

pennsylvania
OFFICE OF OPEN RECORDS
FINAL DETERMINATION

IN THE MATTER OF

**DANIEL AUERBACH,
Requester**

v.

**CITY OF PHILADELPHIA SHERIFF'S
OFFICE,
Respondent**

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Docket No: AP 2024-0791

FACTUAL BACKGROUND

On February 7, 2024, Daniel Auerbach (“Requester”) submitted eight requests (“Requests”) to the City of Philadelphia (“City”) Sheriff’s Office (“Office”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.* On February 8, 2024, Requester submitted one Request, also to the Office. The February 7, 2024, Requests were designated by the City as RTK Tickets #26668, 26669, 26670, 26671, 26673, 26675, and 26676, and sought, the following:

#26668: Any and/or all summaries or compilations of the Sheriff’s Office’s expenses incurred in connection with advertising sheriff’s sales in calendar year 2023.

#26669: Any and all contracts between the City of Philadelphia-and/or its departments, offices, or subcomponents including without limitation the Sheriff’s Office [] and Teleosoft, Inc.

#266670: Any email sent or received by a CURRENT employee of the Sheriff’s Office or the Sheriff herself that contains the phrase “bender” sent from January 1, 2023 to February 7, 2024.

#26671: Any final document or policy reflecting the manner in which the Sheriff's Office advertises sheriff's sales.

#26673: Any document reflecting the Advertising costs of \$810.84 on the Schedule of Proposed Distribution [for 226 E Cambria St] attached as Exhibit A. This request includes without limitation invoices, summaries of the expenses, anything that would show what the expenses were, or any other document that was used to compute the "Advertising" amount for Exhibit A[.]¹

#26675: Any document reflecting the "Sheriff's Fees" of \$2,878.23 on the Schedule of Proposed Distribution [of 226 E Cambria St] attached as Exhibit A. This request includes without limitation invoices, summaries of the expenses, or any other document that was used to compute the "Sheriff's Fees" amount.

#26676: DEFINITIONS

"unused proceeds" means the funds available to be paid to a property owner whose property was sold at sheriff's sale after payment transfer taxes, recording fees, sheriff's costs, municipal liens, other liens. The example Schedule of Proposed Distribution attached as Exhibit A lists under the heading. "UNUSED PROCEEDS:" the "unused proceeds" that this request concerns for an exemplar sheriff's sale. This request covers "unused proceeds" in any sheriff sale requested and not simply in the example; we provide the example only to illustrate the definition of "unused proceeds".

The "status" of unused proceeds refers to whether they have been paid to the property owner whose property was sold of sheriff's sale.

DOCUMENTS REQUESTED

Any document, database, or any other source of written information of any kind whether physical or on paper reflecting the payment of "unused proceeds" to the owner of the property sold at sheriff's sale for any sheriff's sale conducted in 2023. Any document, database, or any other source of written information of any kind whether physical or on paper showing the "status" of "unused proceeds" as to any sheriff's sale conducted in 2023.

#26677: Any final document or policy reflecting the manner in which "Sheriff's Fees" on Schedules of Proposed Distribution are to be calculated for sheriff's sales.

#26692: "Any document reflecting the Sheriff's Office payment of unclaimed property/funds to the Commonwealth of Pennsylvania's Department of the Treasury during 2023. This request includes without limitation the payment to the Treasury of "unused proceeds" or "excess proceeds" that would belong to a property owner but go unclaimed, but also includes any other payment that meets the criteria listed above.

¹ Exhibit A is a document that was attached to the Requests and consists of a Proposed Schedule of Distribution for a Sheriff's Sale of 226 E. Cambria Street, Philadelphia, PA, dated January 10, 2023.

On March 15, 2024, following a thirty-day extension during which to respond, 65 P.S. § 67.902(b), the City responded on behalf of the Office and partially denied the Requests, arguing that #26670 is insufficiently specific, 65 P.S. § 67.703, and that no records exist in the Office's possession, custody or control that are responsive to Ticket #26671, 26673, 26675, 26676, and 26677. For Ticket # 26668, 26669, and 26692, the Requests were granted and records provided with the final response.

On March 20, 2024, the Requester appealed to the Office of Open Records ("OOR"), challenging the denial and stating grounds for disclosure, noting that the records at issue on appeal are those sought in Ticket numbers #26670, 26671, 26673, 26675, 26676, and 26677. 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).

On April 1, 2024, the City submitted a position statement reiterating its grounds for denial. In support of its position, the City submitted the affidavits of LaVanda Harris, Esq., the Office's Open Records Officer ("Harris Affidavit") and Feige Grundman, Esq., Chief Deputy City Solicitor for the Right-To-Know Unit of the City's Law Department and the City's Open Records Officer ("Grundman Affidavit").²

On April 1, 2024, the Requester submitted a statement in support of the appeal. The Requester challenges the veracity of the Affidavits submitted by the City. The Requester also alleges that the City has submitted untrue or contradictory information to the OOR in prior appeals and, therefore, the City is not entitled to a presumption that agencies act in good faith when discharging their statutory duties under the RTKL. The Requester asserts that, without the

² The Harris and Grundman Affidavits were made subject to the penalties set forth in 18 Pa.C.S. § 4904, relating to unsworn falsification to authorities.

presumption, the City cannot prove that no records exist that are responsive to Requests #26671, 26673, 26675, 26676, and 26677. The Requester further argues that Request #26670 is sufficiently specific. The Requester's submission includes an unsworn declaration made subject to the penalty of perjury pursuant to 42 Pa.C.S. §§ 6202 – 6208 (Uniform Unsworn Declarations Act), as well as several Philadelphia Inquirer news articles authored by William Bender and Ms. Harris' affidavits that were submitted by the City in prior OOR appeals docketed to AP 2024-0066 and AP 2024-0068.

On April 5, 2024, the Requester submitted a supplemental statement, further arguing that the Harris Affidavit is not credible because it states that no records for Sheriff's fees related to 226 East Cambria Street exist, but a dollar amount for Sheriff's Fees is listed on the Proposed Schedule of Distribution for the same property. The Requester also argues that the Harris Affidavit is not credible because it states that no records of "unused proceeds" from a sheriff's sale exist, when the Office is required to remit any monies remaining after liens on a property are paid and costs remitted and, therefore, records should exist that document the distribution of these monies. The supplemental submission included a copy of the referenced Proposed Schedule of Distribution.³

LEGAL ANALYSIS

The Office is a local agency subject to the RTKL. 65 P.S. § 67.302. Records in the possession of a local agency are presumed to be public, unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. As an agency subject to the RTKL, the Office 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

³ The Requester's April 5, 2024 submission was received after the record closed; however, to develop the record, the submission was considered. *See* 65 P.S. § 67.1102(b)(3) (stating that "the appeals officer shall rule on procedural matters on the basis of justice, fairness, and the expeditious resolution of the dispute").

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)).

1. Ticket #26670 is insufficiently specific under Section 703

The City argues that Request #26670 is insufficiently specific because the keyword “bender” is “a term with a range of meanings and applications unconnected to [a] transaction or activity of the ... Office, is unclear and subject multiple interpretations” and, further, that this Request “could encompass any one of a number of different subject matters or records.”

Section 703 of the RTKL states that “[a] written request should identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested.” 65 P.S. § 67.703. When determining whether a particular request is sufficiently specific, the OOR uses the multifactor test employed by the Commonwealth Court in *Pa. Dep’t of Educ. v. Pittsburgh Post-Gazette*, 119 A.3d 1121 (Pa. Commw. Ct. 2015).

First, “[t]he subject matter of the request must identify the ‘transaction or activity’ of the agency for which the record is sought.” *Id.* at 1125 (quoting 65 P.S. § 67.102). Second, “[t]he scope of the request must identify ‘a discrete group of documents, either by type ... or by recipient.’” *Id.* (quoting *Carey v. Pa. Dep’t of Corr.*, 61 A.3d 367, 372 (Pa. Commw. Ct. 2013)). Finally, “[t]he timeframe of the request should identify a finite period of time for which records are sought.” *Id.* at 1126 (citing *Carey, supra*). “The timeframe prong is, however, the most fluid of the three prongs, and whether or not the request’s timeframe is narrow enough is generally dependent upon the specificity of the request’s subject matter and scope.” *Id.*

The above factors are intended “to facilitate an analysis in order to determine whether an

agency can ascertain which records are being requested.... The subject matter, scope, and timeframe of a request are flexible, analytical elements, not evidentiary requirements.” *Pa. Dep’t of Health v. Shepherd*, No. 377 C.D. 2021, 2022 Pa. Commw. Unpub. LEXIS 207 *6-7 (Pa. Commw. Ct. 2022), appeal denied, No. 334 MAL 2022, 2022 Pa. LEXIS 1862 (Pa. 2022). Finally, we must analyze the entirety of a request, as it is possible that portions of a request are insufficiently specific, while other portions provide sufficient guidance. *See Pa. State Police v. Office of Open Records*, 995 A.2d 515, 517 (Pa. Commw. Ct. 2010) (noting “the valid part of the request was included in a laundry list of requested materials”).

In support of the City’s argument, the Grundman Affidavit states, in pertinent part, the following:

5. While the request indicates that it seeks “any email” about a “phrase,” the request only lists one word—“bender.”
6. The word “bender” does not refer to any specific activity or transaction of the Sheriff’s Office.
7. The word “bender” is, however, a common word that has many meanings and uses in the English language. In regular usage, it can mean something/someone that bends over something else, a baseball pitch (“throw a bender”), or a type of tent made out of branches and a tarp. In slang, it can be used to refer to a traffic accident (“fender bender”) or an extended period of drinking alcoholic beverages (“go on a bender”).
8. None of these definitions refer to any identifiable activity or transaction of the Sheriff’s Office, nor does the request provide any other clues or criteria as to what activity or transaction the requester seeks records relating to.
9. The many definitions and usages of the word “bender” also do not have a common theme or relate to one another in such a way that would help the City identify what activity or transaction the requester seeks records relating to.
10. The request on its face asks the City to engage in a fishing expedition to provide all email containing a single word from a period of more than one year for more than 300 employees working at the Sheriff’s Office.

Under the RTKL, a sworn 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).

The Request #26670 reads as follows, “[a]ny email sent or received by a CURRENT employee of the Sheriff’s Office or the Sheriff herself that contains the phrase “bender” sent from January 1, 2023 to February 7, 2024.” The Requester argues that the language is clear and the City could have reasonably interpreted the #26670 “into a simple keyword email search” as it has done with more complicated requests in the past. The Requester specifically argues that #26670 has the “very narrow subject matter, a single keyword: “bender”, and William Bender is a reporter for the Philadelphia Inquirer who has “authored a number of articles critical of the Sheriff’s Office during the time period encompassed by this [R]equest.” In addition, in the Requester’s Declaration, he states that he is “familiar with the reporting of William Bender,” that Bender is a reporter for the Philadelphia Inquirer and, also that Bender “has written a number of articles, raising various concerns about the ... Office.” *See Auerbach Declaration* ¶¶ 1-3. The Auerbach Declaration also states that several of Bender’s articles were printed on April 1, 2024 and that the articles attached to the Declaration are true and correct copies. *Auerbach Declaration* ¶¶ 4-5. The Requester asserts that, based on the subject matter, the City does not have to exercise judgment in order to determine whether a record is responsive.

While the Requester may have intended to seek emails containing the *name*, William Bender, Request #26670, as written, did not; rather, #26670 sought emails “that contain the *phrase* “bender”....” Notably, the Requester used the word “phrase” and not “name” and, in addition, did not capitalize the term “bender,” such that a reader would be signaled that the word is a proper noun, William Bender’s name. The OOR’s review is on appeal is confined to the Requests as

written, and any expansion of the Requests on appeal will not be considered. *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 requester requests a specific type of record ... the requester may not, on appeal argue that an agency must instead disclose a different record in response to the request”). *McKelvey v. Office of Attorney General*, 172 A.3d 122 (Pa. Commw. Ct. 2017) (“Once a RTKL request is submitted, a requester is not permitted to expand or modify the request on appeal.”) What the Requester may have intended to seek is irrelevant to our review and the language of #26670 will be analyzed using a plain reading of the language, as submitted.

Request #26670 states a finite timeframe of one year and one month that may be sufficiently short, depending on the scope and subject matter. The Request also clearly defines the scope as seeking emails sent to and by the Sheriff or employees of the Office. However, the subject matter as written is broad, vague and insufficiently defined to enable the Office to conduct a meaningful search for responsive records, as it does not specify a transaction or activity of the Office. Therefore, we determine that the Request #26670 is insufficiently specific. 65 P.S. § 67.703; *Pa. Dep't of Educ.*, 119 A.3d at 1116; *Iverson, supra*. The Requester is not prohibited from submitting a new request to the Office, with additional limiting parameters, such as a subject matter or a more limited group of senders or recipients.

2. The City only demonstrated that certain records do not exist for Requests #26671, 26673, 26675, 26676, and 26677

The City argues that, following a search of the Office's records, a determination was made that no responsive records exist for Requests #26671, 26673, 26675, 26676, and 26677. 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 identified 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 all 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 City’s argument, it has presented the Harris Affidavit and Ms. Harris affirms that she is “familiar with the processes and procedures for the Sheriff’s Office, what kinds of records are stored, and how/where they are stored.” *See* ¶ 1. Regarding the City’s evidence to support the claim that no responsive records exist, the Requester challenges the credibility of the Harris Affidavit, asserting that for prior RTKL requests the Office claimed that responsive records did not exist or did not exist in the format requested, but on appeal the OOR determined otherwise.⁴ The Requester asserts that, because the evidence presented in prior appeals allegedly demonstrated that the Office’s or City’s initial claims were inaccurate, the City should not be afforded the

⁴ The appeals referenced by the Requester are *Auerbach v. City of Phila. Law Dep’t*, OOR Dkt. AP 2024-0068, 2024 PA O.O.R.D. LEXIS 274 and *Auerbach v. City of Phila. Law Dep’t*, OOR Dkt. AP 2024-0066, 2024 PA O.O.R.D. LEXIS 300.

presumption that, as a governmental agency, it is acting in good faith in carrying out its duties under the RTKL, thereby rendering the evidence presented in this matter incompetent.

Regarding the prior RTKL appeals that were adjudicated before the OOR, unless the requests and records at issue are identical to those at issue in this matter, the credibility determinations made by a prior assigned Appeals Officer are irrelevant to the instant appeal. A review of those matters shows that the requests at issue are not identical to the Requests at issue here. Accordingly, this final determination in this appeal will be based on the evidentiary record presented to the undersigned Appeals Officer and relevant legal precedent.

For clarity purposes, we will examine the evidence presented in this matter for each of the Requests at issue individually.

a. #26671 - Policy for Advertising Sheriff's Sales

The City argues that the Office does not possess a document or written policy governing how the Office advertises Sheriff's Sales of properties because the Office follows the directives in Pa.R.C.P. 3129.2. In support of the City's position, the Harris Affidavit states, the following:

4. I searched, or caused to be searched, all locations where any records reflecting a written policy about the manner in which the Sheriff's Office advertises Sheriff's Sales would be saved or stored in the Sheriff's Office, and after thorough search, no responsive records could be located.

5. The manner in which the Sheriff's Office advertises Sheriff's Sales is established by Pennsylvania Rule of Civil Procedure 3129.2, which the Sheriff's Office follows. There is no other document or written policy by the Sheriff's Office regarding the manner of advertising Sheriff's Sales.

6. Therefore, the Sheriff's Office does not have any records that are responsive to this RTKL request.

Chapter 3100 of the Pennsylvania Rules of Civil Procedure governs the "Enforcement of Money Judgments for the Payment of Money." Pa.R.C.P. 3129.2 is titled "Notice of Sale. Handbills. Written Notice. Publication," and outlines the content of a notice of sale, the timeframes

by which service of the notice must be effectuated and the various manners and modes of publication, among other procedures that are required of a sheriff's office related to the sale of real property. While the Harris Affidavit could be more detailed with respect to the Office personnel and department contacted for the search, the Requester has not presented any evidence that, other than the court rules governing Sheriff's Sale notice, a policy record does in fact exist; therefore, the City has proven no records exist that are responsive to Request #26671. *See Hodges v. Pa. Dep't of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

b. #26673 - Advertising Fees for 226 E. Cambria Street

Regarding the advertising fee costs for 226 E. Cambria Street, the City also argues that no responsive records exist. The Harris Affidavit states the following:

7. As Open Records Officer for the Sher[if[f]'s Office, I am specifically familiar with records regarding the advertising costs for Sheriff's Sale[s], as well as where and how any such records are stored in the Sheriff's Office.

8. I searched, or caused to be searched, all locations where any records reflecting the advertising costs on the Proposed Distribution Schedule for 226 E Cambria St. address would have been saved or stored in the Sheriff's Office, and after thorough search, no responsive records could be located.

9. The fees the Sheriff's Office charges for advertising costs for properties sold in Sheriff's Sales are established by Pennsylvania Rule of Civil Procedure 3138 and by Section 10- 1002 of the Philadelphia Home Rule Charter, which the Sheriff's Office follows.

10. The advertising costs are charged, per Pa.R.C.P. 3138 and Philadelphia Home Rule Charter § 10-1002, as a lump sum for each Sheriff's Sale advertised and then split evenly among the properties in that Sher[if[f]'s Sale. Therefore, there is no document specifically reflecting the advertising costs charged to any one property, including 226 E Cambria St.

11. Therefore, the Sher[if[f]'s Office does not have any records that are responsive to this RTKL request.

12. Additionally, to the extent that the lump sum costs are reflected in any record of the Sher[if[f]'s Office, [the Requester] was provided with copies of the

Sheriff's Office advertising invoices for 2023 in response to another RTKL request (#26668), which he has not appealed.

Pa.R.C.P. 3138, "Sheriff's Expenses and Fees. Abandonment of Writ for Non-Payment,"

reads as follows:

(a) The plaintiff shall pay to the sheriff all costs, charges and expenses incident to the execution, the maintenance of the lien of the execution and the preservation of the property. These items shall be deemed taxable costs for refund to the plaintiff from the proceeds of any sale, except that the plaintiff shall not be entitled to recover the costs in connection with writs determined by the court to be unnecessary and oppressive.

(b) If the plaintiff fails to make payment promptly upon demand of the sheriff's proper fees and costs, the sheriff shall be relieved of liability for loss, removal or distribution of the property and may return the writ as abandoned.

Section 10-1002 of the Charter provides:

(1) Real Estate Executions. Any writ of execution or any other writ or order issued out of any Court requiring the levy or seizure of lands and tenements or selling the same according to law:

(a) For receiving, processing and service, one hundred fifty dollars (\$150).

(b) For conducting sale, and processing same, three hundred dollars (\$300).

In addition, a commission of eight percent (8%) will be charged on the highest successful bid processed by the Sheriff.

In addition, the purchaser shall pay the Sheriff any fee of the Prothonotary for the acknowledgement of the Sheriff's deed and the fee of the Department of Records for recording the same.

(c) For sending letter of notice of sale to defendants as per the Pennsylvania Civil Rules of Procedure, sixty dollars (\$60).

(d) For staying sale after advertising and before conducting sale, one hundred fifty dollars (\$150).⁵

⁵ See https://codelibrary.amlegal.com/codes/philadelphia/latest/philadelphia_pa/0-0-0-283436#JD_10-1002 (last accessed April 12, 2024).

Both provisions authorize various categories of fees and costs that a sheriff's office can impose when a property is sold at a sheriff's sale and the Harris Affidavit states that such fees and costs "are charged ... as a lump sum for each Sheriff's Sale advertised and then split evenly among the properties for" sale and, therefore, no single record reflects the advertising costs for the Cambria Street property. However, the Harris Affidavit also states that "to the extent that the lump sum costs are reflected in any record" of the Office, records of the Office's advertising invoices for 2023 were provided in response to Request #26668. *See* ¶¶ 10-11.

The Requester submitted a copy of the Proposed Schedule of Distribution for the Cambria Street property that is dated January 17, 2023. The Schedule contains "Sheriff's Costs" line items that include: Sheriff Prothonotary, Acknowledge Deed; *Advertising*; and Sheriff's fees. This line-item breakdown contradicts the affirmation made in the Harris Affidavit that the costs charged for each Sheriff's sale are "charged ... as lump sum," and, as a result, there is no single document reflecting advertising costs for the Cambria Street property. Moreover, the Harris Affidavit is internally inconsistent in that, in ¶ 12, the City suggests that the lump sum costs would likely be reflected in the "advertising invoices" provided in response to Request #26668, but argues that no responsive records exist. It is unclear how the City can assert that no records exist because "advertising invoices" exist or they do not exist, and it is reasonable and logical to surmise that some sort of documentation would support the dollar figure included in the line item for Advertising that was included in the Distribution Schedule. The Commonwealth Court has held that, in the RTKL context, "[a]ffidavits are the means through which a governmental agency details the search it conducted for the documents requested and justifies nondisclosure of the requested documents under each exemption upon which it relied upon. *The affidavits must be detailed, nonconclusory, and submitted in good faith. ... In other words, a generic determination or*

conclusory statements are not sufficient to justify the exemption of public records.” See Moore v. Pa. Dep’t of Corr., 177 A.3d 1073 (Pa. Commw. Ct. 2017) (citing *Office of Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)) (citation omitted) (emphasis in original); *Pa. Dep’t of Educ. v. Bagwell*, 131 A.3d at 659 (“Affidavits that are conclusory or merely parrot the exemption do not suffice”) (citing *Scolforo*).

More recently, in *Pennsylvania Department of Health v. Mahon*, the Commonwealth Court discussed the evidence required to establish the absence of records, quoting its previous decision in *Hodges*. 283 A.3d 929, 936 (Pa. Commw. Ct. 2022); *see also Campbell v. Pa. Interscholastic Athletic Ass’n*, 268 A.3d 502 (Pa. Commw. Ct. 2021) (noting that an agency need only prove the nonexistence of records by a preponderance of the evidence, the lowest evidentiary standard, and is tantamount to a “more likely than not” inquiry). It should be noted, however, that the holding of the Commonwealth Court in *Mahon* does not appear to establish a bright-line rule by stating that when there is evidence that a record does not exist, “[i]t is questionable to what degree additional detail and explanation are necessary to establish the nonexistence of a record...” 283 A.3d at 936.

In this matter, portions of the Harris Affidavit that address Request # 26673 are conclusory regarding the details of the search and internally inconsistent as to the existence of documentation reflecting advertising costs. In addition, the Proposed Schedule of Distribution submitted by the Requester casts sufficient doubt on the credibility of the factual averments in this portion of the Harris Affidavit. Accordingly, the City has not proven that no responsive records reflecting advertising costs for the sale of the Cambria Street property exist. *Hodges*, 29 A.3d at 1192.

c. #26675 – Sheriff’s Fees for 226 E. Cambria Street

The City also relies on the Harris Affidavit to support its argument that no responsive records “reflecting the Sheriff’s fees of \$2,878.23” on the Distribution Scheduled for the Cambria Street property exist. The Harris Affidavit states:

13. As Open Records Officer for the Sher[if]’s Office, I am specifically familiar with records regarding the Sheriff’s fees charged for Sheriff’s Sales, as well as where and how any such records are stored in the Sheriff’s Office.

14. I searched, or caused to be searched, all locations where any records reflecting the Sher[if]’s fees on the Proposed Distribution Schedule for the sale of 226 E Cambria St. would have been saved or stored in the Sheriff’s Office, and after thorough search, no responsive records could be located.

15. The fees the Sheriff’s Office charges for properties sold in Sheriff’s Sales are established by Pennsylvania Rule of Civil Procedure 3138 and by Section 10-1002 of the Philadelphia Home Rule Charter, which the Sheriff’s Office follows, and which were the only basis the Sheriff’s Sale fees for the sale of 226 E. Cambria Street.

16. Therefore, there are no Sher[if]’s Office records that are responsive to this RTKL request.

As set forth above, the Distribution Schedule includes Sheriff’s Fees as a Sheriff Costs, as a line item. The Harris Affidavit again points to Pa.R.C.P. 3138 and Charter Section 10-1002, as the bases for computing and charging the Sheriff’s Fees. There are several categories of fees and costs authorized by the cited rules and yet, the Office is unable to ascertain that a specific amount, \$2,878.23, was incurred for “Sheriff’s Fees” or how it arrived at the total. As we have concluded above with regard to the Advertising Fees delineated on the Distribution Schedule, the Harris Affidavit is too conclusory to demonstrate that a good faith search was conducted, especially in light of the information contained in the Distribution Schedule. *See Moore, supra.; Scolforo, supra.* Accordingly, the City has not proven that no responsive records reflecting Sheriff’s Fees for the sale of the Cambria Street property exist. *Hodges*, 29 A.3d at 1192.

d. #26676 – 2023 Sheriff’s Sale Unused Proceeds

The City argues that the Office conducted a search for records regarding unused proceeds from the 2023 Sheriff’s Sales and none exist. In support of this portion of the City’s argument, the Harris Affidavit states, the following:

17. As Open Records Officer for the Sher[redacted]’s Office, I am specifically familiar with records regarding the unused proceeds from Sheriffs Sales-including the payment of unused proceeds to any owner of property sold at Sher[redacted]’s Sales and the “status” of unused proceeds (as defined by the requester as, “whether they have been paid to the property owner whose property was sold of sheriff’s sale” from properties sold at Sher[redacted]’s Sales in 2023 – as well as where and how any such records are stored in the Sheriff’s Office.

18. I searched, or caused to be searched, all locations where any such records would have been saved or stored in the Sheriff’s Office, and after thorough search, no responsive records could be located.

19. Therefore, the Sher[redacted]’s Office does not have any records that are responsive to this RTKL request.

The Requester relies on *In Re Sheriff’s Excess Proceeds Litigation*, 98 A.3d 706, 713 n.2 (Pa. Commw. Ct. 2014), to argue that the Office is required to distribute any funds that remain following a sheriff’s sale, back to the property owner and, therefore, the Office should have records of these amounts and whether the money has been repaid to property owners. In *Excess Proceeds Litigation*, the Commonwealth Court concluded that the Philadelphia Court of Common Pleas’ correctly determined that it was not the appropriate forum to rule on the plaintiffs’ (former property owners) motion for class certification against the Philadelphia Sheriff’s Office, in a civil action, alleging the failure to disburse excess proceeds from sheriff’s sales. Therefore, the crux of the case is not factually on point with the RTKL issues presented. While the court discusses that the Philadelphia Controller’s Office followed the Pennsylvania Treasury Department’s recommendation to institute a forensic audit of the Sheriff’s Office in October 2011, due to various irregularities uncovered in a routine Treasury audit related to fees and costs, 98 A.3d at 714, these

facts are irrelevant to the OOR's determination of whether records exist that are responsive to Request #26676. However, the footnote cited by the Requester is instructive. The footnote and the court opinion explain that Pa.R.C.P. 3136 – Distribution of Proceeds states, in part:

(a) Not later than thirty days after the sale of real property and not later than five days after the sale of personal property, the sheriff shall prepare a schedule of proposed distribution of the proceeds of sale which shall be filed in the prothonotary's office. No schedule of distribution or list of liens need be filed when the property is sold to the plaintiff for costs only....

(d) The sheriff shall distribute the proceeds of sale in accordance with the proposed schedule of distribution, unless written exceptions are filed with the sheriff not later than ten (10) days after the filing of the proposed schedule.

It strains credulity that the Sheriff's Office does not have a single record in any format, such as a bank statement, account ledger, or paperwork in the individual property files, which documents the payment of or inability to disburse any monetary proceeds that were remaining after the sale of a property or documentation to show that none of the 2023 sheriff sales resulted in "unused proceeds." While the City's burden of proof is the lowest standard, the affirmation that "all locations where any such records would have been saved or stored in the Sheriff's Office" lacks sufficient detail regarding any aspect of the search and does not rise to the level of proving that no responsive records exist with respect to Request #26676. *See Moore, supra.*; *Scolforo, supra.*; *Hodges*, 29 A.3d at 1192; *see also Highmark, Inc. v. Voltz*, 163 A.3d 485, 491 (Pa. Commw. Ct. 2017) (it is not incumbent upon the OOR to request additional evidence when developing the record.)

e. #26677 – Calculation of Sheriff's Fees

The City argues that no responsive records exist and it relies on the Harris Affidavit in support of its position. The Harris Affidavit states, in pertinent part, the following:

20. As Open Records Officer for the Sheriff's Office, I am specifically familiar with records regarding the Sheriff's fees charged for Sheriff's Sales, as well as where and how any such records are stored in the Sheriff's Office.

21. I searched, or caused to be searched, all locations where any records reflecting the calculation of the Sheriff's fees for Sheriff's Sales would have been saved or stored in the Sheriff's Office, and after thorough search, no responsive records could be located.

22. The fees the Sheriff's Office charges for properties sold in Sheriff's Sales are established by Pennsylvania Rule of Civil Procedure 3138 and by Section 10-1002 of the Philadelphia Home Rule Charter, which the Sheriff's Office follows, and which were the only basis for the Sheriff's Sale fees for Sheriff's Sales.

23. Therefore, there are no Sheriff's Office records that are responsive to this RTKL request.

Request # 26677 seeks "[a]ny final document *or* policy reflecting the manner in which 'Sheriff's Fees'," found on a Distribution Schedule are calculated. Pertinent to the portion of the Request seeking a "policy," the Office states that Pennsylvania Rule of Civil Procedure 3138 and by Section 10-1002 of the Philadelphia Home Rule Charter are utilized to determine the fee calculations. Therefore, we adopt the reasoning set forth above in the analysis of Request # 26671. However, regarding "any final document," both provisions authorize various categories of fees and costs that a sheriff's office can impose when a property is sold at a sheriff's sale, including fees for "receiving, processing and service," for "conducting sale, and processing same," "any fee of the Prothonotary for the acknowledgement of the Sheriff's deed and the fee of the Department of Records for recording the same" for "sending letter of notice of sale to defendants as per the Pennsylvania Civil Rules of Procedure," and for "staying sale after advertising and before conducting sale." The Distribution Schedule shows a single line item for Sheriff's Fees, but the City would have us believe that no supporting documentation, such as a receipt from the Prothonotary or even a postage receipt for mailing the notice of sale, exist. In this matter, portions of the Harris Affidavit that address the existence of "any final document," are conclusory regarding

the details of the search for and existence of documentation reflecting advertising costs. In addition, the Proposed Schedule of Distribution submitted by the Requester casts sufficient doubt on the credibility of the factual averments in this portion of the Harris Affidavit. Accordingly, the City has not proven that no responsive records reflecting the “any document” reflection the manner of calculating of Sheriff’s Fees, as set forth in the Office’s Schedules of Proposed Distribution exist.

CONCLUSION

For the foregoing reasons, the appeal is **granted in part** and **denied in part**, and the Office is required to conduct a good faith search for records responsive to Requests #26673, 26675, 26676, and a portion of 26677, as set forth in this Final Determination, and provide the Requester with any additional responsive records within thirty days. If no additional records are located as a result of its search, the Office shall provide an attestation or sworn affidavit to the Requester confirming same. 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 Philadelphia 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 65 P.S. § 67.1303, but 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.⁶ All documents or communications following the issuance of this Final Determination shall be sent to oor-postfd@pa.gov. This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

⁶ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

FINAL DETERMINATION ISSUED AND MAILED: April 17, 2024

/s/ Kelly C. Isenberg

KELLY C. ISENBERG, ESQ.
SENIOR APPEALS OFFICER

Sent via OOR E-File Portal to: Daniel Auerbach; Andrew Austin, Esq.; Margot Smith, Esq;
LaVanda Harris, Esq.; Feige Grundman, Esq.