pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
DAVID PERRETTA,	:	
Requester	:	
	:	
v.	:	**Docket No: AP 2023-0054**
	:	
ALTOONA AREA SCHOOL DISTRICT,	:	
Respondent	:	

FACTUAL BACKGROUND

On December 22, 2022, David Perretta ("Requester") submitted a request ("Request") to the Altoona Area School District ("District") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq*., seeking in pertinent part, "[copies] of two videos that should be in possession of Mr. Hatch". The Request went on to describe what the Requester believed would be seen on the two videos, and advised that at the time of the videos, he was employed at the "new school" at the front desk.

As the Requester contended that he did not receive the District's response within five business days of the Request, on January 9, 2023, the Requester filed an appeal with the Office of Open Records ("OOR"), claiming that the Request was deemed denied. *See* 65 P.S. § 67.901. The OOR invited both parties to supplement the record and directed the District to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On January 20, 2023, the District submitted a position statement in response to the appeal. The District first advised that it did issue a final response to the Request, dated December 22, 2022, where it denied the Request due to lack of specificity pursuant to 65 P.S. § 67.703.[1] Further, the District advised that lack of specificity aside, it conducted a reasonable investigation and consultation with its staff, and determined that the District is not in possession, custody or control of any responsive records. In support of its position, the District submitted the attestation of Charles A. Prijatelj, Ed.D ("Prijatelj Attestation"), Superintendent of Schools for the District, and the District's Open Records Officer ("AORO").[2]

LEGAL ANALYSIS

The District 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 District is required to demonstrate, "by a preponderance of the evidence," that records are exempt from public access. 65 P.S. § 67.708(a)(1). The preponderance of the evidence standard 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)). 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] On January 24, 2023, the District provided a copy of its final response issued to the Requester to the OOR, which has been made a part of the record.
[2] The Prijatelj Attestation was subject to penalties under 18 Pa. C.S. § 4904, relating to unsworn falsifications to authorities.

While the District argues that the Request is insufficiently specific, it advised that nevertheless, it undertook efforts to narrow down and identify a timeframe, as well as a likely location as to where the videos may have taken place to find any responsive records. As a result of its efforts, it advised that the District is not in possession, custody or control of any responsive records 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. The RTKL does not define the term "good faith effort." However, the Commonwealth Court concluded that:

> 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 record and assess their public nature under... the RTKL.

Uniontown Newspapers, Inc. v. Pa. Dep't of Corr., 185 A.3d 1161, 1171-72 (Pa. Commw. Ct. 2013) (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).

Here, the Prijatelj Attestation states, in part:

> 4. Additionally, upon further review of the [R]equest and with respect to this pending [a]ppeal, I nevertheless conducted an investigation to determine what, if any potentially responsive records might exist in the [District's] custody, possession, and/or control, based on the overall context and alleged events described within the [R]equest. This investigation consisted of a review with the [AORO] and other relevant [District] personnel regarding any anticipated timeframe which could be deduced as applying to this [R]equest

and/or the potential for any video surveillance footage to have been retained and/or preserved.

5. In connection with this effort, I determined and hereby attest to and affirm the following:

    a. The [R]equester…references himself as working security for the [District] when "the new school opened." Relevant personnel records indicate that [the Requester] was employed by the [District] as a security greeter during the timeframe in which the "new school" opened by the [District] would and could only have been the Altoona Area Junior High School. The Altoona Area Junior High School first opened with the start of the 2008-2009 school year, and relevant personnel records reflect that [the Requester] resigned from employment as a security greeter effective January 15, 2010. On this basis, it is assumed that any potential timeframe applicable to the video would be arising at some point between August 26, 2008, which was the first student day of the 2008-2009 school year when the Altoona Area Junior High School opened, and January 15, 2010, which was the date on which [the Requester's] employment as a security greeter with the [District] concluded.

    b. I conducted a reasonable investigation and consultation with relevant [District] staff regarding surveillance video systems(s) utilized in the above-referenced timeframe of August 2008 through January 2010.

    c. I determined, as a result of this investigation and consultation, and hereby attest and affirm, that during the timeframe relevant to this [R]equest, and continuing up until 2018, the [District's] video surveillance system retained video footage for approximately 3-4 days following the time at which it was created/recorded. After the conclusion of this 3-4 day period, if the video was not otherwise proactively preserved for a specific purpose, it would be automatically destroyed and would not be retained on any form of backup storage disc or other media.

    d. Recordings/footage from the video surveillance system would not be proactively preserved, as described above, unless a specific purpose to do so had arisen at the time, such as an investigative purpose related to or arising from an incident depicted on the video footage. When preserved in this proactive fashion, any such video records were then typically retained for a period of seven (7) years following the conclusion of any applicable proceeding, matter, investigation, and/or dispute arising that gave rise to the need for preservation of the video.

e. I hereby attest and affirm, following reasonable investigation and consultation, that there was no investigation, proceeding, matter and/or other dispute arising with respect to [the Requester] and his service as a security greeter and/or with respect to Mr. Hatch and/or any interactions with a student at the Altoona Area Junior High School that resulted in the proactive preservation of video surveillance footage from the Altoona Area Junior High School generally, and specifically the front desk area in which [the Requester] served as a security greeter, between August 26, 2008 and January 15, 2010.

f. I further hereby attest and affirm that following reasonable investigation as described above, I have determined that there is no video footage nor are there any other video records which exist in the [District's] custody , possession, and/or control that are responsive to this [R]equest, due to the surveillance system retention/destruction protocols in place at the timeframe applicable to this matter, which provided for and resulted in automatic destruction of the video within 3-4 days after it was recorded. In this respect, I wish to further emphasize that the [District] has not identified any video record, of any kind, within its possession, custody, or control which is responsive to this [R]equest as stated, and as deduced/interpreted as described above.

g. I further hereby attest and affirm that to the best of my knowledge, information, and belief, the records requested by the [R]equester in this matter did not exist as of the date of the [R]equest, nor do such records exist to date, nor are they otherwise believed to have ever existed following the point at which they would have been destroyed pursuant to standard retention and destruction protocols, which at the latest would have occurred on/around mid-January of 2010.

Under the RTKL, an affidavit or statement made under 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. Off. of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any evidence that the District has acted in bad faith "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 *Off. of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

Here, the Prijatelj Attestation explains how the District undertook a search of its records in sufficient detail. Specifically, the Prijatelj Attestation provides how the District consulted with relevant staff to narrow down a likely location, timeframe, and details the District's record retention policy for its video surveillance system to confirm it is not in possession, custody or control of any responsive records.

The OOR recognizes that the District cannot provide access to a record that does not exist in its possession. Accordingly, the District's submissions are sufficient to prove that it conducted a good faith search, and there are no responsive records to the Request in the District's possession, custody, or control.[3] *See Pa. Dep't of Health v. Mahon*, 283 A.3d 929 (Pa. Commw. Ct. 2022); *Hodges*, 29 A.3d at 1192.

CONCLUSION

For the foregoing reasons, the appeal is **denied**, and the District 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 to the Blair 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.[4] This Final Determination shall be placed on the OOR website at: http://openrecords.pa.gov.

---

[3] Because the District has proven that the responsive records to the Request do not exist, the OOR need not reach the District'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.

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

FINAL DETERMINATION ISSUED AND MAILED: February 3, 2023

/s/ Tope L. Quadri

TOPE L. QUADRI
APPEALS OFFICER

Sent via email: David Perretta
Charles A. Prijatelj, Ed.D, AORO
Elizabeth A. Benjamin, Esq.