



**FINAL DETERMINATION**

**IN THE MATTER OF**

**JOHN YAKIM,  
Requester**

**v.**

**PITCAIRN BOROUGH,  
Respondent**

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**Docket No: AP 2021-0269**

On January 29, 2021, John Yakim (“Requester”) submitted a request (“Request”) to Pitcairn Borough (“Borough”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking “any text message or email received by the Pitcairn manager from any Gateway official including directors, superintendent or food service personnel regarding the Grab and BO, free lunch program....” On February 2, 2021, following a thirty-day extension during which to respond, 65 P.S. § 67.902(b), the Borough denied the Request, claiming that it does not possess any responsive records.

On February 8, 2021, the Requester filed an appeal with the Office of Open Records (“OOR”), challenging the denial and stating grounds for disclosure. In his appeal he noted that the Borough invoked a thirty-day extension but then determined the records do not exist. The OOR invited both parties to supplement the record and directed the Borough to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On February 17, 2021, the Borough submitted a position statement authored by Matthew Kalina, Esq., and the statement made under the penalty of perjury of Annette Dietz, the Borough's Open Records Officer, who attests that a search was conducted and that no responsive records exist in the Borough's possession.

On February 17, 2021, the Requester objected to the position statement, arguing that Attorney Kalina's position statement was not made under penalty of perjury. Attorney Kalina offered to make his statement under penalty of perjury; however, the OOR finds that is not necessary here.

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" as used in Section 901 of the RTKL, in *Uniontown Newspapers, Inc. v. Pa. Dep't of Corr.*, the Commonwealth Court recently 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 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); *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, 138-139 (D.D.C. 2012)) (citations omitted).

Ms. Dietz affirms that she examined her cell phone and emails for responsive records. Ms. Dietz also serves at the Borough Manager.<sup>1</sup>

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<sup>1</sup>See [http://pitcairnborough.us/index.php?option=com\\_content&task=view&id=17&Itemid=48](http://pitcairnborough.us/index.php?option=com_content&task=view&id=17&Itemid=48).

Under the RTKL, a sworn affidavit or 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 Borough has acted in bad faith or that the records exist, “the averments in [the statement] 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)). Based on the evidence provided, the Borough has met its burden of proof that it does not possess the records sought in the Request. *See Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

As to the issue of the Borough invoking a thirty-day extension, the Borough is entitled to do so when it determines, among other things, that a legal review is needed. *See* 65 P.S. § 67.902. Here, the OOR notes that the Borough invoked the extension on February 2, 2021, within the five business days to respond, noting that it would probably not take the full thirty days. Later that same day, the Borough issued its final response. Therefore, whether the extension was properly invoked is a moot issue because the Borough responded within five business days as required under 65 P.S. § 67.901.

For the foregoing reasons, the Requester’s appeal is **denied**, and the Borough 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 or petition for review to the Allegheny County Court of Common Pleas. *See* 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 according to court rules 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.<sup>2</sup> This Final Determination shall be placed on the website at:  
<http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: March 1, 2021**

*/s/ Erin Burlew*

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ERIN BURLEW, ESQ.  
APPEALS OFFICER

Sent to: John Yakim (via email only);  
Matthew Kalina, Esq. (via email only);  
Annette Dietz (via email only)

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