

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. *See* 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the request” and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 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.* Here, neither party requested a hearing.

The Office is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in the possession of a local agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 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. *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL 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)(1). 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)). Likewise, “[t]he 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).

In support of the Office’s position that records responsive to the Request do not exist within its possession, Attorney Niemtzw attests, under the penalty of perjury, as follows:

1. I serve as the Open Records Officer for the [Office].
2. In that role, I am responsible for processing [RTKL] requests filed with the [Office], which includes determining whether requested records are public records, searching for records, and responding to records requests.
3. I process all requests in good faith.
4. On June 9, 2022, the [Office] received [the Request] seeking records pertaining to police officer misconduct.
5. Complaints of police misconduct are handled by the Philadelphia Police Department’s [(“PPD”)] Internal Affairs Bureau.

6. However, prosecutors have an affirmative duty to provide exculpatory material to criminal defendants pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963); given this, the [Office] reviews the personnel files of officers involved in a particular case to learn of any misconduct it may have to disclose.

7. The [Office] through our Conviction Integrity Unit (“CIU”) maintains a “Police Misconduct Database” (“PMD”) in which instances of misconduct by members of Philadelphia law enforcement agencies are entered into the [Office]’s database. PMD packets are provided to the [Office] from the PPD and contain investigative summaries compiled by the Police Internal Affairs Division, including investigative conclusions and the Police Board of Inquiry’s findings with respect to punishment. The [Office] makes a specific and individualized request to Internal Affairs for qualifying information of a particular personnel member, in connection with a specifically identified prosecution where that personnel is a potential witness. The [Office] also adds information it independently discovers to the Database.

8. Through my role as the [Office’s] Open Records Officer, I communicate regularly with the [O]ffice’s Supervisor of the CIU, ADA Michael Garmisa, specifically regarding information related to police misconduct. We have extensively discussed his unit’s role in investigating and maintaining [Office] records of police misconduct in the context of responding to [RTKL] requests on this topic. He has informed me that such records would be contained in the [Office’s] PMD database.

9. Upon receipt of [the Request], I searched the [Office’s] Police Misconduct Database for disclosures pertaining to the six officers [the Requester] requested. The Database indicated that there were no existing records or information pertaining to any of the officers in question. Because the Police Misconduct Database is the source most likely to include responsive information involving misconduct of specific police officers, I therefore confirmed that to date, the Office does not have any PMD packets or other responsive records involving the requested officers.

Under the RTKL, a statement made under penalty of perjury may serve as sufficient evidentiary support of the nonexistence of a record. 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 Office has acted in bad faith or that the information requested exists, “the averments in the [Attorney Niemtzow’s attestation] should be accepted as true.” *McGowan v. Pa. Dep’t of Env’tl. 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)).

In this matter, the Office has presented evidence that if the records requested exist, they would likely be found as part of the Office's Police Misconduct Database. Attorney Niemtzw attests that his search of the Database revealed that "there were no existing records or information pertaining to any of the officers" named in the Request. Attorney Niemtzw states that the Office "does not have any PMD packets or other responsive records involving" the named officers. Moreover, the OOR has not been presented with any evidence that contradicts Attorney Niemtzw's statements.

Based on the evidence provided, the Office has demonstrated that it is "more likely than not" that records responsive to the Request do not exist within its possession. Hence, the Office has shown by a preponderance of the evidence that it does not possess the records sought. *Hodges. supra.; see also Campbell v. Pa. Interscholastic Athletic Assoc.*, 268 A.3d 502 (Pa. Commw. Ct. 2021), *petition for allowance of appeal granted upon other grounds*, Nos. 677 and 678 MAL 2021, 2022 Pa. LEXIS 889 (Pa. June 22, 2022) (an agency meets its burden of proof under the preponderance of evidence standard when it demonstrates that it is "more likely than not" that no responsive records exist").

CONCLUSION

For the foregoing reasons, the appeal is **denied**, and the Office 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 Philadelphia County Court of Common Pleas. 65 P.S. § 67.1302(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. 65 P.S. § 67.1303. 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 OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: September 22, 2022

/s/ Angela Edris

APPEALS OFFICER
ANGELA EDRIS, ESQ.

Sent via email to: Omar Richardson, EN9332;
Josh Niemtzow, Esq., AORO

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