



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
DAN PETRELLA AND THE CHICAGO	:	
TRIBUNE,	:	
Requester	:	
	:	Docket No: AP 2026-0929
v.	:	
	:	
PENNSYLVANIA OFFICE OF THE	:	
GOVERNOR,	:	
Respondent	:	

FACTUAL BACKGROUND

On March 2, 2026, Dan Petrella and The Chicago Tribune (collectively “Requester”) submitted a request (“Request”) to the Pennsylvania Office of the Governor (“Office”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking:

Any and all text messages, including but not limited messages sent via WhatApps, Signal or any other messaging app or social media direct message or chat function, sent or received by Gov. Josh Shapiro to or from Illinois Gov. JB Pritzker from Jan. 1, 2025, to Feb. 2, 2026. This includes any messages sent or received on public accounts or devices or any private accounts or devices on which public business is conducted.

On March 11, 2026, following a thirty-day extension during which to respond, 65 P.S. § 67.902(b), the Office denied the Request, arguing that no responsive records exist within its possession, custody or control.

On March 11, 2026, 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 Office to notify the OOR if any third parties have a direct interest in the appeal. 65 P.S. § 67.1101(c).

On March 24, 2026, the Office submitted a sworn agency affirmation authored by the Office’s Open Records Officer, Marc Eisenstein (“Eisenstein Affirmation”), who affirms that no responsive records exist.

On March 30, 2026, the OOR sought additional information from the Office regarding its search for records. Specifically, the OOR asked the Office to “provide a statement, made under the penalty of perjury, detailing the Office’s search to include information such as who was consulted, who conducted searches, what was searched, and the findings of such search.”

On April 3, 2026, the Office submitted the Supplemental Eisenstein Affirmation in response to the OOR’s request for evidence regarding the Office’s search for records.

LEGAL ANALYSIS

The Office 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 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 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)). 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).

The Office argues that no responsive records exist. In support of its position, the Eisenstein Attestation¹ provides as follows:

3) In response to the request, I conducted a search by reviewing the operations and programs of the Office and consulting with individuals who have knowledge of whether the Office has custody or control over any responsive record, should it exist within the possession of the Office.

4) Such search, review and consultation revealed that no such operations, programs or individuals possess, maintain or have custody or control over any responsive record.

¹ Under the RTKL, a 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 Office has acted in bad faith, “the averments in [the attestations] 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)).

5) The Office therefore does not possess, maintain or have custody or control over the requested records.

The Supplemental Eisenstein Affirmation provides:

6) ... to conduct a good faith search I consulted with the Governor's Chief of Staff, who confirmed that the Governor personally searched all relevant devices and did not find any requested records.

7) The Office therefore does not possess, maintain or have custody or control over the requested records.

As set forth above, under the RTKL, an affidavit or statement made under penalty of perjury may serve as sufficient evidentiary support. *Sherry*, 20 A.3d at 520-21 and *Moore*, 992 A.2d at 909. 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 v. Pa. Dep't of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011), which held that an agency "may satisfy its burden of proof...with either an unsworn attestation by the person who searched for the record or a sworn affidavit of nonexistence of the record." *Mahon*, 283 A.3d 929, 936 (Pa. Commw. Ct. 2022) quoting 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011); *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). However, affidavits or attestations "must be detailed, nonconclusory, and submitted in good faith." *Mahon*, 283 A.3d at 935. The Commonwealth Court in *Mahon* further stated:

It is questionable to what degree additional detail and explanation are necessary to establish the nonexistence of a record rather than its exemption from disclosure. In the absence of any competent evidence that the agency acted in bad faith or that the agency records exist, the averments in such affidavits should be accepted as true.

Mahon, 283 A.3d at 936 citing *Smith Butz, LLC v. Pa. Dep't of Env't Prot.*, 142 A.3d 941, 945 (Pa. Commw. Ct. 2016).

In this matter, the Supplemental Eisenstein Affirmation demonstrates an inquiry was made with the Governor's Chief of Staff regarding the existence of responsive records, AORO Eisenstein was informed that "the Governor personally searched all relevant devices..." and a determination was made that no responsive records exist. The Supplemental Eisenstein Affirmation does not indicate what "relevant devices" or accounts were searched, despite that the OOR's request for supplemental evidence stated that it was a fact to be included in the supplemental submission, but no countervailing evidence has been presented to indicate that the search was not a good faith search or that not all possible devices were searched. Applying *Mahon*, the Office's evidence meets the preponderance of the evidence threshold and, therefore, proves that no responsive records exist within its possession, custody or control. *Hodges*, 29 A.3d at 1192.

CONCLUSION

For the foregoing reasons, the appeal is **denied**, and the Office 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 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.² 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>.

² *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

FINAL DETERMINATION ISSUED AND MAILED: April 13, 2026

/s/ Kelly C. Isenberg

KELLY C. ISENBERG, ESQ.
DEPUTY CHIEF COUNSEL

Sent via OOR E-File Portal: Dan Petrella; Marc Eisenstein, AORO