



**FINAL DETERMINATION**

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| <b>IN THE MATTER OF</b>           | : |                                |
|                                   | : |                                |
| <b>TODD SHEPHERD,</b>             | : |                                |
| <b>Requester</b>                  | : |                                |
|                                   | : |                                |
| <b>v.</b>                         | : | <b>Docket No: AP 2026-3745</b> |
|                                   | : |                                |
| <b>PENNSYLVANIA OFFICE OF THE</b> | : |                                |
| <b>GOVERNOR,</b>                  | : |                                |
| <b>Respondent</b>                 | : |                                |

On July 22, 2026, Todd Shepherd (“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, from January 1, 2023 to the present, electronic copies of:

1. All “Final Response” letters issues by the ... [O]ffice in response to [RTKL] requests — meaning the response letter issued after any 30-day extension period, as distinct from the initial 5-business day acknowledgment letter.
2. All affidavits, attestations, and position statements submitted by the ... [O]ffice to the [OOR] as part of the office’s response to any appeal filed against the office, regardless of whether the document was submitted proactively or in response to a request for supplemental information from the [OOR] during the adjudication of the appeal.

On August 28, 2026, after extending its time to respond by thirty days, 65 P.S. § 67.902(b), the Office partially denied the Request, providing the Requester with records responsive to Item 1 of the Request from which personal identification information was redacted. *See* 65 P.S. §

67.708(b)(6). The Office further advised the Requester that Item 2 of the Request was misdirected and suggested that the Requester contact the OOR for responsive records.

On September 8, 2026, the Requester filed an appeal with the Office of Open Records (“OOR”), challenging the denial of Item 2 of the Request and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the Office to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On September 23, 2026, after being granted additional time to make a submission, the Office provided a statement, made subject to the penalty set forth in 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities), from Thomas Howell, Esq. (“Howell Statement”), Deputy General Counsel. Attorney Howell argues that the Office does not possess records responsive to Item 2 because they are “retained and submitted to the OOR by the Office’s counsel, within the Office of General Counsel (OGC).” Furthermore, Attorney Howell asserts that even if the Request had been submitted to OGC, “the compilation of evidentiary records submitted to OOR does not document the OGC’s business, transactions or activities.”

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).

Despite arguing that it does not possess records responsive to Item 2, the Office fails to submit evidence to describe its search for responsive records. The Howell Statement does not identify the files searched or explain whether any other representatives of the Office were contacted about the Request, such as the Office's Agency Open Records Officer, Marc Eisenstein.<sup>1</sup> Under the RTKL, agency open records officers for Commonwealth agencies are tasked with certain recordkeeping duties, *see* 65 P.S. § 67.502(b)(2)(iv), making Mr. Eisenstein a possible custodian of records.

With respect to the search, the Howell Statement is conclusory, and therefore is not sufficient to satisfy the Office's burden of proof. *See Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013) ("a generic determination or conclusory statements are not sufficient to" meet the agency's burden of proof). Accordingly, based on the evidence provided, the Office has failed to prove that it does not have possession, custody or control of records responsive to Item 2 of the Request. *Hodges v. Pa. Dep't of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011); *Campbell v. Pa. Interscholastic Athletic Ass'n*, 268 A.3d 502 (Pa. Commw. Ct. 2021) (noting that an agency must prove the nonexistence of records by a preponderance of

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<sup>1</sup> <https://www.openrecords.pa.gov/RTKL/AOROInfo.cfm?id=2966>.

the evidence, the lowest evidentiary standard, which is tantamount to a “more likely than not” inquiry).

Furthermore, regarding the Office’s assertion that records responsive to Item 2 would be retained by OGC, the Office’s legal counsel, and not the Office itself, “an agency need not *actually* possess a record in order for the RTKL’s obligations to attached; rather, constructive possession is enough to trigger an agency’s disclosure obligation.” *Pa. Dep’t of Educ. v. Massey*, 148 A.3d 339 (Pa. Commw. Ct. 2025) (emphasis in original) (citing *UnitedHealthcare of Pa. v. Baron*, 171 A.3d 943, 956 (Pa. Commw. Ct. 2017)). The true inquiry is whether the requested records are subject to the control of the agency. *Id.* (quoting *Barkeyville Borough v. Stearns*, 35 A.3d 91 (Pa. Commw. Ct. 2012)). In this case, the Office, as a Commonwealth agency, is obligated to comply with the provisions of the RTKL and, as part of that obligation, may, at times, be required to defend its position in appeals before the OOR by submitting legal argument and evidence (i.e., position statements, affidavits and attestations). The mere fact that the Office’s legal counsel within OGC prepares and transmits those submissions on behalf of the Office does not mean that the Office does not have construction possession over those records. *See Allegheny Co. Dep’t of Admin Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1037 (Pa. Commw. Ct. 2012) (“The location of a ‘public record’ is not at all a relevant consideration in terms of the public’s right to access.”). Although the Office may prove that it is not in *actual* possession of records responsive to Item 2, it must also inquire of the relevant attorneys within OGC to determine whether they possess responsive records involving the Office’s RTKL appeals, which would be in the construction possession of the Office and available under Section 901 of the RTKL.<sup>2</sup> 65 P.S. § 67.901.

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<sup>2</sup> The Office also asserts that submitting the same RTKL request to OGC would result in a denial because “the compilation of evidentiary records submitted to the OOR does not document the OGC’s business, transactions or activities.” Based upon the RTKL’s definition of “Record”, it is unclear why the records would not document

For the foregoing reasons, the appeal is **granted** and, within thirty days, the Office is required to conduct a good faith search for records responsive to Item 2 of the Request and provide any responsive records located during the search to the Requester. 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 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. All documents or communications following the issuance of this Final Determination shall be sent to [oor-postfd@pa.gov](mailto:oor-postfd@pa.gov). This Final Determination shall be placed on the website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: 30 September 2026**

*/s/ Joshua T. Young*

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JOSHUA T. YOUNG, ESQ.  
SENIOR DEPUTY CHIEF COUNSEL

Sent via OOR e-file portal to: Todd Shepherd;  
Thomas Howell, Esq. and Marc Eisenstein, AORO

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activities of both the Office and OGC; however, we need not further address this argument because no such RTKL request is before the OOR.