

# **FINAL DETERMINATION**

IN THE MATTER OF :

DENEKE WEBER,
Requester

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v. : Docket No: AP 2023-0650

:

PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Respondent :

## FACTUAL BACKGROUND

On March 20, 2023, Deneke Weber ("Requester") submitted a request ("Request") to the Pennsylvania Public Utility Commission ("Commission") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq.*, stating:

[The Requester] filed a complaint in March 2023 against Lewistown taxi. The Officer who took my case Officer Becker failed to communicate a case [number], or the date of the outcome of the complaint. I reached out to him to get this information he denied my [R]equest. I had to look on the website to get information on Right to Know.

On March 23, 2023, the Commission denied the Request, arguing that "[t]he Commission conducted a search and found no responsive records in its possession because the matter is an ongoing investigation."

On March 24, 2023, the Requester appealed to the Office of Open Records ("OOR"), challenging the denial and stating grounds for disclosure. Specifically, the Requester states that Officer Becker told her "that he does not have to give me any information on the case and that he will only send a letter out to Lewistown Taxi only." The OOR invited both parties to supplement the record and directed the Commission to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On April 4, 2023, the Commission submitted a position statement reiterating its grounds for denial. The Commission further argues that the Requester "cannot request information on appeal that was not part of her original RTKL [R]equest." In support of its position that it does not have records responsive to the Request, the Commission submits the attestations of Andrew Turriziani ("Turriziani Attestation), Chief of Motor Carrier Division of the Bureau of Investigation and Enforcement ("Motor Carrier"), and Rosemary Chiavetta ("Chiavetta Attestation"), the Secretary and Open Records Officer for the Commission.

## LEGAL ANALYSIS

The Commission is a Commonwealth agency subject to the RTKL. 65 P.S. § 67.301. 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 Commission is required to demonstrate, "by a preponderance of the evidence," that records are exempt from public access. 65 P.S. § 67.708(a)(1). Preponderance of the evidence has been defined as "such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence." *Pa. State Troopers* 

<sup>&</sup>lt;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).").

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 Request cannot be modified on appeal

The Commission argues that the Requester is improperly attempting to modify the Request on appeal. Specifically, the Commission argues that the Requester is now seeking "information on the case other than the case number and date of the outcome of the case."

The OOR has repeatedly held that a requester may not modify, explain or expand a request on appeal. See Pa. State Police v. Office of Open Records, 995 A.2d 515, 516 (Pa. Commw. Ct. 2010); Michak v. Pa. Dep't of Pub. Welfare, 56 A.3d 925 (Pa. Commw. Ct. 2012) (holding that "where a requestor requests a specific type of record...the requestor may not, on appeal argue that an agency must instead disclose a different record in response to the request").

Here, the Request seeks "a case #, or the date of the outcome of the complaint[,]" and does not specifically seek information regarding a complaint that has been filed with the Commission. As such, the OOR's review on appeal is confined to the Request as written, and any modification or explanation of the Request on appeal will not be considered.<sup>2</sup>

## 2. The Commission does not possess records responsive to the Request

The Request seeks "a case #, or the date of the outcome of the complaint." The Commission argues that it does not have records responsive to the Request. In response to a request for records, "an agency shall make a good faith effort to determine if ... the agency has

3

<sup>&</sup>lt;sup>2</sup> Because the OOR finds that the Requester cannot modify her Request on appeal by seeking "other information," the OOR need not address the Commission's contention that "other information" is exempt noncriminal investigatory records. 65 P.S. § 67.708(b)(17).

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).

In support of the Commission's argument that it does not possess records responsive to the Request, the Turriziani Attestation states as follows:

- 1. Within the Commission, Motor Carrier's duties include investigating consumer complaints lodged against regulated taxicab utilities.
- 2. On or about March 3, 2023, [the Requester] initiated a consumer complaint against Lewistown Taxi. The matter was assigned to Officer David Beck. Thereafter Officer Beck investigated the matter, which entailed having telephonic conversations with [the Requester] and Lewistown Taxi and a review of relevant materials.
- 3. Officer Beck completed his investigation by submitting his final report on the matter to Motor Carrier's Harrisburg office on Wednesday, March 28, 2023. Motor Carrier denies any implication by [the Requester] that Officer Beck's investigation was completed prior to that date.
- 4. Unless and until a consumer complaint is filed by the Bureau of Investigations & Enforcement's prosecutorial staff as a staff complaint with the

- Commission's Secretary's Bureau, the matter is not assigned a case number, also known as a docket number or "C-docket."
- 5. To date, [the Requester's] consumer complaint has not been filed as a staff-initiated complaint and therefore the matter has not been docketed and there is no case number for the matter.

Additionally, the Chiavetta Attestation states, in relevant part as follows:

- 1. On the morning of March 20, 2023, I forwarded a copy of the Request to individuals representing bureaus or offices within the Commission that potentially would have records responsive to the Request, including the Bureau of Investigations & Enforcement, Motor Carrier Division ("Motor Carrier"), which among other things handles consumer complaints against taxicab utilities.
- 2. On the afternoon of March 20, 2023, I received an email from Motor Carrier indicating that [the Requester's] consumer complaint against Lewistown Taxi had been assigned to Officer David Beck and that Officer Beck's investigation was still in progress at that time.
- 3. Other than Motor Carrier, no other bureau or office within the Commission identified any records that were potentially responsive to the Request.
- 4. On March 23, 2023, I sent [the Requester] by email the Commission's final response to the Request, which states that the Request was denied because "[t]he Commission conducted a search and found no responsive records in its possession because this matter is an ongoing investigation." This final response is attached hereto as Tab B.

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 Commission has acted in bad faith or that responsive records do, in fact, exist, "the averments in the [attestations] should be accepted as true." *McGowan v. Pa. Dep't of Envtl. 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)).

The Commission explains that the Commission's Open Records Officer "received an email [on March 20, 2023] from Motor Carrier indicating that [the Requester's] consumer complaint against Lewistown Taxi had been assigned to Officer David Beck and that Officer Beck's investigation was in progress at that time." Here, the Turriziani Attestation explains that "Officer Beck completed his investigation by submitting his final report on the matter to Motor Carrier's Harrisburg office on Wednesday, March 28, 2023[,]" prior to the date of the Request. Turriziani Attestation, ¶ 3. The Turriziani Attestation further explains that the Requester's "consumer complaint has not been filed as a staff-initiated complaint and therefore the matter has not been docketed and there is no case number for the matter." Turriziani Attestation, ¶ 5. Thus, while records responsive to a case number or a date of an outcome from the complaint the Requester filed may exist at the current time,<sup>3</sup> the Commission demonstrated that at the time of the Request it did not possess records responsive to the Request. Accordingly, the Commission has met its burden of proving that records responsive to the Request does not exist in its possession, custody or control. \*\*Hodges v. Pa. Dep't of Health\*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

## **CONCLUSION**

For the foregoing reasons, the appeal is **denied**, and the Commission 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. §

<sup>&</sup>lt;sup>3</sup> A RTKL request can only seek records that are in existence as of the date of the request; agencies are not required to provide records that do not exist, or have not been created, as of the time of the request. *See, e.g., Deeter v. New Britain Twp.*, OOR Dkt. AP 2019-1641, 2019 PA O.O.R.D. LEXIS 1314; *Terensky v. City of Monessen*, OOR Dkt. AP 2013-0772, 2013 PA O.O.R.D. LEXIS 349.

<sup>&</sup>lt;sup>4</sup> However, nothing in this Final Determination prevents the Requester from filing a new RTKL request for the same information, and if necessary, filing an appeal pursuant to the requirements of 65 P.S. § 67.1101(a)(1).

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>5</sup> This Final Determination shall be placed on the OOR website at: <a href="http://openrecords.pa.gov">http://openrecords.pa.gov</a>.

FINAL DETERMINATION ISSUED AND MAILED: May 26, 2023

/s/ Lyle Hartranft

LYLE HARTRANFT, ESQ. APPEALS OFFICER

Sent via Portal to: Deneke Weber; Rosemary Chiavetta, AORO; Tiffany Tran, Esq.;

Christopher Van de Verg, Esq.

7

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