pennsylvania
OFFICE OF OPEN RECORDS

May 23, 2023

FILED VIA PACFILE
Michael Krimmel, Esq.
Prothonotary
Commonwealth Court of Pennsylvania
Pennsylvania Judicial Center
601 Commonwealth Avenue, Suite 2100
Harrisburg, PA 17106-2575

RE: Submission of Record in:
Philip Jensen v. Pennsylvania Department of Corrections,
No. 317 CD 2023

Dear Mr. Krimmel:

We hereby submit the record in the above-referenced matter. Section 1303 of the Right-to-Know Law, 65 P.S. §§ 67.101, *et seq*., ("RTKL"), defines the Record on Appeal as "the record before a court shall consist of the request, the agency's response, the appeal filed under section 1101, the hearing transcript, if any, and the final written determination of the appeals officer." Pursuant to *Department of Transportation v. Office of Open Records*, 7 A.3d 329 (Pa. Commw. Ct. 2010), this record includes all "evidence and documents admitted into evidence by the appeals officer pursuant to Section 1102(a)(2)." The record in this matter consists of the following:

Office of Open Records Docket No. AP 2023-0393:

1. The appeal filed by Philip Jensen ("Requester") to the Office of Open Records ("OOR"), received February 22, 2023.

2. Official Notice of Appeal dated February 23, 2023, sent to both parties by the OOR, advising them of the docket number and identifying the appeals officer for the matter.

3. Pennsylvania Department of Corrections' (Department") Entry of Appearance received March 1, 2023.

4. Department submission dated March 6, 2023.

5. Final Determination issued by the OOR on March 17, 2023.

The OOR has discretion to hold a hearing on appeals filed but chose not to do so in this matter. Therefore, there is no transcript to transmit. Certification of the record in this case is attached to this letter. Please feel free to contact us for any reason in connection with this matter.

Sincerely,

Kyle Applegate
Chief Counsel

Attachments

cc: See certificate of service

Commonwealth of Pennsylvania

Agency Docket Number: AP 2023-0393, QN6572

Appellate Court Docket Number: 317 CD 2023

I, Elizabeth Wagenseller, certify that the accompanying electronically transmitted materials are true and correct copies of all materials filed in the Office of Open Records and constitute the record for :

Philip Jensen,
Petitioner
v.
Pennsylvania Department of
Corrections (Office of Open
Records),
Respondent

/s/ Elizabeth Wagenseller

05/23/2023

Executive Director

Volumes:

Agency Record (2)

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PHILIP JENSEN,	:	
Petitioner,	:	
	:	
v.	:	**No. 317 CD 2023**
	:	
PENNSYLVANIA DEPARTMENT	:	
OF CORRECTIONS,	:	
Respondent.	:	
	:	

CERTIFIED RECORD

Kyle Applegate
Chief Counsel
Commonwealth of Pennsylvania
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2334
Phone: (717) 346-9903
Fax: (717) 425-5343
Email: kyapplegat@pa.gov

Dated: May 23, 2023

Received 5/23/2023 9:51:02 AM Commonwealth Court of Pennsylvania

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PHILIP JENSEN,	:	
Petitioner,	:	
	:	
v.	:	**No. 317 CD 2023**
	:	
PENNSYLVANIA DEPARTMENT	:	
OF CORRECTIONS,	:	
Respondent.	:	
	:	

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the Certified Record upon the following by email or first-class mail as indicated below:

Philip Jensen, QN6572
SCI-Houtzdale
PO Box 1000
Houtzdale, PA 16698-1000
(via first class mail only)

Joseph M. Gavazzi, Esquire
Pennsylvania Department of Corrections
1920 Technology Parkway
Mechanicsburg, PA 17150
jgavazzi@pa.gov
(via email only)

Faith Henry, Administrative Officer
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234
Phone: (717) 346-9903
Fax: (717) 425-5343
Email:fahenry@pa.gov

Dated: May 23, 2023

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PHILIP JENSEN,	:	
Petitioner,	:	
	:	
v.	:	**No. 317 CD 2023**
	:	
PENNSYLVANIA DEPARTMENT	:	
OF CORRECTIONS,	:	
Respondent.	:	
	:	

TABLE OF CONTENTS
RECORD

Philip Jensen v. Pennsylvania Department of Corrections,
OOR Dkt. AP 2023-0393

Office of Open Records Docket No. AP 2023-0393:

1. The appeal filed by Philip Jensen ("Requester") to the Office of Open Records ("OOR"), received February 22, 2023.

2. Official Notice of Appeal dated February 23, 2023, sent to both parties by the OOR, advising them of the docket number and identifying the appeals officer for the matter.

3. Pennsylvania Department of Corrections' (Department") Entry of Appearance received March 1, 2023.

4. Department submission dated March 6, 2023.

5. Final Determination issued by the OOR on March 17, 2023.

OOR Exhibit 1

AFFIDAVIT OF PHILIP JENSEN

RTKL #0061-23 APPEAL TO OOR
Philip Jensen V. Pa. D.O.C.

RECEIVED
FEB 22 2023
OFFICE OF OPEN RECORDS

Date: 2·10·23 AD

Dear OOR Appeal officer;

I hereby Appeal the above mentioned RTKL Request to You based on the following;

① On 11·13·22 AD i submitted a Proper RTKL Request to Pennsylvania Department of Corrections "DOC". see attached

② On 1·24·23 AD i received a Bad faith denial from DOC. See attached

③ Respondents, DOC, have stated in support i failed to identify or describe the records i seeked with sufficient specificity to enable them to ascertain which records i was seeking § 703. Respondents state my request contains no limitation with regard to persons; doesnot provide sufficient descripitive information in any or all of the categories. Respondents cite Hucker v. Young scholars AP Dkt. 2009-0901; Anderson v. City of Phila. OOR Dkt. 2009-0618; Nanuyakkara Pa. Dept. of general Services 747 A2d 962 (Pa. Commwlth. 2000) in support thereof.

In additional, Respondents cite § 703 as precluding requests which require files to be reviewed + Judgments made as to the relution of the Document to the specific request; Dep't of Env. Protection v. Legere 50 A3d 260 (2012); And rather a clearly defined universe of documents must be requested such that there be NO Judgments to be Made as to whether the documents are reluted to the request because the Documents either do or do not fall within the ambit of the request. ID at 265. Respondents finally state section 703 of RTKL in determining whether a request satisfies the specificity of a Request might conceivably encompass. Askew v. Pa. office of the Governor 65 A3d 989, 992 (2013).

(4) First, I requested ALL Line entry's / financial ledger of December 12021 "Custodial Account" Resources of the Department of Corrections for Prison Inmates [see attached commonwealth "CAFR" Page 78] see attached Pursuant to § 901 the DOC was Mandated to Make a good faith effort to determine if the requested record is a Public record and whether the agency has Possession, custody or control of the record and to respond promptly after receipt of the written request. Respondents claim my request wasn't specific enough to be able to conduct a search which is untrue.

(5) Second, MY request was sufficiently specific because it had (a.) a subject matter that identifies the transaction or activity of the agency about which records are sought (b.) properly identify a limited scope of Responsive records and (c.) had a finite time frame. See case Pa. Dept. of Edu. v. Pittsburgh Post-Gazette 119 A3d 1121 (2015). MY requests subject matter identifies the Agency's activity as ALL Line Entry's / Finuncial Ledger of a "Custodial Account" containing the combined resources of the DOC for Prison Inmates and is about which records are sought. I properly identifyed a limited scope of responsive records as such im only requesting the DOC's "Custodial Account" records and no other account. I also had a finute time frame as i requested the Month of December and year 2021.

(6) Said Records ive requested are considered Public Because they're not exempt under 3708, is not exempt from being disclosed under any other federal or state law or Regulation or judicial order or decree or is not protected by a privilege. Such Record falls within the defitinion of a Record because it documents a transaction or activity of the agency and is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency.

(7) I requested one kind of Document which is known to the agency as it is their own account not one inmate or individual prison but the "custodial account" of the combined resources of ALL the DOC for prison inmates. Respondents made no attempt to contact 3rd Party's to see if they had responsive records as the commonwealth of Pennsylvania is most likely the one contracted to perform the agency function of fiduciary financial account services. I attached to my request the cover page and page 78 of the commonwealth of Pennsylvania's comprehensive Annual financial Report ("CAFR") which states under the heading:

NOTE 1 - SUMMARY OF SIGNIFICANT ACCOUNTING POLICIES
Fiduciary funds
... custodial funds account for assets held in trustee capacity or a custodian for third Party ... governmental units"...
..." The custodial Accounts, a custodial fund represents the combined resources held by the Department of Corrections for prison inmates"...

Pursuant to §506(d) because the requested records are in possession of a 3rd Party whom the agency has contracted to perform a government function on behalf of the agency i.e. the Commonwealth of Pennsylvania and directly relates to the government function & is not exempt under the RTKL it shall be considered a Public Record of the agency and must be retrieved for requesters inspection & copying.

(8) Agency denied my Right to inspect and copy Public Records under § 701 and in Bad faith.

WHEREFORE, I REQUEST THIS APPEAL BE GRANTED AND (1) DIRECT AGENCY TO PRODUCE REQUESTED RECORDS AND (2) DEEM DENIAL OF AGENCY WAS IN BAD FAITH.

Respectfully submitted,

x

VERIFICATION

I understand that any false statements herein are made subject to the penalties of 18 Pa C.S. § 4904 relating to unsworn Falsification to Authorities.

BY: x executed: 2-10-23 AD

CERTIFICATE OF SERVICE

I certify that i Mailed the foregoing to below parties pre-paid USPS First class Mail:

(1) Pa, DOC
RTKL
1920 Technology Parkway
Mechanicsburg, PA 17050

(2) OOR
333 Market St.
16th floor
Harrisburg, Pa 17101

By: executed: 2-10-23 AD

Pennsylvania Department of Corrections
Right-to-Know Office
Office of Chief Counsel
1920 Technology Parkway
Mechanicsburg, PA 17050
Telephone 717-728-7763
Fax 717-728-0312

January 24, 2023

Smart Communications/PADOC
Philip Jensen, QN6572
SCI- Houtzdale
PO Box 33028
St Petersburg, FL 33733

Re: RTKL #0061-23

Dear Mr. Jensen:

This letter acknowledges receipt by the Department of Corrections (the Department) of your written request for records under the Pennsylvania Right-to-Know Law (RTKL). Your request was received by this office on January 20, 2023. On January 23, 2023, an interim response was sent to you extending the final response date to February 27, 2023. A copy of your request letter is enclosed.

You are denied access to the information you are seeking in the enclosed RTKL request for the following reason:

- Your request fails to identify or describe the records that you seek with sufficient specificity to enable the RTKL Office to ascertain which records that you seek. Consequently, your request is denied pursuant to *65 P.S. § 67.703*.

  Your request contains no limitation with regard to persons. This request does not provide sufficient descriptive information in any or all of the categories noted by the Office of Open Records in *Hocker v. Young Scholars,* OOR Dkt. AP 2009-0901, to enable the Department to determine what information is sought and to locate responsive records. Under both laws, Pennsylvania's courts have consistently held that insufficiently specific requests can be properly denied. *See*, *Anderson v. City of Philadelphia*, OOR Docket # 2009-0618 (9/25/09); *Nanayakkara v. Casella,* 681 A.2d 857, 859-60 (Pa.Cmwlth. 1996); *Associated Builders & Contractors, Inc., v. Pennsylvania Department of General Services*, 747 A.2d 962 (Pa.Cmwlth. 2000).

  In addition, *Section 703* of the RTKL precludes requests which require "files to be reviewed and judgments made as to the relation of the documents to the specific request." *Department of Environmental Protection v. Legere*, 50 A.3d 260, 264 (Pa. Cmwlth. 2012). Rather, "a clearly-defined universe of documents" must be requested such that "there are no judgments to be made as to whether the documents are 'related' to the request" because the documents either do or do not fall within the ambit of the request. *Id. at 265.* In determining whether a request satisfies *Section 703* of the RTKL, "the specificity of a request must be construed in the request's context, rather than envisioning everything the request might conceivably encompass." *Askew v. Pennsylvania Office of Governor,* 65 A.3d 989, 992 (Pa. Cmwlth.) (per curiam), appeal denied, 621 Pa. 660, 72 A.3d 604 (Pa. 2013).

ef: 4211795 pg 3 of 6 for PHILIP JENSEN

You are not precluded from refining and submitting a new request with more specific detail.

You have a right to appeal the above denial of information in writing to the Executive Director, Office of Open Records (OOR), 333 Market Street, 16th Floor, Harrisburg, Pennsylvania 17101. If you choose to file an appeal you must do so within 15 business days of the mailing date of this response and send to the OOR:

1) this response; 2) your request; and 3) the reason why you think the agency is wrong in its reasons for saying that the record is not public (a statement that addresses any ground stated by the agency for the denial). If the agency gave several reasons why the record is not public, state which ones you think were wrong.

Also, the OOR has an appeal form available on the OOR website at:

http://www.openrecords.pa.gov/RTKL/Forms.cfm.

Sincerely,

Yihsien Han

Yihsien Han
Deputy Agency Open Records Officer

Enclosure

cc: File

ef: 4211795 pg 4 of 6 for PHILIP JENSEN

Received

JAN 20 2023

pennsylvania
OFFICE OF OPEN RECORDS

Right-to-Know Office, Tracking # 0061-23

Standard Right-to-Know Law Request Form

Good communication is vital in the RTKL process. Complete this form thoroughly and retain a copy; it may be required if an appeal is filed. You have 15 business days to appeal after a request is denied or deemed denied.

SUBMITTED TO AGENCY NAME: Department of Corrections (Attn: AORO)

Date of Request: 11-13-22 Submitted via: ☐ Email ☒ U.S. Mail ☐ Fax ☐ In Person

PERSON MAKING REQUEST:

Name: Philip Jensen #QN6572 Company (if applicable): NA

Mailing Address: SMART COMMUNICATIONS | PADOC | SCI-Houtzdale PO BOX 33028

City: St. Petersburg State: FL Zip: 33733 Email: EdwardHusn911@protonmail.com

Telephone: NA Fax: NA

How do you prefer to be contacted if the agency has questions? ☐ Telephone ☒ Email ☐ U.S. Mail

RECORDS REQUESTED: *Be clear and concise. Provide as much specific detail as possible, ideally including subject matter, time frame, and type of record or party names. RTKL requests should seek records, not ask questions. Requesters are not required to explain why the records are sought or the intended use of the records unless otherwise required by law. Use additional pages if necessary.*

ELECTRONIC RECORD OF: ALL LINE ENTRY'S / FINANCIAL LEDGER OF DECEMBER, 2021 "CUSTODIAL ACCOUNT" RESOURCES OF THE DEPARTMENT OF CORRECTIONS FOR PRISON INMATES.

[see attached commonwealth "CAFR" Page 78]

DO YOU WANT COPIES? ☐ Yes, printed copies (*default if none are checked*)
☒ Yes, electronic copies preferred if available
☐ No, in-person inspection of records preferred (*may request copies later*)

Do you want certified copies? ☐ Yes (*may be subject to additional costs*) ☒ No

RTKL requests may require payment or prepayment of fees. See the Official RTKL Fee Schedule for more details.

Please notify me if fees associated with this request will be more than ☐ $100 (or) ☒ $ 10.00

ITEMS BELOW THIS LINE FOR AGENCY USE ONLY

Tracking: _____ Date Received: _____ Response Due (5 bus. days): _____

30-Day Ext.? ☐ Yes ☐ No (If Yes, Final Due Date: _____) Actual Response Date: _____

Request was: ☐ Granted ☐ Partially Granted & Denied ☐ Denied Cost to Requester: $_____

☐ Appropriate third parties notified and given an opportunity to object to the release of requested records.

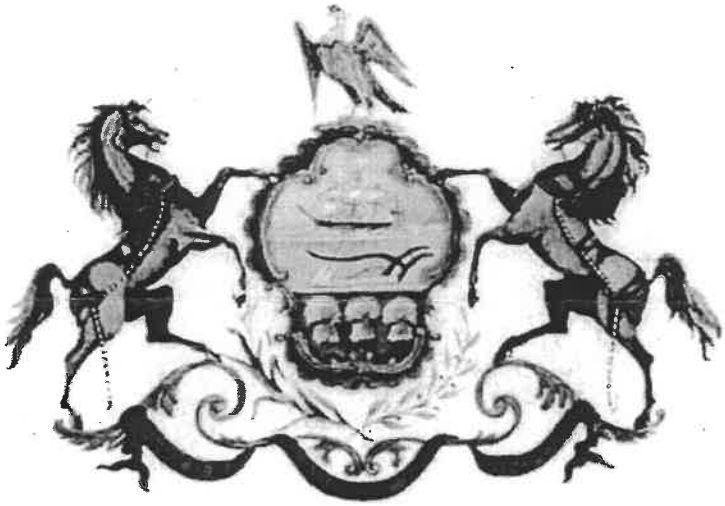
NOTE: In most cases, a completed RTKL request form is a public record.
More information about the RTKL is available at https://www.openrecords.pa.gov

Form updated Feb. 3, 2020

Commonwealth of Pennsylvania

Comprehensive Annual Financial Report
For the Fiscal Year Ended June 30, 2020

Tom Wolf, Governor



Prepared By:
Office of the Budget

Jen Swails
Secretary

Brian Lyman, CPA
Chief Accounting Officer

This document is available on the Office of the Budget homepage at: www.budget.pa.gov
Click on Publications & Reports for access to the current and previous reports.

Ref: 3893703 pg 62 of 75 for PHILIP JENSEN

NOTE 1 - SUMMARY OF SIGNIFICANT ACCOUNTING POLICIES (continued)

Fiduciary Funds

Fiduciary funds are used to account for resources that a government holds as a trustee or custodian on behalf of an outside party and that cannot be used to support that government's own programs.

Trust and custodial funds account for assets held in a trustee capacity or as a custodian for third party beneficiaries, such as individuals, private organizations, other governmental units. Funds are classified as pension (and other employee benefit) trust funds, investment trust funds, private purpose trust funds, and custodial funds. The three types of trust funds are distinguished from custodial funds by the existence of a trust agreement or equivalent arrangement that has certain characteristics. With the exception of employee benefit trust funds, fiduciary fund resources may not be derived from Commonwealth revenues and other resources. The Commonwealth reports pension and other employee benefit trust funds and custodial funds.

The State Employees' Retirement System (SERS)-Pension, a defined benefit pension trust fund, accounts for the payment of retirement, disability, and death benefits to members of the SERS and their beneficiaries. The Deferred Compensation Fund is a pension trust fund that collects and administers amounts contributed by Commonwealth employees who defer a portion of their income until future years, in accordance with Internal Revenue Code Section 457. The SERS-Defined Contribution, a defined contribution pension trust fund, administered by the SERS, was established by Act 5 of 2017 to provide defined contribution retirement benefits to new members of the SERS effective January 1, 2019. The SERS-Pension, SERS-Defined Contribution and the Deferred Compensation Fund are reported for their fiscal years ended December 31, 2020.

The Public School Employees' Retirement System (PSERS)-Pension, a defined benefit pension trust fund, was created to administer and provide pension benefits to public school employees in Pennsylvania. The PSERS-Defined Contribution, a defined contribution pension trust fund, administered by the PSERS, was established by Act 5 of 2017 to provide defined contribution retirement benefits to new public school employees effective July 1, 2019.

The INVEST Program for Local Governments is an external investment pool, not held in trust, reported as a custodial fund that invests amounts owned by local governments, school districts, and not for profit entities. The INVEST Program for Local Governments is reported for its fiscal year ended December 31, 2020. Audited financial statements for that Program are available through the Chief Accounting Officer.

The Tuition Account Investment Program is a custodial fund that invests amounts on behalf of participants who are saving for college tuition costs. Audited financial statements for that Program are available through the Chief Accounting Officer.

The Monetary Penalty Endowments Trust Fund, a custodial fund, was established in accordance with Act 1 of 2013 to account for the monetary penalty payments from the Pennsylvania State University.

The Statutory Liquidator Fund, the largest custodial fund, converts the remaining assets of insolvent insurance companies to cash for remittance to policyholders, creditors, and stockholders. The order of distribution of the assets is established in Article V of the Pennsylvania Insurance Department Act of 1921 and on a Commonwealth Court approved percentage of claim basis. Although not yet determined, the actual amounts to be paid based on the amount of the remaining assets are expected to be less than the amounts actually claimed by creditors, policyholders, and stockholders.

The Custodial Accounts, a custodial fund, represents the combined resources held by the Department of Corrections for prison inmates, the Department of Human Services for residents of state health facilities, and the Department of Military and Veteran affairs for the residents of veteran long-term living facilities.

The Sales and Use Tax Fund, the Allegheny Regional Asset District Sales and Use Tax Fund, the PA Intergovernmental Cooperation Authority Tax Fund, and the Local Cigarette Tax Fund serve to collect and distribute local sales taxes to the appropriate local taxing authority for the convenience of taxpayers. These funds are reported as custodial funds.

OOR Exhibit 1 Page 011

3641892 pg 60 of 64 for PHILIP JENSEN

Smart Communications/PADOC
SCI- Houtzdale
Name Philie Jensen Number QN6572
PO Box 33028
St. Petersburg, FL 33733

INMATE MAL
PA DEPT
OF CORRECTIONS

neopost
02/13/2023
FIRST-CLASS MAIL
US POSTAGE $000.84[0]
ZIP 16698
041L12204394

c/o Office of open Records
16th floor
333 Market st.
Harrisburg, Pa 17101

OOR Exhibit 2

NOTICE OF DEADLINES

The appeal has been docketed by the OOR and it has been assigned to an Appeals Officer. The docket number and the Appeals Officer's contact information are included in the attachments you received along with this notice.

The Final Determination is currently due on **March 24, 2023**.

The timeline for this RTKL appeal may be extended by the OOR during the appeal. This extension will allow the OOR the flexibility it requires to protect due process and to ensure that the agency and requester, along with any third parties, have a full and fair opportunity to meaningfully participate in the appeal.

Evidence, legal argument and general information to support your position must be submitted within seven (7) business days from the date of this letter, unless the Appeals Officer informs you otherwise. *Note: If the proceedings have been stayed for the parties to submit a completed mediation agreement, the record will remain open for seven (7) business days beyond the mediation agreement submission deadline*.

Submissions in this case are currently due on **March 6, 2023**.

If you are unable to meaningfully participate in this appeal under the above deadlines, please notify the Appeals Officer as soon as possible.

Due to delays in U.S. mail, we urge agencies and requesters to use email or the E-File Appeal Portal for all communications with the OOR to the extent possible.

Presently, the OOR is receiving postal mail on a limited basis. Accordingly, we urge agencies and requesters to use email for all communication with the OOR to the extent possible.

If you have any questions about this notice or the underlying appeal, please contact the Appeals Officer. The OOR is committed to working with agencies and requesters to ensure that the RTKL appeal process proceeds as fairly and as smoothly as possible.

333 Market Street, 16th Floor | Harrisburg, PA 17101-2234 | 717.346.9903 | F 717.425.5343 | https://openrecords.pa.gov

February 23, 2023

Via First Class Mail Only:

Philip Jensen, QN6572
SCI-Houtzdale
P.O. Box 1000
209 Institution Drive
Houtzdale, PA 16698-1000

Via Email Only:

Andrew Filkosky
Agency Open Records Officer
Pennsylvania Department of Corrections
1920 Technology Pkwy
Mechanicsburg, PA 17050
ra-docrighttoknow@pa.gov

RE: OFFICIAL NOTICE OF APPEAL - Jensen v. Pennsylvania Department of Corrections OOR Dkt. AP 2023-0393

Dear Parties:

Review this information and all enclosures carefully as they affect your legal rights.

The Office of Open Records ("OOR") received this appeal under the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101, et seq. on February 22, 2023. A binding Final Determination ("FD") will be issued pursuant to the timeline required by the RTKL, **please see the attached information for more information about deadlines.**

Notes for both parties (more information in the enclosed documents):

- The docket number above must be included on all submissions related to this appeal.
- Any information provided to the OOR must be provided to all parties involved in this appeal. Information that is not shared with all parties will not be considered.
- All submissions to the OOR, other than *in camera* records, will be public records. Do not include any sensitive information- such as Social Security numbers.

If you have questions about this appeal, please contact the assigned Appeals Officer (contact information enclosed), providing a copy of any correspondence to all parties involved in this appeal.

Sincerely,

Elizabeth Wagenseller
Executive Director

Enc.: Description of RTKL appeal process
Assigned Appeals Officer contact information
Entire appeal as filed with OOR

333 Market Street, 16th Floor | Harrisburg, PA 17101-2234 | 717.346.9903 | F 717.425.5343 | https://openrecords.pa.gov

The Right-to-Know Law Appeal Process

Please review this information carefully as it affects your legal rights.

The Office of Open Records ("OOR") has received the enclosed appeal, which was filed under the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101, et seq. A binding Final Determination will be issued by the OOR pursuant to the statutory timeline, subject to the notice of deadlines enclosed herein. If you have any questions, please contact the Appeals Officer assigned to this case. Contact information is included on the enclosed documents.

Submissions to the OOR

Both parties may submit evidence, legal argument, and general information to support their positions to the assigned Appeals Officer. Please contact the Appeals Officer as soon as possible.

Any information provided to the OOR must be provided to all parties involved in this appeal. Information submitted to the OOR will not be considered unless it is also shared with all parties.

Include the docket number on all submissions.

The agency may assert exemptions on appeal even if it did not assert them when the request was denied (*Levy v. Senate of Pa.*, 65 A.3d 361 (Pa. 2013)).

It is strongly advised that attorneys and other party representatives **file an Entry of Appearance** by contacting the Appeals Officer or completing the form at https://www.openrecords.pa.gov/Appeals/EntryOfAppearance.cfm.

NOTE TO AGENCIES: In cases assigned to the E-File Portal, if an Entry of Appearance is not filed, the AORO is responsible to inform attorneys and other party representatives of all docket activity.

Generally, submissions to the OOR — other than *in camera* records — will be public records. Do not include sensitive or personal information, such as Social Security numbers, on any submissions.

Agency Must Notify Third Parties

If records affect a legal or security interest of a third party; contain confidential, proprietary or trademarked records; **or** are held by a contractor or vendor, **the agency must notify such parties of this appeal immediately and provide proof of that notice by the record closing date set forth above.**

Such notice must be made by: (1) Providing a copy of all documents included with this letter; **and** (2) Advising relevant third parties that interested persons may request to participate in this appeal by contacting the Appeals Officer or completing the form at https://www.openrecords.pa.gov/Appeals/DIPRequest.cfm. (see 65 P.S. § 67.1101(c)).

The Commonwealth Court has held that "the burden [is] on third-party contractors... to prove by a preponderance of the evidence that the [requested] records are exempt." (*Allegheny County Dep't of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1042 (Pa. Commw. Ct. 2011)).

A third party's failure to participate in a RTKL appeal before the OOR

may be construed as a waiver of objections regarding release of requested records.

NOTE TO AGENCIES: If you have questions about this requirement, please contact the Appeals Officer immediately.

Statements of Fact & Burden of Proof

Statements of fact <u>must</u> be supported by an affidavit or attestation made under penalty of perjury by a person with actual knowledge. Statements of fact or allegations submitted without an affidavit may not be considered.

Under the RTKL, the agency has the burden of proving that records are exempt from public access (see 65 P.S. § 67.708(a)(1)). **To meet this burden, the agency <u>must</u> provide evidence to the OOR**.

The law requires the agency position to be supported by sufficient facts and citation to all relevant sections of the RTKL, case law, and OOR Final Determinations.

An affidavit or attestation is required to prove that records do not exist.

Sample affidavits are on the OOR website, openrecords.pa.gov.

Any evidence or legal arguments not submitted or made to the OOR may be waived.

Preserving Responsive Records

The agency must preserve all potentially responsive records during the RTKL appeal process, including all proceedings before the OOR and any subsequent appeals to court.

Failure to properly preserve records may result in the agency being sanctioned by a court for acting in bad faith.

See *Lockwood v. City of Scranton*, 2019-CV-3668 (Lackawanna County Court of Common Pleas), holding that an agency had "a mandatory duty" to preserve records after receiving a RTKL request. Also see generally *Uniontown Newspapers, Inc. v. Pa. Dep't of Corr.*, 185 A.3d 1161 (Pa. Commw. Ct. 2018), holding that "a fee award holds an agency accountable for its conduct during the RTKL process..."

Mediation

The OOR offers a mediation program as an alternative to the standard appeal process. To participate in the mediation program, both parties must agree in writing.

The agency must preserve all potentially responsive records during the RTKL appeal process. Mediation is a voluntary, informal process to help parties reach a mutually agreeable settlement. The OOR has had great success in mediating RTKL cases.

If mediation is successful, the requester will withdraw the appeal. This ensures that the case will not proceed to court — saving both sides time and money.

Either party can end mediation at any time.

If mediation is unsuccessful, both parties will be able to make submissions to the OOR as outlined on this document, and the OOR will have no less than 30 calendar days from the conclusion of the mediation process to issue a Final Determination.

Parties are encouraged to consider the OOR's mediation program as an alternative way to resolve disputes under the RTKL.

APPEALS OFFICER:	**Tope L. Quadri, Esq.**
CONTACT INFORMATION:	**Commonwealth of Pennsylvania Office of Open Records 333 Market Street, 16th Floor Harrisburg, PA 17101-2234**
FACSIMILE:	**(717) 425-5343**
EMAIL:	**tquadri@pa.gov**
Preferred method of contact and submission of information:	**EMAIL (Except cases assigned to the E-File Appeal Portal)**

Please direct submissions and correspondence related to this appeal to the above Appeals Officer. Please include the case name and docket number on all submissions.

You must copy the other party on everything you submit to the OOR. The Appeals Officer cannot speak to parties individually without the participation of the other party.

The OOR website, https://openrecords.pa.gov, is searchable and both parties are encouraged to review prior final determinations involving similar records and fees that may impact this appeal.

The OOR website also provides sample forms that may be helpful during the appeals process. OOR staff are also available to provide general information about the appeals process by calling (717) 346-9903.

pennsylvania
OFFICE OF OPEN RECORDS

IN THE MATTER OF	:	
	:	
_____,	:	
Requester	:	
	:	**OOR Dkt. AP** _____
v.	:	
	:	
_____,	:	
Agency	:	

Please accept my appearance for the _____ in the above captioned case.

(Requester/Agency)

PUBLIC RECORD NOTICE: ALL FILINGS WITH THE OOR WILL BE PUBLIC RECORDS AND SUBJECT TO PUBLIC ACCESS WITH LIMITED EXCEPTION. IF YOU DO NOT WANT TO INCLUDE PERSONAL CONTACT INFORMATION IN A PUBLICLY ACCESSIBLE RECORD, PLEASE PROVIDE ALTERNATE CONTACT INFORMATION IN ORDER TO RECEIVE FUTURE CORRESPONDENCE RELATED TO THIS APPEAL.

Attorney: _____

Firm: _____

Address: _____

_____

Email: _____

Phone #: _____

Please submit this form to the Appeals Officer assigned to the appeal. Remember to copy all parties on this correspondence. The Office of Open Records will not consider direct interest filings submitted after a Final Determination has been issued in the appeal.

REQUEST TO PARTICIPATE BEFORE THE OOR

Please accept this as a Request to Participate in a currently pending appeal before the Office of Open Records. The statements made herein and in any attachments are true and correct to the best of my knowledge, information and belief. I understand this statement is made subject to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsifications to authorities.

NOTE: The requester filing the appeal with the OOR is a named party in the proceeding and is NOT required to complete this form.

OOR Docket No: _____ **Today's date**: _____

Name:_____

PUBLIC RECORD NOTICE: ALL FILINGS WITH THE OOR WILL BE PUBLIC RECORDS AND SUBJECT TO PUBLIC ACCESS WITH LIMITED EXCEPTION. IF YOU DO NOT WANT TO INCLUDE PERSONAL CONTACT INFORMATION IN A PUBLICLY ACCESSIBLE RECORD, PLEASE PROVIDE ALTERNATE CONTACT INFORMATION IN ORDER TO RECEIVE FUTURE CORRESPONDENCE RELATED TO THIS APPEAL.

Address/City/State/Zip_____

E-mail_____

Fax Number:_____

Name of Requester: _____

Address/City/State/Zip_____

Telephone/Fax Number:_____/_____

E-mail_____

Name of Agency: _____

Address/City/State/Zip_____

Telephone/Fax Number:_____/_____

E-mail_____

Record at issue: _____

I have a direct interest in the record(s) at issue as (check all that apply):

- ☐ An employee of the agency
- ☐ The owner of a record containing confidential or proprietary information or trademarked records
- ☐ A contractor or vendor
- ☐ Other: (attach additional pages if necessary) _____

<u>I have attached a copy of all evidence and arguments I wish to submit in support of my position.</u>

Respectfully submitted, _____(must be signed)

Please submit this form to the Appeals Officer assigned to the appeal. Remember to copy all parties on this correspondence. The Office of Open Records will not consider direct interest filings submitted after a Final Determination has been issued in the appeal.

OOR Exhibit 3

pennsylvania
OFFICE OF OPEN RECORDS

IN THE MATTER OF	:	
	:	
PHILIP JENSEN,	:	
Requester	:	
	:	
v.	:	**Docket No.: AP 2023-0393**
	:	
PENNSYLVANIA DEPARTMENT OF	:	
CORRECTIONS,	:	
Respondent	:	

Please accept my appearance for the Agency in the above captioned case.

Attorney: Joseph Gavazzi
Firm:
Address:
Email: jgavazzi@pa.gov
Phone #:

333 Market Street, 16th Floor | Harrisburg, PA 17101-2234 | 717.346.9903 | F 717.425.5343 | https://openrecords.pa.gov

OOR Exhibit 4

pennsylvania
DEPARTMENT OF CORRECTIONS

March 6, 2023

Tope L. Quadri, Esquire
Appeals Officer
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234
(tquadri@pa.gov)

Re: Appeal No.: 2023-0393
Philip Jensen v. Pennsylvania Department of Corrections

Dear Appeals Officer Quadri:

Please accept this correspondence both as my Entry of Appearance on behalf of the Pennsylvania Department of Corrections ("Department") and also in support of its position in opposition to the above-referenced Right-to-Know Law ("RTKL") Appeal which was initiated by inmate requester, Philip Jensen. Mr. Jensen's underlying RTKL Request, received by the Department's Deputy Agency Open Records Officer ("AORO") on January 20, 2023, sought access to "all live entry's/financial ledger of December, 2021 "custodial account" resources of the Department of Corrections for prison inmates." *See* Request. After issuing a timely interim response letter extending its final response issuance deadline under the RTKL on January 23, 2023, departmental officials within its RTKL Office contacted the Director of the Department's Bureau of Administration which is responsible for all departmental budget and fiscal matters. That official explained to the RTKL personnel that neither she nor officials within her office understood what records Mr. Jensen was referring to and seeking access to, and therefore they were unable to conduct a search for responsive records. *See* Final Response; *see also* Exhibit "A" hereto, ¶¶ 5-6. As such, the Department thereafter timely issued to Mr. Jensen its Final Response on January 24, 2023, explaining to him that his RTKL Request lacked sufficient specificity in order to enable the Department to conduct a good faith search for responsive records. *See* Final Response.

Mr. Jensen subsequently initiated the within RTKL Appeal before the Office of Open Records ("OOR") challenging the Department's denial of his requested access to records. On appeal, Mr. Jensen argues that the Department's basis for

denying his requested access is incorrect, and that in his opinion, his Request was sufficiently specific. In that context, he repeatedly refers to and/or describes the records to which he seeks access as stemming from one specific financial account, the "custodial account" containing the combined resources of the Department for all prison inmates. *See* Appeal Documents. This repeated assertion caused the Department's RTKL personnel to share another conversation with the Director of its Bureau of Administration, whereupon that official was able to ascertain that no responsive records exist because the "custodial account" Mr. Jensen is referring to does not exist. *See* Exhibit "A." The Department's position in support of its proper denial of requested access to records that do not exist follows.

Responsive Records Do Not Exist

"Under the RTKL, an agency bears the burden of demonstrating that it has reasonably searched its records to establish that a record does not exist." *Dep't of Labor & Indus. v. Earley,* 126 A.3d 355, 357 (Pa. Cmwlth. 2015). "An affidavit may serve as sufficient evidence of the non-existence of requested records." *Id.* In that regard here, the Department attaches as Exhibit "A" hereto the signed Declaration of its AORO, Andrew Filkosky, attesting under penalty of unsworn falsification under Pennsylvania law that no records responsive to the Request exist within the Department's possession. Specifically, he asserts in relevant part as follows:

> 5. In response to Mr. Jensen'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 Mr. Jensen 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 Mr. Jensen, 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 Mr. Jensen has initiated an RTKL Appeal to the Office of Open Records ("OOR") challenging the Department's denial of his requested access, and arguing that his Request was sufficiently specific.

9. On Appeal, Mr. Jensen 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 Mr. Jensen's RTKL Appeal filing, I shared another discussion with the Director of the Department's Bureau of Administration where I extended Mr. Jensen's assertions on Appeal.

11. In response, the Director explained to me that Mr. Jensen 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 that does not exist likewise do not exist.

12. Therefore, after conducting a good faith search in response to Mr. Jensen's RTKL Request as described above, I can state here that the Department does not possess any responsive records.

See Exhibit "A," ¶¶ 5-12.

"In the absence of any evidence that the Department has acted in bad faith or that the records do, in fact, exist, 'the averments in [the declaration] should be accepted as true.'" *Foster v. Pa. Dep't of Corr.,* 159 A.3d 1020, 1021 (Pa. Cmwlth. 2017). Here, Mr. Jensen has put forth no evidence that the Department has acted in bad faith or that the requested records do, in fact, exist. Rather, his mistaken belief that responsive records must exist seems to stem from an obscure line of text from the Commonwealth's "Comprehensive Annual Financial Report for the Fiscal Year

Ended June 30, 2020" document that he has misunderstood and/or taken out of context and attached to his appeal filing. *See* Appeal Documents. But neither that document nor that obscure line of text Mr. Jensen relies upon overcome the attestations from Mr. Filkosky within Exhibit "A" relaying information from the Director of the Department's Bureau of Administration, who is responsible for and knowledgeable about all departmental budget and fiscal matters, who definitively explained that no such account exists, and therefore the entries from that account to which Mr. Jensen seeks access likewise do not exist. *See* Exhibit "A." As such, the averments made by the Department's Deputy AORO in the Declaration attached hereto as Exhibit "A" should be accepted as true, just as the Commonwealth Court has done in numerous similar instances. *See, for example, Hodges v. Department of Health*, 29 A.3d 1190, 1192 (Pa. Cmwlth. 2011) (affidavit of agency's Open Records Officer was dispositive evidence that requested records did not exist); *Moore v. Office of Open Records*, 992 A.2d 907, 908-909 (Pa. Cmwlth. 2010) (agency's submission of sworn and unsworn affidavits that it was not in possession of requested records was sufficient to satisfy its burden of proving non-existence of record).

Based upon the foregoing, the Department respectfully requests that the OOR deny the within RTKL Appeal because the signed Declaration of its AORO as Exhibit "A" hereto sufficiently establishes the nonexistence of responsive records within its possession.

Sincerely,

/s/ Joseph M. Gavazzi
Joseph M. Gavazzi
Assistant Counsel

cc: Smart Communications/PADOC, Philip Jensen, QN6572, SCI-Houtzdale (via regular mail)

DECLARATION OF ANDREW FILKOSKY

I, Andrew Filkosky, hereby declare under the penalty of unsworn falsification, pursuant to 18 Pa. C.S. § 4904, that the following statements are true and correct based upon my personal knowledge, information, and belief:

1. Currently, the Pennsylvania Department of Corrections ("Department") employs me as its Agency Open Records Officer ("AORO").

2. I was appointed to my current position as the AORO in July 2008.

3. In my current role as AORO, I am responsible for logging in and issuing responses to Right-to-Know Law ("RTKL") requests received by the Department, as well as coordinating the research and information-gathering efforts in response to those requests.

4. On January 20, 2023, the Department received an RTKL request from inmate, Philip Jensen, which was internally docketed as RTKL #0061-23 and sought access to "all live entry's/financial ledger of December, 2021 "custodial account" resources of the Department of Corrections for prison inmates." *See* Request.

5. In response to Mr. Jensen'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 Mr. Jensen 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 Mr. Jensen, 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 Mr. Jensen has initiated an RTKL Appeal to the Office of Open Records ("OOR") challenging the Department's denial of his requested access, and arguing that his Request was sufficiently specific.

EXHIBIT
A

9. On Appeal, Mr. Jensen 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 Mr. Jensen's RTKL Appeal filing, I shared another discussion with the Director of the Department's Bureau of Administration where I extended Mr. Jensen's assertions on Appeal.

11. In response, the Director explained to me that Mr. Jensen 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 that does not exist likewise do not exist.

12. Therefore, after conducting a good faith search in response to Mr. Jensen's RTKL Request as described above, I can state here that the Department does not possess any responsive records.

Andrew Filkosky

_____

Andrew Filkosky
Agency Open Records Officer
Pennsylvania Department of Corrections

Date: March 6, 2023

OOR Exhibit 5

pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
PHILIP JENSEN,	:	
Requester	:	
	:	
v.	:	**Docket No: AP 2023-0393**
	:	
PENNSYLVANIA DEPARTMENT OF CORRECTIONS,	:	
Respondent	:	
	:	

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,[1] 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").[2]

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. §

[1] 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).

[2] 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 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 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.[3] *See Pa. Dep't of Health v. Mahon*, 283 A.3d 929 (Pa. Commw. Ct. 2022); *Hodges*, 29 A.3d at 1192.

[3] 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.[4] 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

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.

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