



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:
	:
JULIA BURDELSKI AND TRIB LIVE,	:
Requester	:
	:
v.	:
	:
PITTSBURGH CITY,	:
Respondent	:

Docket No: AP 2024-2132

On June 26, 2024, Julia Burdelski, a reporter with TribLive (collectively “Requester”), filed a request (“Request”) with Pittsburgh City (“City”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking “[m]essages discussing [C]ity business sent to/from Ed Gainey, Maria Montañó, Olga George, Lisa Frank, Jake Pawlak, Jake Wheatley, Kathryn Vargas, Paula Kellerman and Heidi Norman via the Signal app from June 1, 2023 through June 26, 2024.” On August 7, 2024, after invoking a thirty-day extension to respond, *see* 65 P.S. § 67.902(b)(2), the City denied the Request in pertinent part.¹

On August 14, 2024, the Requester filed an appeal with the Office of Open Records (“OOR”), challenging the denial and stating grounds for disclosure. The OOR invited both parties

¹ On August 2, 2024, the City requested an additional extension and the Requester agreed on the same day. *See* 65 P.S. § 67.902(b)(3). The Request includes paragraphs preceding and following the quoted material. The City provided records in response to these paragraphs and argued that some response records are exempt from disclosure, but the Requester does not challenge this portion of the City’s response. As such, she has waived any objections thereto. *See Pa. Dep’t of Corr. v. Off. of Open Records*, 18 A.3d 429 (Pa. Commw. Ct. 2011).

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 August 23, 2024, the City submitted a position statement, reiterating that no responsive records exist. In support, the City submitted a statement made under the penalties of unsworn falsification to authorities by John Andrews, the City’s Open Records Officer (“Andrews Attestation”), describing the City’s search for responsive records. The City also submitted statements made under the penalties of unsworn falsification to authorities by Ed Gainey, Pamela Collier, John Andrews, Olga George, Lisa Frank, Jake Pawlak, Jake Wheatley, Kathryn Vargas, Paula Kellerman and Heidi Norman, each of whom attest that they found no responsive records on either their City-issued or personal cell phones.

The Jones Attestation provides:

2. The City ORO does not have the ability to perform text message searches of the City-issued cell phones because the City’s platform is owned by AT&T.
...
4. The City ORO similarly lacks the ability to perform searches of personal cell phones. []
...
7. On June 26, 2024, City ORO sent a memorandum to the above-listed City officials which directed said officials to conduct a good faith search, compile any potentially responsive records, and forward them to the City ORO
8. The City ORO sent an email to the above-listed officials on July 19, 2024 reminding said officials to compile and forward any potentially responsive records identified during a good faith search, or alternatively, to confirm there are no records if none were identified during a good faith search.
9. Maria Montaña responded to the email on July 19, 2024 indicating that she had no responsive messages.²
...

² The Andrews Attestation further provides that Ms. Montaña resigned, effective immediately, on August 14, 2024, and the City was not able to obtain an attestation from her. Andrews Attestation at ¶¶ 18-19. Although the City has provided evidence of the nonexistence of records in the possession, the OOR notes that agencies are not required to contact former employees. *Breslin v. Dickenson Twp.*, 68 A.3d 49, 55 (Pa. Commw. Ct. 2012) (internal citation omitted).

14. ... [T]he above-listed officials were directed to conduct a good faith search and ultimately identified no responsive records after completing a good faith search.

“The 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). An attestation by the individual who searched for responsive records is sufficient to meet an agency’s burden of proving the nonexistence of a record. *Id.*; *see also Pa. Dep’t of Health v. Mahon*, 283 A.3d 929, 936 (Pa. Commw. Ct. 2022) (holding that, when there is evidence that a record does not exist, “[i]t is questionable to what degree additional detail and explanation are necessary....”); *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).

In the absence of any evidence that the City has acted in bad faith, “the averments in the [attestation] should be accepted as true.” *McGowan v. Pa. Dep’t of Env’t 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)). Because the City directed the individuals named in the Request to conduct a search and those individuals conducted a search and confirmed the nonexistence of responsive records, the City conducted a good faith search for records. *See Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr.*, 185 A.3d 1161, 1171-72 (Pa. Commw. Ct. 2018) (citations omitted) (holding that a good faith search entails advising all custodians of potentially responsive records and obtaining all potentially responsive records), *aff’d*, 243 A.3d 19 (Pa. 2020). Accordingly, the City has met its burden of proving that no records exist in its possession, custody, or control. *See Hodges*, 29 A.3d at 1192.

For the foregoing reasons, the appeal is **denied**, and the City is not required to take any further action. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Allegheny County Court of Common Pleas. 65 P.S. § 67.1302(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond according to court rules as per Section 1303 of the RTKL, 65 P.S. § 67.1303, but as the quasi-judicial tribunal that adjudicated this matter, the OOR is not a proper party to any appeal and should not be named as a party.³ 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 website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: September 13, 2024

/s/ Blake Eilers
Blake Eilers, Esq.
Appeals Officer

Delivered via E-File Portal to: Julia Burdelski and John Andrews

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