



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

:

**EDWARD KIRBY,
Requester**

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:

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v.

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Docket No: AP 2026-1756

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**CITY OF PHILADELPHIA
DEPARTMENT OF PUBLIC HEALTH,
Respondent**

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FACTUAL BACKGROUND

On March 9, 2025,¹ Edward Kirby (“Requester”) submitted a request (“Request”) to the City of Philadelphia Department of Public Health (“Department”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking:

[Background information omitted for brevity]

Requested Records

Please provide copies of the following records maintained by the Department of Public Health.

1. Oversight Communications

Any communications between Department of Public Health leadership and personnel of the Medical Examiner’s Office concerning:

- [O]versight of the Medical Examiner’s Office [(“Office” or “MEO”);]
- [A]dministrative supervision of forensic practices[;]
- [C]oncerns regarding cause-of-death determination procedures.

¹ The Request is dated March 8, 2026, a Sunday; however, it was received by the Department on March 9, 2026.

2. Administrative Reviews or Internal Assessments

Any internal reviews, evaluations, assessments, or reports conducted by the Department of Public Health concerning:

- [T]he operations or performance of the [Office;]
- [F]orensic procedures or practices used by the [O]ffice.

3. Complaint Records

Any administrative records reflecting complaints, concerns, or internal discussions within the Department of Public Health regarding:

- [P]ractices or procedures of the [Office;]
- [C]oncerns regarding cause-of-death determinations[;]
- [I]nteractions between Medical Examiner personnel and law enforcement agencies.

4. Communications Referencing Specific Personnel

Any administrative communications within the Department of Public Health referencing:

- Dr. Samuel Gulino [and]
- Dr. Marlon Osbourne

[I]n connection with their work at the Philadelphia Medical Examiner’s Office.

5. Records Concerning Policy Changes or Reforms

Any records discussing proposed or implemented policy changes, administrative reforms, or procedural updates relating to the [Office].

6. Records Referencing Public Reviews or Reports

Any records within the Department of Public Health referencing or discussing findings concerning the [Office] contained in publicly released reports or administrative reviews of that [O]ffice.

[...]

On April 22, 2026 following an extension during which to respond, 65 P.S. § 67.902(b),² the Department granted the Request in part, providing a record (a report dated June 9, 2022) responsive to Items 2 and 6 of the Request, and denied the Request in part, arguing that the Department does not have records responsive to Items 1, 3 and 5 of the Request. The Department further denied Item 4 of the Request, citing to the OOR’s decision in OOR Dkt. AP 2026-0819, in

² The Requester granted the Department additional time to respond until April 22, 2026.

seeking similar records and finding that records responsive to Item 4 of the Request do not exist in its possession, custody or control.

On May 1, 2026, the Requester appealed to the Office of Open Records (“OOR”), challenging the denial and stating grounds for disclosure.³ Specifically, the Requester “asks the OOR to find the [Department’s] search inadequate and order the production of all [Philadelphia Department of Public Health] administrative oversight records regarding the [Office’s] handling of the specified case, Philadelphia Medical Examiner Case # 14-00370.”⁴ The OOR invited both parties to supplement the record and directed the Department to notify the OOR if any third parties have a direct interest in the appeal. 65 P.S. § 67.1101(c).

On May 6, 2026, the OOR extended the submission deadline to June 1, 2026 and sought clarification of the issues on appeal.

On June 1, 2026, the Department submitted a position statement, reiterating its grounds for denial. Specifically, the Department argues that it is not in possession of records responsive to Items 1, 3 and 5 of the Request and that there are no additional records responsive to Items 2 and 6 and, as it relates to Item 4 of the Request, that the “OOR has already determined in [OOR Dkt.] AP 2026-0819 a portion of the Request seeks exempt records relating to an agency employee.” In support of its position, the Department submitted the attestations, made pursuant to 18 Pa.C.S. § 4904, from Tracy Jones (“Jones Attestation”), the Department’s Open Records Officer (“AORO”), and from Margot Smith, Esq. (“Smith Attestation”), Chief Deputy City Solicitor and Open Records

³ The Requester granted the OOR a 30-day extension to issue a final determination. *See* 65 P.S. § 67.1101(b)(1) (“Unless the requester agrees otherwise, the appeals officer shall make a final determination which shall be mailed to the requester and the agency within 30 days of receipt of the appeal filed under subsection (a).”).

⁴ The Requester raises several issue(s) that were not raised in the Department’s final response. For example, the Requester argues “Waiver of Privilege” and argues that the Department must disclose “[t]he homicide ‘H’ file” because it was “shared with a non-governmental third party[.]”

Officer for the City of Philadelphia (“City”) Law Department. In addition, the Department provided copies of the attestations submitted in OOR Dkt. AP 2026-0819.⁵

On June 1, 2026, the Requester submitted a position statement, arguing that 1) the Department’s “search was demonstrably inadequate” and 2) “[t]he §708(b)(7) personnel exemption does not apply to Dr. Gulino” because he is no longer a City employee.

LEGAL ANALYSIS

The Department 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 Department 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)).

1. The Request cannot be modified or expanded on appeal

On appeal, the Requester asks the OOR to “order the production of all [Department] administrative oversight records regarding the MEO’s handling of the specified case, Philadelphia Medical Examiner Case # 14-00370.” The Department argues that “the Request did not seek records specific to MEO case 14-00370.” Jones Attestation, ¶ 4. To the extent the Requester is now attempting to modify or expand the Request on appeal to seek the additional records related to a specific MEO case, such is impermissible and cannot be considered by the OOR. *See*

⁵ *See* Dr. Lindsay Simon Attestation, Tracy Jones Attestation, and the Margot Smith Attestation attached to the Smith Attestation.

McKelvey v. Off. of the Att’y Gen., 172 A.3d 122, 125 (Pa. Commw. Ct. 2017) (“Once a RTKL request is submitted, the requester may not expand or modify the request on appeal”); *see also Michak v. Pa. Dep’t of Pub. Welfare*, 56 A.3d 925, 930 (Pa. Commw. Ct. 2012) (holding that “where a request[e]r requests a specific type of record...the request[e]r may not, on appeal, argue that an agency must instead disclose different records in response to the request”).⁶ However, nothing in this Final Determination prevents the Requester from submitting a new RTKL request to the Department for records specific to MEO Case # 14-00370, and if necessary, filing a new appeal with the OOR pursuant to the requirements under 65 P.S. § 67.1101(a)(1).⁷

2. Part of the appeal is barred by collateral estoppel

The Department asserts that “[t]he appeal should be denied to the extent the Request is the Requester’s second attempt to obtain records related to an agency employee, despite the OOR’s Final Determination in AP 2026-0819 which found a similarly-worded records request sought records which are exempt under [65 P.S. § 67.]708(b)(7).” The doctrine of collateral estoppel prevents a party from re-litigating an issue if: 1) the issue decided in the earlier case is identical to the issue presented in the latter case; 2) there was a final judgment on the merits; 3) the party against whom estoppel is asserted was a party to the prior case; and 4) the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the prior case. *City of Pittsburgh v. Zoning Bd. of Adjustment*, 599 A.2d 896 (Pa. 1989); *see also Pa. Dep’t of Corr. v. Maulsby*, 121 A.3d 585 (Pa. Commw. Ct. 2015) (applying collateral estoppel in the context of RTKL appeals).

The Department asserts that the prior request for the same records in Item 4 of the Request

⁶ As a way of background, the Requester has filed other requests pertaining to MEO case 14-00370. Jones Attestation, ¶ 4.

⁷ The OOR notes that the Requester sought records specific for MEO Case # 14-00370 in OOR Dkt. AP 2026-0819.

was properly denied, and responsive records were properly withheld under the RTKL. *See Kirby v. City of Phila. Medical Examiner's Office*, OOR Dkt. AP 2026-0819, 2026 PA O.O.R.D. LEXIS 1538.⁸ In this matter, Item 4 of the Request seeks communications referencing specific personnel. The Department reiterates its argument previously presented to the OOR and resubmits that the responsive records were exempt personnel records, 65 P.S. § 67.708(b)(7)(ii, vii), and resubmitted the evidence it submitted in OOR Dkt. AP 2026-0819. As such, the issue of whether these specific records to Item 4 are exempt from disclosure was presented to the OOR by this same Requester for consideration and was adjudicated on the merits, with the OOR issuing a Final Determination holding, in relevant part, those records could be withheld from disclosure under the RTKL. *See Kirby v. City of Phila. Medical Examiner's Office*, OOR Dkt. AP 2026-0819, 2026 PA O.O.R.D. LEXIS 1538. Accordingly, the issue of whether records responsive to Item 4 can be disclosed is barred by collateral estoppel.

3. The Department demonstrated that there are no records responsive to Items 1, 3 and 5 of the Request and that additional records responsive to Items 2 and 6 do not exist in its possession, custody or control

The Department asserts that it conducted a good faith search, that there are no records responsive to Items 1, 3 and 5 of the Request, and that there are no additional records responsive to Items 2 and 6 of the Request. 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. Pennsylvania Department of Corrections*, 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

⁸ Currently pending before the Philadelphia Court of Common Pleas.

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 its argument that it conducted a good faith search, the Jones Attestation,⁹ submitted by the Department's AORO, who is familiar with any records created or received by the Department, where such records are stored, and how to locate such records, including the Medical Examiner's Office. Jones Attestation, ¶ 1. Ms. Jones "searched, or caused to be search[ed], all locations where any records potentially responsive to the Request would be saved or stored by the Department." *Id.* at ¶ 5. As a result of this search, "no records responsive to Items 1, 3 and 5 were located as a result of the foregoing search." *Id.* at ¶ 6. Ms. Jones further asserts that she made a "good faith attempt to respond to Items 2 and 6 of the Request" and provided the sole responsive record to the Requester. *Id.* at ¶ 7. Thus, Ms. Jones affirms that "all records responsive to the underlying Request which have been located have been produced to the Requester [and that

⁹ Under the RTKL, an attestation is generally 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 competent evidence that the Department acted in bad faith or that responsive/additional records exist, "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)).

f]ollowing the thorough search outlined above, there are no other records responsive to the [Request] in the possession or control of the [Department].” *Id.* at ¶ 9.

In *Pa. Dep’t of Health v. Mahon*, the Commonwealth Court 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.” 283 A.3d 929, 936 (Pa. Commw. Ct. 2022) (quoting *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011)). We note that the preponderance of the evidence is the lowest evidentiary standard. *See 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). Based on the Jones Attestation, the Department has met its burden of proof, by a preponderance of the evidence, that no records exist that are responsive to Items 1, 3 and 5 of the Request and that there are no additional records responsive to Items 2 and 6 of the Request.¹⁰ *Hodges*, 29 A.3d at 1192.

CONCLUSION

For the foregoing reasons, the Requester’s appeal is **denied**, and the Department 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 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 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.¹¹ All documents

¹⁰ Despite the Requester’s arguments that additional records must exist, the OOR makes no determinations as to whether additional records should exist, as our inquiry is limited to only whether or not records are “in existence and in possession of the ... agency at the time of the right-to-know request.” *Moore*, 992 A.2d at 909.

¹¹ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

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: June 30, 2026

/s/ Lyle Hartranft
Lyle Hartranft, Esq.
Appeals Officer

Sent via E-File Portal to: Edward Kirby; Tracy Jones, AORO; Adrienne Chapman, Esq.