



FINAL DETERMINATION

IN THE MATTER OF

**HARRY DUTY,
Requester**

v.

**PENNSYLVANIA DEPARTMENT OF
AGRICULTURE,
Respondent**

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Docket No: AP 2022-2254

On September 20, 2022, Harry Duty (“Requester”) submitted a request (“Request”) to Pennsylvania Department of Agriculture (“Department”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, requesting “the definition for the animal feed and pet food term ‘chicken meal’, adopted as law in PA via regulation.” On September 26, 2022, the Department denied the Request, stating “[t]his definition is not written into Pennsylvania Regulation” and thus the Department does not have the records requested.

On September 27, 2022, the Requester filed an appeal with the Office of Open Records (“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 this appeal. 65 P.S. § 67.1101(c).

In response to a request for records, “an agency shall make a good faith effort to determine if . . . the agency has possession, custody or control of the record[.]” 65 P.S. § 67.901. While the

RTKL does not define the term “good faith effort,” in *Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr.*, the Commonwealth Court stated:

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 ... After obtaining potentially responsive records, an agency has the duty to review the records and assess their public nature under ... the RTKL.

185 A.3d 1161, 1171-72 (Pa. Commw. Ct. 2018) (citations omitted), *aff’d*, 243 A.3d 19 (Pa. 2020).

An agency must show, through detailed evidence submitted in good faith from individuals with knowledge of the agency’s records, that it has conducted a search reasonably calculated to uncover all relevant documents. *See Burr v. Pa. Dep’t of Health*, OOR Dkt. AP 2021-0747, 2021 PA O.O.R.D. LEXIS 750; *see also Mollick v. Twp. of Worcester*, 32 A.3d 859, 875 (Pa. Commw. Ct. 2011).

On October 4, 2022, the Department submitted a position statement and statement made under the penalty of perjury from Susan West, who attests that “[a]fter conducting a good faith search by inquiring with relevant and knowledgeable PDA personnel, no such record can be found within Pennsylvania regulation and, therefore, the requested record is not within PDA’s possession, custody or control.”¹ *See West Attestation* ¶ 5. Ms. West further attests:

Upon receipt of the initial request quoted above, I conducted a thorough examination of files in the possession, custody and control of PDA for records responsive to this request. This search entailed contacting Erin Bubb, Division Chief, Bureau of Plant Industry regarding this request for records. Ms. Bubb provided information stating that the definition of “Chicken Meal” is not contained within Pennsylvania regulation and, therefore, no such record exists within PDA.

¹ Under the RTKL, a sworn affidavit or statement made under the penalty of perjury 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 or that the requested records exist, “the averments in [sworn statement] 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 *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

The Department has the authority to and does adopt definitions contained within the Official Definitions of the Feed Ingredients adopted by the Association of American Feed Control Officials (AAFCO). The definition of “Chicken Meal” does appear in the AAFCO feed definitions and PDA does use and refer to this definition. However, the definition of “Chicken Meal” is absent from the regulations promulgated by this agency.

Id. at ¶ 4. Based on the competent evidence provided, the Department has not promulgated regulations defining “chicken meal” and thus a document responsive to the Request does not exist. The Department is not required to create a record that does not exist. *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011). Therefore, based on the evidence provided, the Department has met its burden of proof that it conducted a good faith search for responsive records and does not possess the records sought in the Request.

For the foregoing reasons, the 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 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. 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 website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: October 21, 2022

/s/ Catherine R. Hecker

CATHERINE R. HECKER, ESQ.
APPEALS OFFICER

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

Sent to: Harry Duty (via email only);
Marija Kuren, Esq. (via email only);
Susan West (via email only)