



FINAL DETERMINATION

IN THE MATTER OF

**JIM GARLAND,
Requester**

v.

**PENNSYLVANIA DEPARTMENT OF
HEALTH,
Respondent**

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Docket No: AP 2023-0060

FACTUAL BACKGROUND

On December 16, 2022, Jim Garland (“Requester”) submitted a request (“Request”) to the Pennsylvania Department of Health (“Department”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking, “[A]ny information the Department of Health has relative to Dr. Caryl Wecht.” On December 23, 2022, the Department denied the Request and advised the Requester that Westmoreland County may have the requested records. The Requester was provided with the RTKL contact information for Westmoreland County.

On January 9, 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).

On January 20, 2023, the Requester submitted a position statement.¹

On January 23, 2023, the Department submitted a position statement arguing that the interpretation of the Department's Agency Open Records Officer ("AORO") was reasonable, the Request was not sufficiently specific in accordance with 65 P.S. § 67.703, and the records requested do not exist. In support of its position, the Department submitted an attestation made subject to the penalties of unsworn falsification to authorities, 18 Pa.C.S. § 4904, from Danica Hoppes, the AORO.

LEGAL ANALYSIS

The Department is a Commonwealth agency subject to the RTKL. 65 P.S. § 67.301. Records in the possession of a Commonwealth 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 Commonwealth 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 factfinder ... 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).

¹ The issues raised in this submission do not fall within the jurisdiction of the OOR and seem to relate to, among other things, a hearing before a Magisterial District Judge. As the documentation does not relate to the issue underlying this appeal, it is not included as part of the record. *See* 65 P.S. § 67.1102(a)(2) (stating that "[t]he appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute").

1. The Department's interpretation of the Request is reasonable

The Department argues that the AORO's interpretation of the Request is reasonable, namely that the Request sought records relating to Dr. Wecht as a medical practitioner in the Commonwealth of Pennsylvania. Hoppes Attestation ¶ 9.

An agency may interpret the meaning of a request for records, but that interpretation must be reasonable. *See Spatz v. City of Reading*, OOR Dkt. AP 2013-0867, 2013 PA O.O.R.D. LEXIS 513; *Signature Info. Solutions, Inc. v. City of Warren*, OOR Dkt. AP 2012-0433, 2012 PA O.O.R.D. LEXIS 557. The RTKL is remedial legislation that must be interpreted to maximize access. *See Gingrich v. Pa. Game Comm'n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38 at *16 (Pa. Commw. Ct. 2012) (citing *Bowling*, 990 A.2d at 824). The OOR determines the reasonableness of the agency's interpretation from the text and context of the request alone, as neither the OOR nor the Requester are permitted to expand the request on appeal. *See Pa. State Police v. Office of Open Records*, 995 A.2d 515 (Pa. Commw. Ct. 2010); *McKelvey v. Office of Attorney General*, 172 A.3d 122 (Pa. Commw. Ct. 2017) ("Once a RTKL request is submitted, a requester is not permitted to expand or modify the request on appeal."). In this case, without more evidence to suggest a contrary interpretation, the Department's interpretation of the Request is reasonable.

2. The Department has met its burden that it does not have records responsive to the Request

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).

The Request seeks any information that the Department may have in regard to Dr. Wecht. In support of the Department's argument that it does not possess records responsive to this Request, the Hoppes Attestation indicates, in relevant part, as follows:

1. I am employed by the Pennsylvania Department of Health as a Legal Administrative Officer and serve as the AORO.
3. As such, I am familiar with the records of the Agency.
5. I am not aware of any records within the Department relating to Dr. Wecht and have no reason to believe the Department possesses any records pertaining to Dr. Wecht.
6. I am not aware of any bureaus within the Department that would have records pertaining to Dr. Wecht[,] or any individual physician, because the Department does not routinely maintain records pertaining to individual physicians.
7. I have never been asked to provide records pertaining to Dr. Wecht and am not aware of any Departmental activities that would involve Dr. Wecht.
8. Because this request did not provide any context, I was not able to devise any methods by which to narrow the request, identify any potential relevant Departmental activities, or identify potential custodians of records.

9. Because there was no indication that the request sought information about Dr. Wecht in connection with a discernable departmental activity, I interpreted the request to seek records relating to Dr. Wecht generally, as a medical practitioner in the Commonwealth of Pennsylvania.

10. The Department does not maintain such records.

11. Rather than denying the request based on the lack of specificity or the fact that the Department does not maintain records on individual physicians, I attempted to [determine] what Commonwealth agency would be a more likely source of responsive records.

12. I conducted an internet search and learned that Dr. Wecht had been a forensic pathologist in the Commonwealth of Pennsylvania for more than four decades and had also served in a number of official capacities; none of this information narrowed the scope of the request or aided me in identifying potentially responsive records or custodians of records.

13. This same internet search revealed that Dr. Wecht had most recently been affiliated with Westmoreland County, Pennsylvania[.]

14. Based on this, I determined that Westmoreland County would be the most likely source of responsive records.

15. Accordingly, I provided a referral to the AORO for Westmoreland County and provided contact information in the Department's final response.

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 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)). 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 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 for an appropriate Commonwealth agency and an internet search. The Department has demonstrated that its Open Records Officer conducted a good faith search and made inquiries to relevant departmental bureaus and third parties, namely an internet search that revealed a connection between Dr. Wecht and Westmoreland County. Based on the evidence provided, the Department has demonstrated that it does not maintain records relating to individual physicians. The Hoppes 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 Hoppes Attestation. *See Pa. Dep’t of Health v. Mahon*, 2022 Pa. Commw. LEXIS 136 (Pa. Commw. Ct. 2022). Therefore, based on the evidence provided, the Department has met its burden of proof that the requested records do not exist.² *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

CONCLUSION

For the foregoing reasons, the appeal is **denied**, and the Department is not required to take any further action.³ This Final Determination is binding on all parties. Within thirty days of the

² Because the Department has demonstrated that the requested records do not exist, the OOR need not reach the County’s alternative grounds for denying access. *See Jamison v. Norristown Bor. Police Dept.*, OOR Dkt. AP 2011-1233, 2011 PA O.O.R.D. LEXIS 927.

³ Nothing in this Final Determination prevents the Requester from filing a new RTKL request for the same information with Westmoreland County, and if necessary, filing an appeal pursuant to the requirements of 65 P.S. § 67.1101(a)(1).

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.⁴ 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)
Anna LaMano, Esq. (via portal only)
Danica Hoppes (via portal only)

⁴ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).