



providing answers to Items 2 (the “two patrol vehicles that have the highest mileage if and when the said vehicles are ordered”) and 4 (“[the Department] has 4 vehicles that are take home vehicles.”).

On November 14, 2022, the Requester filed an appeal with the Office of Open Records (“OOR”), challenging the denial and stating grounds for disclosure.<sup>1</sup> Specifically, the Requester argues that the Requester has a right to obtain the requested records and that the mileage and hours sought would be available on the electronic dash information of each vehicle. The OOR invited both parties to supplement the record and directed the Department to any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On December 6, 2022, the Department submitted a position statement reiterating its grounds for denial. In support of its position, the Department submitted the Attestation of Steven Lutz, Police Chief and (“Lutz Attestation”), Agency Open Records Officer (“AORO”) for the Department.

On January 4, 2023, the OOR contacted the parties asking the Department to submit a supplemental attestation specifically addressing Items 2 and 4 of the Request. On January 9, 2023, the Department submitted a supplemental attestation from Chief Lutz (“Lutz Supplemental Attestation”).

On January 17, 2023, the OOR contacted the Department asking whether “the Police Department maintain[s] paperwork associated with oil changes/and/or inspection reports ... that would reflect the mileage on a given police vehicle[.]”<sup>2</sup>

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<sup>1</sup> The Requester granted the OOR a 30-day extension to issue a final determination. *See* 65 P.S. § 67.1101(b)(1). (“Unless the requester agrees otherwise, the appeals officer shall make a final determination which shall be mailed to the requester and the agency within 30 days of receipt of the appeal filed under subsection (a).”).

<sup>2</sup> The paperwork appeared to show three mileage indicators for three Department vehicles (a 2016, 2019, and 2020 Ford Explorer). These three vehicles correspond to the list provided by the Department listing its 11 Department vehicles.

On January 19, 2023, the Department provided “invoices/work orders from the service center where the [Department] has its vehicles maintained.” That same day, the OOR responded asking whether the number in front of ‘Mi.’ reflects the mileage on a given vehicle.<sup>3</sup> On January 19, 2023, the Department indicated that the number “referenced on the attached invoices may in fact be the mileage as of the date of service.” The Department further argues that the “invoices are still not responsive to [the R]equest for ‘current mileage’, in that the service station often takes a month or two before invoicing the [D]epartment for service.” In support, the Department submitted a spreadsheet providing “the tracks the date of the receipt of the invoice, along with the date the [D]epartment forwards the invoice to [Newberry T]ownship for payment.”

### LEGAL ANALYSIS

The Department is a local agency subject to the RTKL. 65 P.S. § 67.301/302. 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 Department 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 Department proved that some records responsive to the Request do not exist**

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

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<sup>3</sup> The Requester also responded on January 18, 2023 arguing that the Department refuses to provide information and on January 19, 2023, the Requester submitted a copy of an inspection invoice showing mileage.

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).

In support of the Department’s argument that it conducted a good faith search and no additional responsive records exist, it provided the Lutz Supplemental Attestation which attests as follows:

1. [Lutz] serve[s] as the [AORO for the Department] and [is] responsible for responding to [RTK] requests with the [Department].
2. In [his] capacity as the AORO, along with being Chief of the Department, [he is] familiar with the records of the [Department].
3. Upon review of the [R]equest from [the Requester], [Lutz] reviewed the records the Department keeps.
4. [The Department does] not maintain a record that records the mileage ([Item 1 of the Request]) or the hours of the vehicles in [the Department’s] fleet (the third [item]).
5. Therefore, [the Department] denied [the R]equest based upon the [Department] not having the records requested.

6. [The Department] did provide [the Requester] with answers to her other questions related to the vehicles being retired and the number of vehicles taken home by the officers.
7. Specifically, [the Department] informed [the Requester] that the vehicles to be retired are the two with the highest mileage. However, as noted above, the [Department] does not maintain a record of mileage information for [the Department] to provide to [the Requester].
8. Further [the Department] provided [the Requester] with information related to the four vehicles taken home by officers, but that for privacy reasons [the Department] could not provide information as to where those vehicles were kept.
9. Finally, even if [the Department] did not have privacy concerns related to the vehicles taken home by officers, the [Department] does not maintain a record that contains the information [the Requester] has requested relative to the township or borough where the vehicles are kept and which officers use said vehicles.

Under the RTKL, an attestation 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 competent evidence that the Department acted in bad faith, “the averments in [the supplemental 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 *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

In this instance, the Department demonstrated that Chief Lutz, the Department’s AORO, conducted a good faith search of the Department’s records.. Lutz Supplemental Attestation, ¶ 3. The Department also demonstrated that the good faith search resulted in no responsive records relating to Items 2-4. *Id.* at ¶¶ 4-5. *See Pa. Dep’t of Health v. Mahon*, 283 A.3d 929 (Pa. Commw. Ct. 2022) (holding a search of records and sworn and unsworn affidavits that documents were not in agency’s possession is enough to satisfy burden that records do not exist); *Campbell v. Pa. Interscholastic Ath. Ass’n*, 268 A.3d 502, (Pa. Commw. Ct. 2021) (the burden of proving that a

record of a Commonwealth agency is exempt from public access shall be on the Commonwealth agency and the affidavit of the association's executive director stating that after a thorough search, the association did not have possession, custody or control of certain records was sufficient).

While the Requester argues that the requested records, including the hours of vehicles and the township or borough where an officer with a vehicle resides should be easy for the Department to obtain, the Department is not required to create a record that does not exist. *See* 65 P.S. § 67.705 (“[w]hen responding to a request to access, an agency shall not be required to create a record which does not currently exist or to compile, maintain, format, or organize the public record in a manner in which the agency does not currently compile, maintain, format or organize the record.”).<sup>4</sup> Therefore, based on the evidence submitted, the Department has met its burden of proving that the requested records do not exist for Items 2-4.<sup>5</sup> *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

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

Here, Item 1 seeks the “mileage on every vehicle” relating to the “11 vehicles associated with the [Department.]” On January 19, 2023, the Department provided “invoices/work orders from the service center where the [Department] has its vehicles maintained” reflecting the mileage on three of its vehicles. As such, the appeal to those records is dismissed as moot. *See Kutztown Univ. of Pa. v. Bollinger*, 2019 Pa. Commw. Unpub. LEXIS 521, \*6 (holding that an appeal is properly dismissed as moot where no controversy remains).

However, the Department did not provide an invoice/work order reflecting the mileage for the remaining eight vehicles identified in the “2022 NTPD Vehicles” list. Accordingly, the

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<sup>4</sup> Additionally, the home addresses of law enforcement officers are exempt under the RTKL. *See* 65 P.S. 67.708(b)(6)(i)(C).

<sup>5</sup> The OOR notes that the Department responded to part of Item 1, Item 3, and Item 4 in its final response.

Department must provide the most recent invoice/work order reflecting the mileage log as it relates to those eight vehicles. The OOR recognizes the Department's argument that the invoice/work order would not provide a "current" mileage due to the "lapse in time between the date of service and the receipt of the invoice...." However, the Request seeks "mileage on every vehicle" and the invoice/work order is a 'record' reflecting the mileage on a Department vehicle. The OOR is also 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 the record; however absent the Department providing a sufficient evidentiary basis that the records do not exist and noting that the Department was able to provide mileage to three of its vehicles, the OOR will order disclosure. *See, e.g., Campbell v. Galetton Area Sch. Dist.*, OOR Dkt. AP 2018-2175, 2019 PA O.O.R.D. LEXIS 45; *Kowalchick v. Norwegian Twp.*, OOR Dkt. AP 2018-2217, 2019 PA O.O.R.D. LEXIS

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## CONCLUSION

For the foregoing reasons, the appeal is **denied in part, dismissed as moot in part, and granted in part**, and the Department is required to provide the responsive records reflecting the mileage for the remaining eight vehicles within thirty days. 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 York County Court of Common Pleas. 65 P.S. § 67.1302. 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.<sup>6</sup> This Final Determination shall be placed on the website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: January 23, 2023**

*/s/ Lyle Hartranft*

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Lyle Hartranft, Esq.  
APPEALS OFFICER

Sent via email to: Jane Harman, Chief Steven Lutz, AORO; Douglas Myers, Esq.

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<sup>6</sup> *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).