

**COMMONWEALTH COURT OF PENNSYLVANIA
DOCKETING STATEMENT
PETITION FOR REVIEW**

Counsel for Petitioner(s) must complete this form and file it with the Prothonotary of the Commonwealth Court within 10 days of the date of the Notice of Docketing.

Failure to timely file a docketing statement, with required attachments and proof of service, may result in dismissal of the petition for review.

Attach additional sheets if needed.

Case Caption: Simon Campbell v. Pennsylvania Interscholastic Athletic Association

Commonwealth Court Docket No.: 25 CD 2021

Required Attachments:

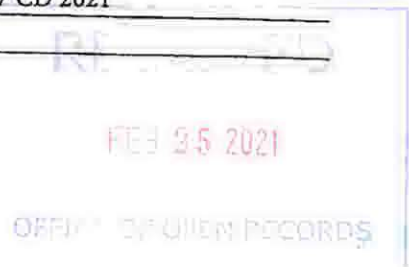
- (1) Attach a copy of **all decisions and opinions, if any, and all pertinent orders in this case** (including, for example, the decision of the Workers Compensation Judge, or similar decision).
- (2) Attach a **Statement of Issues** of no more than *two pages* in length, containing a summary sufficient to explain the case (*see* Order of September 15, 1999, 29 Pa. Bull. 5064, 210 Pa. Code §69.501), and indicating the relief requested.
- (3) Attach a **proof of service** indicating service of the docketing statement, statement of issues, and all attachments on all other parties.

A. Appealability of Order

- (1) Is the order appealed a final order? Yes No
- (2) If not a final order, pursuant to what Rule of Appellate Procedure is this order being appealed, e.g., Pa.R.A.P. 311, 313, 341(c)? _____
Please explain: _____

B. Are there any related cases, including cross-appeals, pending in this court or any other federal or state court or agency? Yes No

If yes, please list below the court or agency, caption and docket number(s):
Pennsylvania Interscholastic Athletic Association, Inc. v. Simon Campbell, Commonwealth of Pennsylvania, Office of Open Records, and Elizabeth Wagenseller, in her Official Capacity as Executive Director of the Office of Open Records - Docket No. 107 CD 2021



C. Have there been any previous efforts to settle this matter? _____ Yes No

If yes, please explain: _____

D. Are you aware of any conflict of interest that may exist with respect to any party, lawyer, or issue in this case that may suggest the need for recusal by any judge of this court?

_____ Yes No

If yes, please explain: _____

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by: Craig J. Staudenmaier, Esquire

Signature: *Craig J. Staudenmaier*

Attorney No.: 34996 Date: 2/22/21

Telephone No.: 717-236-3010 ext. 122 Fax No.: 717-234-1925

Counsel for (Name of Party): Simon Campbell

Rev. 7/2019

1. ... [E]lectronic copies of all legal invoices that already exist in electronic form that were paid by [the] PIAA to any and all attorneys/law firms between the dates of January 1, 2012 and the present....
2. [E]lectronic copies of the fronts of all electronic cleared check images that already exist in electronic form ... for all financial accounts owned/operated by [the] PIAA between the dates of June 1, 2019 and the present....
3. [E]lectronic copies of all monthly bank (or other financial institution) statements that already exist in electronic form for all financial accounts owned/operated by [the] PIAA between the dates of December 1, 2013 and the present.
4. [A]ll posted line item transactions in all bank (or other financial institution) accounts that already exist in electronic form for all financial accounts owned/operated by [the] PIAA between the dates of June 1, 2019 and the present....
5. [The] PIAA's most recent three (3) years of independent audited financial statements that already exist in electronic form....
6. [The] PIAA's most recent Form 990 filing with the IRS that already exists in electronic form....
7. [E]lectronic copies of all written communications that already exist in electronic form, and that were exchanged between [the] PIAA officials (and between [the] PIAA officials and counsel) between the dates of January 1, 2020 and the present that discuss the topic of [the] PIAA being improperly included in the RTKL....
8. [A] screenshot image showing [the Requester] the name of the software program/s in [the] PIAA's possession, custody or control that can perform electronic redactions on PDF files and/or other electronic file types....

On November 6, 2020, the PIAA invoked a thirty-day extension of time, 65 P.S. § 67.902(b), to respond to the Request. On December 7, 2020, the PIAA partially denied the Request, asserting that records responsive to Items 1, 2, 3, 4, 7 and 8 do not exist. With respect to Item 5, the PIAA stated that it "requested these records from its auditors but has not yet received them" and the records "will be produced upon receipt." In response to Item 6 of the Request, the PIAA directed the Requester to the IRS's publicly available website, www.irs.gov. The PIAA also noted a

“[g]eneral objection” to the Request, stating that the PIAA “is not a Commonwealth authority or entity” that is subject to the RTKL and that it intended “to litigate this issue in response to th[e] [R]equest.”

On December 10, 2020, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the PIAA to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On December 21, 2020, the PIAA filed a Motion to Stay Proceedings (“Motion”), asserting that the instant appeal should be stayed pending the Commonwealth Court’s consideration of the PIAA’s Petition for Review in the Nature of a Complaint for Declaratory and Injunctive Relief, which was filed with the Commonwealth Court on December 18, 2020. On December 21, 2020, the OOR afforded the Requester the opportunity to respond to the PIAA’s Motion. On December 22, 2020, the Requester submitted his response to the PIAA’s Motion, stating that he objects to the Motion. Also, on December 22, 2020, the OOR informed the parties that the PIAA’s Motion was denied, and the OOR set forth deadlines for the parties to submit evidence in the appeal.

On December 30, 2020, the PIAA submitted a position statement reiterating its grounds for denial. The PIAA also contends that the PIAA is not subject to the RTKL and that application of the RTKL to the PIAA “constitutes unconstitutional special legislation.” The PIAA further argues that the RTKL violates the PIAA’s “equal protection rights under the United States and Pennsylvania Constitutions,” and that disclosure of certain banking information “would violate privacy rights.” The PIAA also submitted the affidavit, made under penalty of perjury, of Dr. Robert Lombardi (“Dr. Lombardi”), Executive Director and Open Records Officer of the PIAA.

On December 31, 2020, the Requester made a submission, requesting that the record in this matter remain open an additional two or three business days. On the same day, the PIAA made a submission, asserting that because the Requester “submitted no timely response . . . addressing any of the issues identified in the denial letter, argument on those issues in a submission addressing assertedly newly raised issues would be untimely and should not be permitted.” Also, on December 31, 2020, the Requester submitted a reply to the PIAA’s submission, stating, in part, that the PIAA acted in bad faith. On the same day, the OOR notified the parties that the record would remain open through January 5, 2021.

On January 4, 2021, the Requester made a submission, indicating that he was “ask[ing the Pennsylvania Office of the Attorney General (“AG’s Office”)] to make sure the appropriate attorney from the AG’s [O]ffice asserts the Commonwealth’s direct interest into this appeal via Section 1101(c)(1) of the RTKL.” The Requester’s submission also included a letter to the AG’s Office.

On January 5, 2021, the PIAA submitted a supplemental position statement, asserting, in part, that “any submission by [the] Requester relating to responses presented in [the] PIAA’s letter of December 7, 2020 should be rejected as untimely.”¹ On the same day, the Requester submitted a supplemental position statement, stating, in part, that “[a]ny and all redaction arguments not raised thus far have similarly now been waived” and requesting that the OOR “issue an advisory opinion finding that [the] PIAA and its counsel acted in bad faith and in wanton disregard of [the] law.”

¹ Of note, to develop the record in this matter, all submissions of both parties were considered. *See* 65 P.S. § 67.1102(b)(3) (stating that “the appeals officer shall rule on procedural matters on the basis of justice, fairness and the expeditious resolution of the dispute”).

LEGAL ANALYSIS

“The objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government.” *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law is “designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions.” *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff’d* 75 A.3d 453 (Pa. 2013).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the request.” 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing is discretionary and non-appealable. *Id.* The law also states that an appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* Here, neither party requested a hearing; however, the OOR has the necessary information and evidence before it to properly adjudicate the matter.

The PIAA is a Commonwealth agency² subject to the RTKL that is required to disclose public records. 65 P.S. § 67.301. Records in the possession of a Commonwealth agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

² This is addressed in further detail in Section 1 of this Final Determination.

Section 708 of the RTKL places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.” 65 P.S. § 67.708(a). 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)). Likewise, “[t]he burden of proving a record does not exist ... is placed on the agency responding to the right-to-know request.” *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

1. The PIAA is subject to the RTKL

As a preliminary matter, the PIAA argues that because it is not a Commonwealth authority or entity, it is not subject to the requirements of the RTKL. Specifically, the PIAA contends that “[a]s [the] PIAA does not meet the definition of State-affiliated entity, nor is it included within the scope of the RTKL based on any other provision, the RTKL is not applicable to [the] PIAA and the OOR has no jurisdiction over requests for records made to [the] PIAA.”³

Under the RTKL, the term “State-affiliated entity” is defined as “[a] Commonwealth authority or Commonwealth entity. The term includes the ... *Pennsylvania Interscholastic Athletic Association....*” 65 P.S. § 67.102 (emphasis added). Additionally, the term “Commonwealth

³ Along these lines, the PIAA also maintains that application of the RTKL to the PIAA “constitutes unconstitutional special legislation” and that the RTKL violates the PIAA’s “equal protection rights under the United States and Pennsylvania Constitutions.” However, the PIAA also states that it “recognizes that the OOR does not have the authority to grant declaratory and/or equitable relief on a challenge to the constitutionality of a statute. See *Pa. Indep. Oil & Gas Ass’n v. [Pa.] Dep’t of Env’tl. Prot.*, 135 A.3d 1118, 1129 (Pa. Commw. 2015).” Accordingly, these issues will not be addressed in this Final Determination.

agency” is defined to include “[a]ny office, department, authority, board, multistate agency or commission of the executive branch, an independent agency and a *State-affiliated entity*.” *Id.* (emphasis added). As such, under the RTKL, the PIAA is defined as a State-affiliated entity and is considered a Commonwealth agency. Pursuant to the clear language of the RTKL, “[a] Commonwealth agency shall provide public records in accordance with [the RTKL].” 65 P.S. § 67.301(a).

In light of the above statutory language, the OOR has repeatedly determined that the RTKL applies to the PIAA. *See, e.g., Scicchitano v. PIAA*, OOR Dkt. AP 2019-1504, 2019 PA O.O.R.D. LEXIS 1521; *Palattella v. PIAA*, OOR Dkt. AP 2018-0743, 2018 PA O.O.R.D. LEXIS 747. To hold otherwise would disregard the legislative intent behind the RTKL to promote government transparency and would also ignore the Legislature’s unambiguous directive that the RTKL applies to the PIAA.

2. Records responsive to Item 1 of the Request are subject to disclosure

Item 1 of the Request seeks electronic copies of “all legal invoices that already exist in electronic form that were paid by [the] PIAA to any and all attorneys/law firms between the dates of January 1, 2012 and the present...” While the PIAA asserts that it “receives its legal invoices in paper format,” the PIAA further states that it “has requested electronic copies of the records from its law firms.” In support, Dr. Lombardi affirms, in part, as follows:

40. [The] PIAA has no responsive records in an electronic format.
41. [The] PIAA receives its legal invoices in a paper format.
42. I have requested electronic records from law firms which we have used but have not received them.
43. There are several thousand pages of such invoices.
44. Once the records arrive, they will need to be redacted.

45. It will take weeks to do so since none of those documents are ... currently in a redacted format and must be created by [the] PIAA.
46. Our standard redaction process involves going through entries on each printed invoice.
47. I had recently undertaken this task with the same requested records pursuant to an earlier request by another individual for the same documents, so I know how long the effort will take. However, those redacted records were destroyed once the requester informed [the] PIAA that he would not pay for the costs of reproduction. That destruction occurred prior to receiving [the R]equest. Consequently, I would need to replicate the process here.

Under the RTKL, a sworn affidavit 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 PIAA acted in bad faith, "the averments in [the affidavit] 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)).

Here, while the PIAA states that the relevant invoices "will need to be redacted," the PIAA presents no evidence in support of any redactions. Specifically, the PIAA's submissions fail to indicate what would need to be redacted and the basis for such redactions. Notably, although the PIAA states that it is waiting to receive the responsive invoices in electronic form from its attorneys, the PIAA acknowledges that it has in its possession the invoices in paper format. As such, the PIAA has had the opportunity to review the responsive invoices and determine any necessary redactions. Moreover, the fact that a request may entail retrieving a large number of documents does not relieve the agency's duty to comply with the RTKL. *See Pa. Dep't of Env'tl. Prot. v. Legere*, 50 A.3d 260, 265 (Pa. Commw. Ct. 2012); *see also Ruggiero v. Lackawanna County*, OOR Dkt. AP 2014-0043, 2014 PA O.O.R.D. LEXIS 157 ("[A] request involving the

detailed review of voluminous documents does not relieve the agency of its requirements to presume the records are open and available and [to] respond in accordance with the RTKL”); *Falcetta v. Grove City Area Sch. Dist.*, OOR Dkt. AP 2018-0908, 2018 PA O.O.R.D. LEXIS 908. Accordingly, to the extent the legal invoices currently exist in electronic format, they are subject to disclosure.⁴ *See* 65 P.S. § 67.708(a)(1).

3. Portions of the records responsive to Items 2, 3 and 4 of the Request are subject to disclosure

Items 2, 3 and 4 of the Request seek various check images, bank statements and posted line-item transactions from the PIAA. The PIAA contends that “information on a check, including the account number, must be redacted to protect [the PIAA’s] privacy interests.” Section 708(b)(6) of the RTKL exempts from disclosure “personal financial information,” which the RTKL defines as “[a]n individual’s personal credit, charge or debit information; bank account information; bank, credit or financial statements; account or PIN numbers and other information relating to an individual’s personal finances.” 65 P.S. § 67.102; 65 P.S. § 67.708(b)(6). Because bank account numbers constitute “bank account information” of the PIAA, it is expressly exempt under Section 708(b)(6). *See Murray v. Pa. Dep’t of Health and GGNCS Lancaster, LLP d/b/a Golden Living Center-Lancaster*, OOR Dkt. AP 2017-0461, 2017 PA O.O.R.D. LEXIS 1361 (finding the bank account number of a nursing home the department contracts with to be exempt from disclosure pursuant to Section 708(b)(6)); *Berney v. Sch. Dist. of Phila.*, OOR Dkt. AP 2016-1390, 2016 PA O.O.R.D. LEXIS 1426 (finding the bank account number of a law firm that the district contracts with to be exempt from disclosure pursuant to Section 708(b)(6)). Therefore, the PIAA may redact its bank account numbers from the responsive records.

⁴ However, if the records only exist in hard copy, the PIAA is not required to convert those records into electronic copies. *See* 65 P.S. § 67.705.

With respect to the remaining portions of responsive records, Dr. Lombardi affirms, in part, as follows:

50. Recent years have shown the risk to corporations from hacks of their banking and other records. Disclosure of banking account information has been determined to considerably increase those risks.
51. Additionally, assembly and redaction of the requested records is not realistically feasible. There are many thousands of individual checks which must be reviewed and redacted.
52. [The] PIAA is divided into twelve administrative districts, each ... using separate banks, almost all using volunteer treasurers working with physical, not electronic records.
53. Assembling, redaction and production of the requested records would be extremely difficult.
54. Even at the headquarters level alone, [the] PIAA pays thousands of workers (officials, referees, ticket takers, security, maintenance staff, health officials, etc.) for each season.
55. As an example, the printout of just the records for a single season of [the] PIAA's basketball tournament is over 600 pages.
56. Multiply that by 22 sports and a number of years, and then multiply that by 12 separate districts, and it quickly becomes apparent that tens of thousands of records must be reviewed, potentially redacted, and then produced.
57. Just on these requests, I estimate that it would take a full-time employee three to four months to properly comply with the [R]equest.
58. This would significantly impact on the operations of [the] PIAA.

As previously stated, the fact that a request may entail retrieving a large number of records does not relieve the agency's duty to comply with the RTKL. *See Legere*, 50 A.3d at 265. The OOR notes that an agency which does not have sufficient time to locate and review responsive records is entitled to apply to the OOR for additional time under the Commonwealth Court's decision in *Pa. State Sys. of Higher Educ. v. Ass'n of State Coll. & Univ. Faculties* ("APSCUF"), where the Commonwealth Court determined:

The agency making such a claim has to provide the OOR with a valid estimate of the number of documents being requested, the length of time that people charged with reviewing the request require to conduct this review, and if that request involves documents in electronic format the agency must explain any difficulties it faces when attempting to deliver the documents in that format. Based on the above information, the OOR can then grant any additional time warranted so that the agency can reasonably discern whether any exemptions apply.

142 A.3d 1023, 1032 (Pa. Commw. Ct. 2016).

In this instance, the PIAA did not seek any such extension under *APSCUF*. Rather, the PIAA argues that “[t]he appeal seeking these records should be rejected.” Because the PIAA did not set forth any basis for exemptions from public access, any records responsive to Items 2, 3 and 4 of the Request that currently exist in electronic format are subject to disclosure, subject to redactions of the PIAA’s bank account numbers, as directed above.

4. Records responsive to Item 5 of the Request are subject to disclosure

Item 5 of the Request seeks the PIAA’s “most recent three (3) years of independent audited financial statements that already exist in electronic form.” In response, the PIAA states that it agrees to provide the records to the Requester, once it receives them in electronic format from the PIAA’s auditors. Specifically, Dr. Lombardi affirms that the PIAA “receives its audited financial statements in hard copy format from its auditors. Upon receipt of the [R]equest, I asked our auditors for electronic copies if they exist. Once they are obtained, I will provide them to [the Requester].”

As the PIAA agrees to provide the responsive records and has not presented any argument in support of withholding the responsive records, 65 P.S. § 67.708(a)(1), to the extent that the PIAA’s auditors have the records responsive to Item 5 of the Request in electronic format, they are subject to public access.

5. The PIAA provided electronic access to records responsive to Item 6 of the Request

In response to Item 6 of the Request, which seeks the PIAA's "most recent Form 990 filing with the IRS that already exist in electronic form," the PIAA directed the Requester to the IRS's website, www.irs.gov. The PIAA argues that its response to this portion of the Request "was correct and appropriate." Section 704(b) of the RTKL permits an agency to respond to a request for records "by notifying the requester that the record is available through publicly accessible electronic means[.]" 65 P.S. § 67.704(b)(1). If a requester is unwilling or unable to access the records electronically, the requester may "submit a written request to the agency to have the record converted...." 65 P.S. § 67.704(b)(2). If the requester does not timely do so, an agency has no further obligation under the RTKL relative to a requester's access to the particular requested record(s). An appeal to the OOR is not "a written request to the agency to have the record converted" such that it triggers an agency's responsibility to take further action pursuant to Section 704(b)(2) of the RTKL. *Borden v. Ridgebury Twp.*, OOR Dkt. AP 2011-1460, 2011 PA O.O.R.D. LEXIS 1223.

Here, Dr. Lombardi affirms that "[a]s those records already exist in electronic format on the IRS website, I referred him to those documents." Under the RTKL, a sworn affidavit may serve as sufficient evidentiary support. *See Sherry*, 20 A.3d at 520-21; *Moore*, 992 A.2d at 909. The OOR has previously held that directing a requester to an internet website for the responsive records satisfies an agency's obligations under Section 704 of the RTKL. *See Rowbottom v. Dauphin County*, OOR Dkt. AP 2019-0472, 2019 PA O.O.R.D. LEXIS 542; *Citizens for Pennsylvania's Future v. Pa. Turnpike Comm'n*, OOR Dkt. AP 2015-0726, 2015 PA O.O.R.D. LEXIS 856. As such, the PIAA's response regarding Item 6 of the Request satisfies the requirements under Section 704 of the RTKL.

6. The PIAA has demonstrated that records responsive to Item 7 of the Request do not exist

In response to Item 7 of the Request, the PIAA contends that there are no responsive records. In support, Dr. Lombardi affirms, in part, as follows:

30. [Item] 7 of [the Request] sought copies of all written communications between [the] PIAA officials, including legal counsel between January 1, 2020 and the date of [the Request] “that discuss the topic of [the] PIAA being improperly included in the RTKL.”
31. I conducted a thorough search of all [the] PIAA records relating to that topic and found no responsive records.
32. I am also aware that any communications on that subject would be limited to me and legal counsel as no other PIAA official was involved in 2020 in discussion of that issue as of the date of the [R]equest.
33. I am also aware that all communications between me and legal counsel on that topic in 2020 were oral. There were no 2020 written communications on that subject prior to submission of the [R]equest.

Under the RTKL, a sworn affidavit may serve as sufficient evidentiary support for the nonexistence of records. *See Sherry*, 20 A.3d at 520-21; *Moore*, 992 A.2d at 909. Based on the evidence provided—the affidavit of the PIAA’s Executive Director and Open Records Officer, who would have the capacity to search for responsive records—the PIAA has demonstrated that it conducted a good faith search for responsive records. *See Hays v. Pa. State Police*, OOR Dkt. AP 2015-0193, 2015 PA O.O.R.D. LEXIS 294 (finding that an agency conducted a good faith search by “contact[ing] the Bureau most likely to possess responsive records, and ... explain[ing] why that Bureau is most likely to possess those records”); *Yakim v. Municipality of Monroeville*, OOR Dkt. AP 2017-1946, 2017 PA O.O.R.D. LEXIS 1685. Accordingly, the PIAA has met its burden of proof that it does not possess records responsive to Item 7 of the Request. *See Hodges*, 29 A.3d at 1192.

7. The PIAA has failed to demonstrate that records responsive to Item 8 do not exist

The PIAA asserts that records responsive to Item 8 of the Request, which seeks a “screenshot image showing ... the name of the software program/s in [the] PIAA’s possession, custody or control that can perform electronic redactions on PDF files and/or other electronic file types,” does not exist. In support, Dr. Lombard affirms that he “conducted a search of the PIAA records and did not locate any existing screen shot responsive to the [R]equest.”

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 concluded that:

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 record and assess their public nature under ... the RTKL.

185 A.3d 1161, 1171-72 (Pa. Commw. Ct. 2013) (internal citations omitted); *see also Rowles v. Rice Twp.*, OOR Dkt. AP 2014-0729, 2014 PA O.O.R.D. LEXIS 602 (citing *Judicial Watch, Inc. v. United States Dep’t of Homeland Sec.*, 857 F.Supp.2d 129, 138-39 (D.D.C. 2012)). Additionally, the Commonwealth Court has held that an open records officer’s inquiry of agency members may constitute a “good faith effort” to locate records, stating that open records officers have:

a duty to inquire of [agency personnel] as to whether he or she was in the possession, custody or control of any of the ... requested emails that could be deemed public and, if so, whether the emails were, in fact, public and subject to disclosure or exemption from access by [r]equest[e]r.

Mollick v. Twp. of Worcester, 32 A.3d 859, 875 (Pa. Commw. Ct. 2011); *see also In re Silberstein*, 11 A.3d 629, 634 (Pa. Commw. Ct. 2011) (holding that it is “the open-records officer’s duty and responsibility” to both send an inquiry to agency personnel concerning a request and to determine whether to deny access).

In this instance, although Dr. Lombardi affirms that he conducted a search for responsive records, Dr. Lombardi does not provide any additional information regarding the search he conducted, including what steps he took in conducting his search. Notably, Dr. Lombardi’s affidavit does not indicate if he inquired of other relevant personnel, such as the PIAA’s IT Department, to determine if there were any applicable software programs. Accordingly, the evidence submitted by the PIAA fails to demonstrate that the PIAA does not possess records responsive to Item 8 of the Request. Therefore, the PIAA has not proven that it conducted a good faith search in response to Item 8 of the Request. *See Mollick v. Worcester Twp.*, OOR Dkt. AP 2018-2153, 2019 PA O.O.R.D. LEXIS 90 (finding that “[w]ithout identifying the potentially responsive emails possessed by the [t]ownship’s Supervisors and providing them to [the township’s Open Records Officer], the [t]ownship is unable to prove that it conducted a good faith search...”).

The OOR is mindful that an agency cannot produce records that do not exist within its “possession, custody or control” and, accordingly, is not ordering the creation of any records. Absent the PIAA providing a sufficient evidentiary basis that no responsive records exist, the OOR will order disclosure of responsive public records. *See Sindaco v. City of Pittston*, OOR Dkt. AP 2010-0778, 2010 PA O.O.R.D. LEXIS 755; *Schell v. Delaware County*, OOR Dkt. AP 2012-0598, 2012 PA O.O.R.D. LEXIS 641.

8. The OOR declines to make a finding of bad faith

The Requester asks that the OOR make a finding of bad faith. Specifically, the Requester maintains that “[o]ther than writing *something* to me in a timely manner I cannot find any aspect of the RTKL that has been complied with.” (emphasis in original). While the OOR may make findings of bad faith, only the courts have the authority to impose sanctions on agencies. *See generally* 65 P.S. § 67.1304(a) (noting that a court “may award reasonable attorney fees and costs of litigation ... if the court finds ... the agency receiving the ... request willfully or with wanton disregard deprived the requester of access to a public record ... or otherwise acted in bad faith...”); 65 P.S. § 67.1305(a) (“A court may impose a civil penalty of not more than \$1,500 if an agency denied access to a public record in bad faith”).

In this instance, the PIAA properly extended its time to respond to the Request by thirty days, 65 P.S. § 67.902(b)(2), and, ultimately, issued its response in a timely manner. Moreover, while the OOR disagrees with the PIAA’s legal arguments regarding whether it is subject to the RTKL, the OOR declines to make a finding of bad faith on that basis. Likewise, the PIAA’s assertion that certain records do not exist, or that responding to portions of the Request “would significantly impact on the operations of [the] PIAA” does not rise to the level of bad faith.

CONCLUSION

For the foregoing reasons, the Requester’s appeal is **granted in part and denied in part**, and the PIAA is required to provide responsive records, as directed above, within thirty days. 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 as per Section 1303 of the RTKL. 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.⁵ This Final Determination shall be placed on the OOR website at: <https://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: January 13, 2021

/s/ Magdalene C. Zeppos-Brown

MAGDALENE C. ZEPPOS-BROWN, ESQ.
APPEALS OFFICER

Sent to: Simon Campbell (via email only);
Alan Boynton, Esq. (via email only); and
Dr. Robert Lombardi, AORO (via email only)

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

finding of bad faith against PIAA which would support an award of statutory penalties and attorneys' fees against PIAA?

Relief Sought

Campbell seeks an order reversing the Office of Open Records Final Determination of January 13, 2021, as to its findings regarding Item 7 of his November 2, 2020 request and its failure to make a finding of bad faith by PIAA.

He also seeks the imposition of a civil penalty upon PIAA pursuant to Section 1305(a) and an award of attorneys' fees and costs pursuant to Section 1304(a)(1) of the RTKL.

NAUMAN, SMITH, SHISSLER & HALL, LLP

By: /s/Craig J. Staudenmaier

Craig J. Staudenmaier, Esquire
Supreme Court ID# 34996
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Supreme Court ID# 93967
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Supreme Court ID #329351

200 North Third Street, 18th Floor
Harrisburg, PA 17101
Telephone: (717) 236-3010 ext. 122
Counsel for Simon Campbell, Petitioner

Date: February 22, 2021

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by: Craig J. Staudenmaier, Esquire

Signature: /s/Craig J. Staudenmaier

Name: Craig J. Staudenmaier, Esquire

Attorney No. (if applicable): 34996

CERTIFICATE OF SERVICE

I, Karen L. Gagne, hereby certify that I am this day, in conformance with Pa.R.A.P. 121, serving the foregoing *“Docketing Statement and Statement of Issues”* upon the persons listed below as follows:

Via First Class Mail

Alan R. Boynton, Jr., Esquire
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Right to Know Law Appeals Officer
Pennsylvania Office of Open Records
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Harrisburg, PA 17101-2234

/s/Karen L. Gagne
Karen L. Gagne

Date: February 22, 2021

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Simon Campbell, : 25 CD 2021
Petitioner :
 :
 v. :
 :
 Pennsylvania Interscholastic
Athletic Association (Office
of Open Records),
Respondent

PROOF OF SERVICE

I hereby certify that this 22nd day of February, 2021, I have served the attached document(s) to the persons on the date(s) and in the manner(s) stated below, which service satisfies the requirements of Pa.R.A.P. 121:

Service

Served: Alan R. Boynton Jr.
Service Method: eService
Email: aboynton@mcneeslaw.com
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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

/s/ Craig James Staudenmaier

(Signature of Person Serving)

Person Serving: Staudenmaier, Craig James
Attorney Registration No: 034996
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