



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

<b>IN THE MATTER OF</b>	:
	:
<b>DARWIN LEUBA,</b>	:
<b>Requester</b>	:
	:
<b>v.</b>	: <b>Docket No.: AP 2022-2723</b>
	: <b>Consolidated appeal of OOR Dkts. AP</b>
<b>ALLEGHENY COUNTY CONTROLLER’S</b>	: <b>2022-2723, 2022-2724, 2022-2725, 2022-</b>
<b>OFFICE,</b>	: <b>2726, 2022-2727, 2022-2728, 2022-2729,</b>
<b>Respondent</b>	: <b>2022-2730, 2022-2731, 2022-2732, 2022-</b>
	: <b>2733, 2022-2734, and 2022-2735</b>

## FACTUAL BACKGROUND

Darwin Leuba (“Requester”) submitted thirteen requests (“Requests”) to the Allegheny County Controller’s Office (“Office”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.* On November 23, 2022,<sup>1</sup> the Requests were filed seeking information relating to correspondence the County issued in response to an email sent by Shawna Johnson on or about October 21, 2021.<sup>2</sup>

As the Requester did not receive the Office’s response within five business days of the Requests, on December 5, 2022, the Requester filed an appeal with the Office of Open Records

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<sup>1</sup> The Requests were dated November 20, 2022 (docket 2022-2723 was dated November 18, 2022) but were not received by the Office until November 23, 2022.

<sup>2</sup> For the sake of brevity, the OOR will not fully list the Requests, which sought, among other things, emails, payment information, policy documents and procedures, receipts and documents, information on a pre-registration fee, information on the Office’s Tier-1 program, references and CVs, an invoice, and information on a “proposal of services.”

(“OOR”) claiming that the Requests were deemed denied.<sup>3</sup> *See* 65 P.S. § 67.901. 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 December 14, 2022, the Office submitted a position statement arguing that “[i]t is the position of the [O]ffice that the correspondence with [the Requester], in which he responded to the email about when a response could be expected, is deemed a consent to a delay in fulfillment of the [R]equests.” The Office also “noted that the [R]equests deal with significant legal issues involving litigation and privilege that will need to be examined fully before the [R]equests can be ultimately resolved.”

On December 14, 2022, the OOR contacted the Office asking whether the Office planned “on submitting evidence that the withheld records are exempt under the [RTKL].” On December 15, 2022, the Office notified the OOR that it “will not be submitting any evidence of exemption.” The Office further indicated that “since it is [their] position that the initial [R]equests were not denied, [they] intend to examine these [R]equests thoroughly after this appeal process has concluded.”

On December 15, 2022, the Requester submitted a position statement arguing that the Requests were deemed denied and asks the OOR to make a finding of bad faith.

On December 29, 2022, the Office provided records responsive to certain Requests, while also stating that with regard to the remainder of the Requests, the Office is “working diligently

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<sup>3</sup> The Requester filed thirteen appeals arising from substantially similar Requests, docketed as OOR Dkts. AP 2022-2723 through 2022-2735. Because the appeals involve the same agency, requester, and similar issues and requests, the appeals are consolidated into OOR Dkt. AP 2022-2723. *See* 65 P.S. § 1102(b)(3) (stating that “the appeals officer shall rule on procedural matters on the basis of justice, fairness, and the expeditious resolution of the dispute”).

with both [the] IT department, as well as Allegheny County DIT, to obtain these records [relating to past employees].”<sup>4</sup>

On December 30, 2022, the OOR, noting that the Office appeared to provide records responsive to the Requests, asked the Requester whether he wished to withdraw the instant appeal or, in the alternative, to identify what issues remain outstanding for the OOR to adjudicate. On January 2, 2023, the Requester responded arguing that the Office has not satisfied its burden to prove that “other responsive documents do not exist.” The Requester further asked that “a binding final determination be issued requiring [the Office] to provide all responsive records as required under the RTK law....”

### LEGAL ANALYSIS

The Office is a local agency subject to the RTKL. 65 P.S. § 67.302. Records in the possession of a local agency are presumed to be public, unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. See 65 P.S. § 67.305. As an agency subject to the RTKL, the Office is required to demonstrate, “by a preponderance of the evidence,” that records are exempt from public access. 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)).

#### 1. The appeal was timely filed

The Office argues that correspondence with the Requester about when a response to the Requests could be expected resulted in a “deemed consent to a delay in fulfillment of the

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<sup>4</sup> The Office provided a separate email correspondence with attached records responsive to each individual Request or an explanation that no records exist but that the Office is still searching for responsive records.

[R]equests.” By way of background, the Requests were received by the Office’s Open Records Officer (“ORO”) on November 23, 2022 and the Office sent a notification to the Requester that the Office had received the Requests. That same day, the Requester responded, in part, “[t]hanks again and hope I don’t cause too much work for yinz.” Thereafter, having received no response, the Requester filed an appeal with the OOR on December 5, 2022.

Section 901 of the RTKL requires an agency to respond to a RTKL request within five business days of the date the Request is received by its ORO. *See* 65 P.S. § 67.901. That Section further states: “If the agency fails to send the response within five business days of receipt of the written request for access, the written request for access shall be deemed denied.” *Id.* The OOR has generally found that days upon which an agency is officially closed are not considered “business days” in the context of the RTKL. *See, e.g., Klaproth v. Pa. Dep’t of Health*, OOR Dkt. AP 2020-1102, 2020 PA O.O.R.D. LEXIS 2766. As the Requests were received by the Office’s ORO on November 23, 2022, the Office had until December 2, 2022<sup>5</sup> to send a response either denying or granting the Requests or invoking its right to a 30-day extension under Section 902(b)(2) of the RTKL.<sup>6</sup> *See* 65 P.S. § 67.902 (providing several reasons for which an agency may, in writing, invoke a thirty-day extension of time to respond to a request). Furthermore, the OOR does not find the Requester’s response to the ORO as indicative of a deemed “consent to a delay in fulfillment of the [R]equests.” Accordingly, the Requests were deemed denied on December 2, 2022 and the Requester timely filed an appeal with the OOR on December 5, 2022.

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<sup>5</sup> The OOR notes that the Office was closed on November 24 and 25, 2022 for the Thanksgiving Holiday.

<sup>6</sup> While the OOR is sympathetic to the ORO’s sickness, there is no provision in the RTKL that provides for an extension for an ORO missing work due to an illness.

## **2. The appeal is moot in part**

On December 29, 2022, the Office provided several records that it asserts are responsive to the Requests. Accordingly, insofar as the Requests seeks those records, the appeal is dismissed as moot. *See Kutztown Univ. of Pa. v. Bollinger*, 217 A.3d 931 (Pa. Commw. Ct. 2019) (holding that an appeal is properly dismissed as moot where no controversy remains).

## **3. The Office failed to meet its burden that any exemptions apply or that all responsive records have been provided to the Requester**

On appeal, the Office indicated that it “will not be submitting any evidence of exemption.” Local agencies have the burden of proving that records are exempt from access. 65 P.S. § 67.708(a)(1). Here, the Office did not comply with the RTKL by timely responding to the Requests, nor did the Office participate on appeal by submitting legal argument or evidence in support of withholding the requested records or that all records responsive to the Requests have been provided.<sup>7</sup>

In response to a record request, “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” as used in Section 901, the Commonwealth Court outlined elements of a good faith search in *Uniontown Newspapers, Inc. v. Pa. Dep’t of Corrections*, 243 A.3d 19, 33 (Pa. 2020). The Court noted that an Agency Open Records Officer (AORO) has a duty to:

1. Advise all custodians of potentially responsive records about the request;
2. Obtain all potentially responsive records from those in possession of the potentially responsive records;
3. Contact agents within its control, including third party contractors; and
4. Review the records and assess their public nature.

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<sup>7</sup> Again, the OOR notes that the Office did provide the Requester with some records responsive to the Requests.

In sum, an agency must show that it has conducted a search reasonably calculated to uncover all relevant documents; an agency may do so by providing relatively detailed and non-conclusory affidavits submitted in good faith by officials or employees with knowledge of the records and the search for records.

In the immediate appeal, while the Office did provide some records responsive to the Requests, the Office does not provide any supporting evidence (i.e., an attestation) describing how the search for records was conducted or what was searched in locating records responsive to the Request. Nor did the Office provide an attestation or submit legal argument or evidence proving that no additional responsive records exist, or, in the alternative, evidence to support the withholding of the requested records. Accordingly, the Office did not meet its burden of proof under the RTKL. 65 P.S. § 67.305. *See Highmark Inc. v. Voltz*, 163 A.3d 485, 491 (Pa. Commw. Ct. 2017) (*en banc*) (stating that “it is not incumbent upon OOR to request additional evidence when developing the record. Rather, it is the parties’ burden to submit sufficient evidence to establish material facts.”). As such, the Office failed to meet its burden of proof with respect to the records sought in the instant Requests.<sup>8</sup>

The OOR is mindful that an agency cannot produce records that do not exist within its “possession, custody or control” and, accordingly, is not ordering the creation of any records sought in the Request. Absent the Office providing a sufficient evidentiary basis that no records exist or that records should be withheld, the OOR will order disclosure of responsive public records. *See generally Sindaco v. City of Pittston*, OOR Dkt. AP 2010-0778, 2010 PA O.O.R.D.

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<sup>8</sup> The Office never sought an extension to extend the submission period pursuant to the OOR’s ability to extend deadlines by which an agency must process a request, as enunciated in *Pa. State Sys. of Higher Educ. v. Ass’n of State Coll. & Univ. Faculties* (“APSCUF”), 142 A.3d 1023 (Pa. Commw. Ct. 2016).

LEXIS 755; *Schell v. Delaware County*, OOR Dkt. AP 2012-0598, 2012 PA O.O.R.D. LEXIS 641.

#### **4. The OOR declines to make a finding of bad faith**

The Requester argues that the Office “is brazenly defying the intent and spirit of the appeals process by refusing to provide the most basic of legal argument for why basic documents such as an itemized invoice cannot be provided in a timely fashion.” Section 1305(a) of the RTKL states that “[a] court may impose a civil penalty of not more than \$1,500 if an agency denied access to a public record in bad faith.” 65 P.S. § 67.1305(a); *Office of the Dist. Atty. Of Phila. v. Bagwell*, 155 A.3d 1119, 1140-41 (Pa. Commw. Ct. 2017) (“An example of bad faith is a local agency’s failure to comply with the mandate of Section 901 of the RTKL, which requires that a local agency make a good faith search for information responsive to a request and determination of whether that information is public.”). In this matter, the Office asserts that it has not denied access to responsive records but rather, argues that it needs additional time to respond, stating that “[d]ue to the number of [R]equests that were filed, and nature of the [R]equests, further examination is needed.” While the Office did not properly invoke a thirty-day extension, the Office has indicated its willingness to provide records responsive to the Requests.<sup>9</sup> Additionally, as noted above, on December 29, 2022, the Office provided records responsive to the Requests or an explanation that the Office is “working diligently with both [the] IT department, as well as Allegheny County DIT, to obtain these records [relating to past employees].” Accordingly, based on the evidence presented, the record does not support a finding of bad faith.

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<sup>9</sup> The OOR further notes that thirteen Requests were submitted to the Office on November 23, 2022, the day before the Thanksgiving Holiday break and the Office’s ORO has indicated that he “contracted the flu and was out for the entire week of 11/28-12/2....”

## CONCLUSION

For the foregoing reasons, the appeal is **granted in part** and **dismissed as moot in part**, and the Office is required to perform a good faith search for additional records responsive to the Requests and provide any responsive records identified as a result of that search to the Requester within thirty days. If no additional records responsive to the Requests are identified, the Office must provide a detailed attestation describing its search and affirming that no additional responsive records exist to the Requests within its possession, custody or control and that all records responsive to the Requests have been provided to the Requester. 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 Allegheny 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.<sup>10</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: January 4, 2023**

/s/ Lyle Hartranft  
Lyle Hartranft, Esq.  
Appeals Officer

Sent via email to: Darwin Leuba; Ryan Herbinko, Esq., AORO

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<sup>10</sup> *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013)