



**FINAL DETERMINATION**

<b>IN THE MATTER OF</b>	:
	:
<b>JACK WISOR AND FIRST APOSTLES’</b>	:
<b>DOCTRINE CHURCH,</b>	:
<b>Requester</b>	:
	: <b>Docket No: AP 2023-0435</b>
<b>v.</b>	:
	:
<b>CITY OF HARRISBURG,</b>	:
<b>Respondent</b>	:

On January 23, 2023, Jack Wisor and First Apostles’ Doctrine Church (collectively “Requester”), submitted a request (“Request”) to the City of Harrisburg (“City”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking:

Any and all documents that the City of Harrisburg has relied upon in publicly stating that it cannot prevent homeless persons from residing in a public space, as referenced by City Spokesperson Matt Maisel in an article by Penn[L]ive on January 20, 2023.

On February 7, 2023, following a thirty-day extension during which to respond, 65 P.S. § 67.902(b), the City denied the Request, stating that responsive records do not exist within the City’s possession, custody or control.

On February 27, 2023, 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 provided the article in which the City’s spokesperson referenced the change in position of the City regarding the rights of the homeless to live in any public space. The OOR invited both parties to supplement the record and directed the City 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). 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).

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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).”).

On March 9, 2023, the City submitted a position statement and an attestation made subject to the penalties of unsworn falsification to authorities, 18 Pa.C.S. § 4904, authored by Lauren Keim, the City's Agency Open Records Officer ("AORO"). The Keim Attestation indicates, in relevant part, the following:

3. [The Requester's] request was received via email on January 23, 2023. In response, I reached out directly to Matthew Maisel, the City's Director of Communications, and requested that he send me any records that he used to support a statement that he made in a PennLive interview on January 20, 2023.
4. Mr. Maisel responded by stating that no documentation exists as all information that was provided to him was said to him in person or on phone call meetings with legal counsel.
5. Based on my inquiries to Mr. Maisel, confirmed by the City Solicitor, I made a good faith determination that no responsive records exist.

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 City's attestation is authored by the City's AORO. The attestation describes the search for responsive records, which included an inquiry with Mr. Maisel and the City Solicitor. The Keim Attestation is credible and sufficient to meet the City's burden of proof that records do not exist. In fact, the emails from Mr. Maisel supporting the Keim Attestation were also submitted by the City. There has been no evidence provided that otherwise contradicts the statements offered

by the City in the attestation. *See Pa. Dep't of Health v. Mahon*, 283 A.3d 929 (Pa. Commw. Ct. 2022).

Pursuant to the Keim Attestation, a search has been conducted and no responsive records exist in the City's possession, custody or control.<sup>2</sup> The City has demonstrated that its AORO conducted a good faith search and made inquiries to relevant City employees and third parties. Therefore, based on the evidence provided, the City has met its burden of proof that the requested records do not exist in the City's possession, custody or control. *Hodges v. Pa. Dep't of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

For the foregoing reasons, the appeal is **denied**, and the City 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 Beaver 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 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.<sup>3</sup> 65 P.S. § 67.1303. This Final Determination shall be placed on the website at: <http://openrecords.pa.gov>.

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<sup>2</sup> 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 City 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)).

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

**FINAL DETERMINATION ISSUED AND MAILED: March 24, 2023**

*/s/ Bandy L. Jarosz*

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BANDY L. JAROSZ, ESQ.  
APPEALS OFFICER

Sent to: Jack Wisor (via email only)  
Lauren Keim (via email only)