



FINAL DETERMINATION

IN THE MATTER OF

**JIM GARLAND,
Requester**

v.

**PENNSYLVANIA DEPARTMENT OF
STATE,
Respondent**

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Docket No: AP 2023-0048

On December 16, 2022, Jim Garland (“Requester”) submitted a request (“Request”) to the Pennsylvania Department of State (“Department”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking, “[A]ny information the Department of State has relative to Dr. Cirył Wecht.” On December 22, 2022, the Department denied the Request, stating that the records do not exist within the Department’s possession, custody or control.

On January 6, 2023, 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).

On January 20, 2023, the Department submitted an attestation made subject to the penalties of unsworn falsification to authorities, 18 Pa.C.S. § 4904, from Janelle S. Hawthorne, the Agency Open Records Officer ("AORO"), attesting to the following:

2. I am employed by the Department of State (Department) as the Agency Open Records Officer. As part of my duties, I am to make a good faith effort to determine whether the agency has possession, custody or control of the record requested, pursuant to 65 P.S. § 67.901.

3. In my search for records...I searched the Pennsylvania Licensing System (PALS) website to see if the Department of State has any records of Dr. Cirył Wecht holding a professional license with the Department. On PALS, I entered the name "Wecht" in the last name search field category and the name "Cirył" in the first name search field category...[t]he PALS searched showed that there are no professional licensure records for Cirył Wecht on file with the Department.¹

4. On December 22, 2022, I responded...with the Department's final response denying the request because there are no records in the Department's possession that are responsive to the request based on the information provided in the request.

5. Therefore, I have made a thorough inquiry with the designated and/or reasonably likely records custodians for the Department regarding the requested records noted above, and based on the information provided to me, I do hereby affirm that, to the best of my knowledge, information and belief, that there are no records on file responsive to [the] [Request].

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

¹ PALS is publicly accessible online.

search for the records. *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 re Silberstein*, 11 A.3d 629, 634 (Pa. Commw. Ct. 2011) (holding that it is “the open-records officer’s duty and responsibility” to both send an inquiry to agency personnel concerning a request and to determine whether to deny access).

The Department’s attestation is authored by the AORO. The attestation describes the search for responsive records, which included a search on the Pennsylvania Licensing System website. The Hawthorne Attestation is credible and sufficient to meet the Department’s burden of proof that records do not exist. There has been no evidence provided that otherwise contradicts the statements offered by the Department in the Hawthorne Attestation.² *See Pa. Dep’t of Health v. Mahon*, 2022 Pa. Commw. LEXIS 136 (Pa. Commw. Ct. 2022).

Pursuant to the Hawthorne Attestation, a search had been conducted and no responsive records exist in the Department’s possession, custody or control.³ The Department has demonstrated that its Open Records Officer conducted a good faith search. Therefore, based on the evidence provided, the Department has met its burden of proof that the requested records do not exist in the Department’s possession, custody or control. *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).⁴

² The Requester submitted lengthy argument and concerns at the time of the appeal and on January 19, 2023; however, the issues raised in these submissions do not fall within the jurisdiction of the OOR.

³ 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 responsive records exist, “the averments in the [attestation] should be accepted as true.” *McGowan v. Pa. Dep’t of Envtl. 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)).

⁴ The Requester included a newspaper clipping with his appeal submissions that contained a photograph of “Dr. Cyril Wecht.” It appears that the Requester may have misspelled the first name of Dr. Wecht in the Request. The OOR declines to conclude the Department acted unreasonably by relying upon the spelling provided by the Requester; however, nothing in this Final Determination prevents the Requester from submitting a new RTKL request utilizing the correct spelling of Dr. Wecht’s first name. *See Brock v. Bucks County*, OOR Dkt. AP 2022-2350, 2022 PA O.O.R.D. LEXIS 2874.

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; 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.⁵ 65 P.S. § 67.1303. This Final Determination shall be placed on the website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: January 30, 2023

/s/ Bandy L. Jarosz

BANDY L. JAROSZ, ESQ.
APPEALS OFFICER

Sent to: Jim Garland (via First Class Mail only)
C. William Fritz, Esq. (via portal only)
Janelle Hawthorne (via portal only)

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