



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

**IN THE MATTER OF**

**PHILIP JENSEN,  
Requester**

**v.**

**PENNSYLVANIA DEPARTMENT OF  
CORRECTIONS,  
Respondent**

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: **Docket No: AP 2023-0393**  
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### **FACTUAL BACKGROUND**

On January 20, 2023, Philip Jensen (“Requester”), an inmate at SCI-Houtzdale, submitted a request (“Request”) to the Pennsylvania Department of Corrections (“Department”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking, in pertinent part, “[a]ll line [entries]/financial ledger[s] of December 2021 ‘custodial account’ [for] resources of the [Department] for prison inmates.”

On January 24, 2023, following a thirty-day extension during which to respond, 65 P.S. § 67.902(b), the Department denied the Request, arguing that the Request lacked the required specificity pursuant to 65 P.S. § 67.703.

On February 13, 2023,<sup>1</sup> the Requester appealed to the Office of Open Records (“OOR”), challenging the denial and stating grounds for disclosure. The Requester argues that his Request was sufficiently specific and references his research, a portion of the Comprehensive Annual Financial Report for the Fiscal Year ended June 30, 2020 for the Commonwealth of Pennsylvania, which he attached to his appeal, arguing that the responsive records should exist. Further, the Requester argues that the Department acted in bad faith by denying his Request. 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 March 6, 2023, the Department submitted a position statement in response to the appeal. On appeal, the Department advised that based on the Requester’s assertions in his appeal, the Department conducted a good faith search and consulted with relevant Department personnel to confirm that it is not in possession, custody or control of any responsive records. In support of its position, the Department submitted the attestation of Andrew Filkosky (“Filkosky Attestation”), Open Records Officer for the Department (“AORO”).<sup>2</sup>

### 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 Department is required to demonstrate, “by a preponderance of the evidence,” that records are exempt from public access. 65 P.S. §

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<sup>1</sup> The appeal was received by the OOR on February 22, 2023; however, it was postmarked February 13, 2023. Therefore, pursuant to the “prisoner mailbox rule,” the appeal is considered filed as of February 13, 2023. *See Commonwealth v. Jones*, 700 A.2d 423, 426 (Pa. 1997).

<sup>2</sup> The Filkosky Attestation was made subject to the penalties under 18 Pa.C.S. § 4904, relating to unsworn falsifications to authorities.

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. The Department has demonstrated that it does not have any responsive records in its possession, custody or control**

On appeal, the Department asserts that it does not have any responsive records in its possession, custody or control. 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. 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).

Here, the Filkosky Attestation states, in part:

5. In response to [the Requester's] RTKL Request, this office contacted the Director of the Department's Bureau of Administration[,] which is responsible for all departmental budget and fiscal matters.
6. That official explained that neither she nor officials within her office understand what records [the Requester] is referring to and seeking access to[,] and therefore they cannot conduct a search for responsive records.
7. As such, this office issued a Final Response to [the Requester], dated January 24, 2023, indicating that his RTKL Request lacked sufficient specificity in order to enable the Department to conduct a good faith search. *See* Final Response.
8. Instead of submitting a follow-up Request sufficiently describing the records to which he seeks access, I am aware that [the Requester] ha[d] initiated [a] RTKL [a]ppeal to the [OOR] challenging the Department's denial of his requested access, and arguing that his Request was sufficiently specific.
9. On [a]ppeal, [the Requester] repeatedly refers to and describes the records sought as being from one account, the "custodial account" containing the combined resources of the Department for all prison inmates. *See* Appeal Documents.
10. In response to [the Requester's] RTKL [a]ppeal filing, I shared another discussion with the Director of the Department's Bureau of Administration[,] where I extended [the Requester's] assertions on [a]ppeal.
11. In response, the Director explained to me that [the Requester] is basing his RTKL Request on a flawed premise; there is no one "custodial account" containing the combined resources of the Department for all of its inmates, and therefore the entries for December 2021 for that account...does not exist[/]likewise do not exist.
12. Therefore, after conducting a good faith search in response to [the Requester's] RTKL Request as described above, I can state here that the Department does not possess any responsive records.

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 Department has acted in bad faith or that responsive records do, in fact, 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 *Off. of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

Here, the Filkosky Attestation explains how the Department undertook a search of its records in sufficient detail. Specifically, in response to the Request and on appeal, the AORO explains how he consulted more than once with the Director of the Department’s Bureau of Administration, which is responsible for all departmental budget and fiscal matters. Filkosky Attestation ¶¶ 5,10. Further, the Filkosky Attestation sufficiently explains that there is no one “custodial account” containing the combined resources of the Department for all its inmates, and therefore, the entries for December 2021 that the Requester seeks does not exist. Filkosky Attestation ¶¶ 11-12.

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

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<sup>3</sup> Despite the Requester’s arguments, the OOR makes no determination as to whether records should exist, only that the Department does not possess responsive records. See *Duffy v. Kennett Township*, OOR Dkt. AP 2022-0404, 2022 PA O.O.R.D. LEXIS 1126 (quoting *Troupe v. Borough of Punxsutawney*, OOR Dkt. AP 2010-0743, 2010 O.O.R.D. LEXIS 731) (“While ... evidence may establish that a [record] should exist, the OOR lacks jurisdiction to rule on the propriety of the lack of such [record] -- the OOR may only determine whether a responsive record does, in fact, exist”).

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

The Requester asserts that the Department has acted in bad faith by denying his Request. Although the OOR may make such a finding, only the courts have the authority to impose sanctions on agencies. *See generally* 65 P.S. § 67.1304(a) (noting that a court “may award reasonable attorney fees and costs of litigation...if the court finds...the agency receiving the...request willfully or with wanton disregard deprived the requester of access to a public record...or otherwise acted in bad faith...”); 65 P.S. § 67.1305(a) (“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”). Under the RTKL, a finding of bad faith may be appropriate where an agency refuses to comply with its statutory duties under the RTKL. *See Uniontown*, 185 A.3d at 1172; *see also Office of the Dist. Atty. of Phila. v. Bagwell*, 155 A.3d 1119 (Pa. Commw. Ct. 2017) (a finding of bad faith was warranted where the agency based a denial on the identity of the requester, refused to provide a legal rationale for denial and did not perform a good faith search). Bad faith involves failing to perform a detailed search and review of records to ascertain if the requested material exists or if any exclusion applies prior to denial of access. *Uniontown*, 185 A.3d at 1172.

Here, the evidence shows that the Department assessed and processed the Request and issued its final response to the Requester. Further, on appeal, the Department proved that it conducted a good faith search by consulting relevant Department personnel to confirm that it does not have responsive records in its possession, custody or control. Accordingly, the OOR declines to find that the Department acted in bad faith.

## CONCLUSION

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 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 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>4</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: March 17, 2023**

*/s/ Tope L. Quadri*

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TOPE L. QUADRI  
APPEALS OFFICER

Sent via first class mail to: Philip Jensen, QN6572

Sent via portal to: Andrew Filkosky, AORO  
Joseph M. Gavazzi, Esq.

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