



FINAL DETERMINATION

IN THE MATTER OF

**KEN SILVA AND HEADLINE USA,
Requester**

v.

**BUTLER COUNTY,
Respondent**

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Docket No.: AP 2024-2232

FACTUAL BACKGROUND

On August 16, 2024, Ken Silva and Headline USA (collectively “Requester”) submitted a request (“Request”) to Butler County (“County”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, stating:

This is a [R]equest for a timeline and transcripts of all local radio traffic from the July 13 shooting at the Butler Trump rally, as provided by ESU Commander Lenz to Rep. Clay Higgins and Rep. Mark Kelly. I note the Washington Post has also apparently been provided with these records, according to this article: <https://www.washingtonpost.com/investigations/2024/08/03/trump-rally-police-radio-transmissions/>[.]

On August 19, 2024, the County partially granted the Request, providing a responsive timeline, while also partially denying the Request, asserting that transcriptions of local radio traffic do not exist within the County’s possession, custody or control.

On August 23, 2024, the Requester appealed to the Office of Open Records (“OOR”), challenging the denial and stating grounds for disclosure. The OOR invited both parties to

supplement the record and directed the County to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On September 13, 2024, the County submitted a position statement reiterating its reason for denial, while also asserting that to the extent the Request seeks records of the Butler Emergency Services Unit, such records would be in the possession of the Butler County District Attorney's Office, which is a separate agency under the RTKL. In support of its position, the County submitted the attestation made subject to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsification to authorities, of Maria Malloy, Open Records Officer for the County.

On September 12, 2024 and September 13, 2024, the Requester submitted position statements arguing that the requested transcripts exist and that the Request should have been forwarded by the County to the Butler County District Attorney's Office. In support of their arguments, the Requester provided a copy of an August 12, 2024 Preliminary Investigative Report authored by Congressman Clay Higgins, which states that the Congressman was provided with a timeline and transcripts of local radio traffic. The Requester also provided screenshots indicating that their attempt to file the instant Request with the District Attorney's Office was "blocked."

LEGAL ANALYSIS

The County argues that no responsive transcripts exist within 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. 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 County's position, the Malloy Attestation provides that upon receipt of the Request, the Open Records Officer identified Emergency Services as the only department within the County likely to have the requested records.¹ *See* Malloy Attestation, ¶ 2. The Malloy Attestation also provides that the Open Records Officer reviewed the Request with Steve Bicehouse, the County's Director of Emergency Services, and that Director Bicehouse provided them with a responsive timeline, but indicated that the County's Emergency Services "has no transcriptions in its possession, custody or control." *Id.* at ¶¶ 3-6. The Malloy Attestation further provides that, to the extent the Request seeks records of the Butler Emergency Services Unit, such entity is not part of the County, but rather, is an entity that "exists by virtue of mutual aid agreements entered into by various municipalities and the Butler County District Attorney's Office." *Id.* at ¶¶ 7-8. Additionally, the Butler County District Attorney's Office has its own open

¹ Under the RTKL, a statement made under the penalty of perjury is competent evidence to sustain an agency's burden of proof. *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 County has acted in bad faith or that additional responsive records exist, "the averments in [the attestation] should be accepted as true." *McGowan v. Pa. Dep't of Env'tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

records department and open records officer, and the County's Open Records Officer has no authority to search the records of the District Attorney. *Id.* at ¶¶ 9-10.

The Requester, on the other hand, argues that the County has possession of the requested records, and as evidence, submits a Preliminary Investigation Report. A review of such report indicates that the Butler Emergency Services Unit Commander, rather than the County's Emergency Services department, provided a timeline and transcripts. Additionally, while the news article referenced in the Request also indicates that a transcript was obtained by the Washington Post, there is nothing to suggest that it was the County that provided such transcript. The Requester points to the County's statement that "[t]he qualifying phrase 'as provided by ESU Commander Lenz to Rep[.] Clay Higgins and Rep. Mark Kelly' determines whether, and to what extent, records exist in the possession, custody, or control of [the] County[]" and argues that the Requester does not seek the record specifically handled by Emergency Services Unit Commander Lenz, but rather, seeks "the transcript provided to Rep. Higgins [and] [i]f anyone in [the] County has a copy of that record, the County should provide it[.]" However, the Malloy Attestation states that no responsive transcriptions exist in the County's possession, custody or control. *Id.* at ¶ 6.

The Requester also argues that pursuant to Section 703 of the RTKL, the County should have forwarded the Request to the District Attorney's Office. While the Requester is correct in that Section 703 provides that "[e]mployees of an agency shall be directed to forward requests for records to the open-records officer[.]" here, the Requester directed the Request to the County's Open Records Officer, who pursuant to the RTKL, conducted a search of its records and responded, stating that no responsive transcripts exist. 65 P.S. § 67.703; *see also Commonwealth v. Donahue*, 98 A.3d 1223 (Pa. 2014) (it is presumed that agencies will act in good faith in discharging their statutory duties under the RTKL). Further, the Malloy Attestation provides that

the Butler County District Attorney's Office has a separate open records officer from the County, and nothing in the RTKL creates an obligation to search another agency's records.² Rather, a requester should address any requests for an agency's records to that particular agency's open records officer, and agency open records officers should endeavor to notify requesters if another agency is likely to possess the records. *Id.*; 65 P.S. § 67.502(b)(1). While there is no evidence in the record that during the Request stage the County notified the Requester that the records of the Butler Emergency Services Unit would be part of the District Attorney's Office, they have done so during the course of the appeal and the Requester has acknowledged such. *See* 65 P.S. § 67.502(b)(1). However, the Requester asserts that they have attempted to file a request with the District Attorney's Office, and that such requests are being blocked by the Office's email server. As the instant appeal is limited to the Request submitted to the County, the OOR will not address claims that the Requester's email addresses are blocked, but notes that the District Attorney's website includes a telephone number and the Requester is encouraged to contact the District Attorney's Office regarding the filing of a request, or, in the alternative, the website also indicates that, in addition to email, requests may be filed via mail, fax or hand delivery.

Based on the evidence presented on appeal, the County has met its burden of proving that it conducted a good faith search for the requested records by contacting the department within the County that would likely possess the records, and that other than what was provided, no additional responsive records exist within its possession, custody or control. *See Pa. Dep't of Health v. Mahon*, 283 A.3d 929 (Pa. Commw. Ct. 2022); *see also Hodges v. Pa. Dep't of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

² *See* <https://www.butlercountypa.gov/799/Right-to-Know-Law> (last accessed September 20, 2024).

CONCLUSION

For the foregoing reasons, the appeal is **denied**, and the County is not required to take any further action. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal or petition for review to the Butler 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. 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.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 24, 2024

/s/ Kathleen A. Higgins

KATHLEEN A. HIGGINS
DEPUTY CHIEF COUNSEL

Sent via OOR portal to: Ken Silva;
Maria Malloy, AORO;
Julie M. Graham, Esq.

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