pennsylvania
OFFICE OF OPEN RECORDS

# FINAL DETERMINATION

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| **IN THE MATTER OF** | : | |
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| **DAVID DIXON,** | : | |
| **Requester** | : | |
| | : | |
| **v.** | : | **Docket No.: AP 2024-2764** |
| | : | |
| **PENNSYLVANIA STATE POLICE,** | : | |
| **Respondent** | : | |

## FACTUAL BACKGROUND

On August 18, 2024, David Dixon ("Requester"), an inmate at SCI-Greene, submitted a three-part request ("Request") to the Pennsylvania State Police ("PSP") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq*.

The PSP invoked an extension of time to respond, and on October 3, 2024, provided a response purportedly granting the Request, "insofar as the responsive two-page record, Pennsylvania State Police Megan's Law Public Report…and the responsive fourteen-page record, Pennsylvania State Police Sexual Offender Registration Form (SP 4-218)[.]"[1] On October 23, 2024, the Requester filed an appeal with the Office of Open Records ("OOR") challenging the scope of the response.[2] More specifically, the Requester asserts that "the PA State Police granted

[1] The response letter is signed by PSP Open Records Officer William Rozier but is neither sworn nor made subject to the penalty of perjury.
[2] The Requester's appeal was postmarked on October 23, 2024, and, pursuant to the "prisoner mailbox rule," is considered timely filed. *See Commonwealth v. Jones*, 700 A.2d 423, 426 (Pa. 1997).

and sent [records responsive to] Section 1 and 2 [of the Request] but did not send anything [responsive] to Section 3."[3] On appeal, the Requester submitted copies of the Request and the PSP's response letter. 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).

The PSP, acting through its counsel, informed the OOR on November 8, 2024: "Please be advised that PSP will rely on its Final Response to Requester in support of its request that the appeal be denied. As stated in PSP's Final Response, the request was fully granted." The PSP did not submit evidence on appeal in support of its position that the Request had been granted. On November 8, 2024, the Requester submitted a document, which seeks to modify Section 3 of the Request and expand the scope of this appeal to include additional records. *See* Requester Submission.

## LEGAL ANALYSIS

The PSP 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 PSP 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 Ass'n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Pa. Dep't of Transp. v. Agric. Lands*

[3] Because the Requester does not challenge the sufficiency of the PSP's response to Sections 1 and 2 of the Request on appeal, the Requester has waived any objections regarding the sufficiency of the responsive records provided for those Items. *See Dep't of Corrections v. Office of Open Records*, 18 A.3d 429 (Pa. Commw. Ct. 2011).

*Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)). "Unless otherwise provided by law, a public record… shall be accessible for inspection and duplication in accordance with [the RTKL]." 65 P.S. § 67.701(a).

In this case, the PSP does not claim that an exemption applies to deny access to a public record, nor does it argue that it does not possess any record responsive to Section 3 of the Request. Rather, the PSP maintains that it fully granted the Request. In contrast, the Requester argues that the PSP did not respond at all to Section 3 of the Request.

Because the Requester has waived any objection to the response to Sections 1 and 2 of the Request, and because the PSP maintains that it fully granted the three-part Request, the PSP need only prove that it made a good faith effort to determine if the record requested under Section 3 is a public record and whether it had possession, custody, or control of the record, and responded in a timely manner.

**1. Amendment of Request on Appeal**

As noted, the Requester sought to amend the scope of his Request on November 8, 2024. However, a requester may not modify, explain, or expand a RTKL request on appeal. *See Pennsylvania State Police v. Office of Open Records*, 995 A.2d 515, 516 (Pa. Commw. Ct. 2010); *Staley v. Pittsburgh Water and Sewer Authority*, OOR Dkt. AP 2010-0275, 2010 PA O.O.R.D. LEXIS 256 ("A requester may not modify the original request as the denial, if any, is premised upon the original request as written"). Therefore, the OOR's review on appeal is confined to the Request as initially written and submitted to PSP, and the modifications of the Request on appeal were not considered. *See Brown v. Pennsylvania Turnpike Commission*, OOR Dkt. AP 2011-1287, 2011 PA O.O.R.D. LEXIS 998. That said, the Requester is not precluded from submitting a new request to PSP seeking the specific records identified in his attempted amendment in this appeal.

**2. Sufficiency of Evidence**

The PSP did not submit an affidavit or any other documentary evidence to OOR. The PSP's only submission on appeal is a letter from its counsel incorporating the PSP's Open Record Officer's response to the Request. An unsworn statement does not constitute evidence. *See Office of the Governor v. Davis*, 122 A.3d 1185, 1193 (Pa. Commw. Ct. 2015). As explained by the Court in *Davis*, such statements "are akin to briefs or proposed findings of fact, which, while part of the record, are distinguishable from the *evidentiary* record." *Id*. (emphasis in original) (citations omitted).

Under Section 901, "[u]pon receipt of a written request for access to a record, an agency shall make a good faith effort to determine if the record requested is a public record, legislative record or financial record and whether the agency has possession, custody or control of the identified record, and to respond as promptly as possible under the circumstances existing at the time of the request." 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 this matter, the PSP did not submit any evidence on appeal and instead relied entirely on the unsworn letter of its open records officer (i.e., its initial response).[4] As set for the above, in the PSP's only submission on appeal, counsel for PSP writes in a letter to the OOR: "As stated in PSP's Final Response, the request was fully granted." This letter is signed by counsel for PSP, but is neither sworn nor made subject to the penalty of perjury. Accordingly, the PSP has failed to establish that it complied with Section 901 of the RTKL by conducting a search for records responsive to Item 3. 65 P.S. § 67.901.

**3. Claim of Exemption**

Section 701(a) of the RTKL, 65 P.S. § 67.701(a) provides that "[u]nless otherwise provided by law, a public record… shall be accessible for inspection and duplication in accordance with this act." Section 708 of the RTKL, 65 P.S. § 67.708 enumerates the specific exemptions under the RTKL. In its response to the Request, the PSP states, "should such records [pertaining to covert law enforcement investigations] exist, they are entirely exempt from public disclosure under the RTKL and Criminal History Record Information Act[.]" 18 Pa. C.S. § 9101 *et seq.* ("CHRIA").

However, there is no evidence that the Request seeks this type of record. Instead, a reasonable reading of Section 3 of the Request indicates that the Requester seeks records and documents showing the expiration date of his 10-year-reporting period under Pennsylvania's Megan's Law.[5] As set forth above, the PSP has failed to present evidence on appeal and, instead, relied on the final response to the Request. While the PSP indicated that, if in the event the records

[4] Although the PSP's open records officer did not submit anything on appeal, his letter is still part of the record. The Commonwealth Court has explained that the General Assembly intended the request and response to be substantive parts of the record. *See Pa. Game Comm'n v. Fennell*, 149 A.3d 101, 104 (Pa. Commw. Ct. 2015).
[5] 42 Pa. C.S. § 9799.1 *et seq*.

fell within a category of information that is confidential under CHRIA, the PSP has neither developed this argument nor submitted supporting evidence on appeal. *See Davis, supra.* Moreover, by taking the position on appeal that the Request was fully granted, PSP has arguably waived any claim to deny the Request based on an exemption.[6]

## CONCLUSION

For the foregoing reasons, the appeal is **granted**, and the PSP is required to provide to the Requester the record(s) requested under Section 3 of the Request within thirty days. Within thirty days of the mailing date of this Final Determination, either party may appeal or petition for review with 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 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.[7] 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: NOVEMBER 25, 2024**

*/s/ Josh Macel*

APPEALS OFFICER

Sent to: David Dixon (US Mail)
Nolan Meeks, Esq. and William Rozier, AORO (*via* OOR Appeal E-File Portal)

[6] To the extent that the records sought in Item 3, consists of a judicial record, the OOR has no jurisdiction over judicial records. *See* 65 P.S. §§ 67.102, 503(b); *Grine v. County of Centre*, 138 A.3d 88 (Pa. Commw. Ct. 2016) (noting that the OOR has no jurisdiction over the records of a judicial agency, even when they are possessed by a local agency for administrative purposes).
[7] *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).