

FINAL DETERMINATION

IN THE MATTER OF :

ZMANUEL LVDDAND

EMANUEL LYBRAND,
Requester

:

v. : Docket No: AP 2021-0990

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PENNSYLVANIA DEPARTMENT OF :

CORRECTIONS, : Respondent :

On March 31, 2021, Emanuel Lybrand ("Requester") submitted a request ("Request") to the Pennsylvania Department of Corrections ("Department") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq.*, seeking "clear photocop[ies] of diagnostic classification...." On May 4, 2021, following a thirty-day extension during which to respond, 65 P.S. § 67.902(b), the Department denied the Request, asserting that disclosure of the requested records would pose a threat to personal or public safety, 65 P.S. §§ 67.708(b)(1)-(2), and that the records are criminal and noncriminal investigative records, 65 P.S. §§ 67.708(b)(16)-(17), and contain personal medical information, 65 P.S. § 67.708(b)(5).

On May 20, 2021, the Requester filed an appeal with the Office of Open Records ("OOR"), challenging the denial and stating grounds for disclosure. He asserts that he was previously provided with the requested records in 2018. The OOR invited both parties to supplement the record and directed the Department to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On June 1, 2021, the Department submitted the statement made under the penalty of perjury of Andrew Filksoky, the Department's Open Records Officer, who attests that a search was conducted and that no responsive records exist in the Department's possession.

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).

Mr. Filkosky affirms that while the Department originally denied the Request under the security exemptions, upon receipt of the appeal, it became clear that he was seeking photographs that might accompany his diagnostic classification in 1976 and 1978. Mr. Filkosky contacted SCI-Smithfield because if the photographs existed, they would be located in his inmate file at SCI-Smithfield. No such photographs were located.

Further, review of the 2018 request and response provided by the Requester shows that the Requester sought an inmate photo, not photos that accompanied any diagnostic classification.

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 Department 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 Envtl. 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

Department 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).

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 or petition for

review to the Commonwealth Court. See 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 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. This Final Determination shall be placed on the website at: http://openrecords.pa.gov.

FINAL DETERMINATION ISSUED AND MAILED: June 10, 2021

/s/ Erin Burlew

ERIN BURLEW, ESQ.

APPEALS OFFICER

Sent to:

Emanuel Lybrand, AF5586 (via US mail only);

Ralph M. Salvia, Esq. (via email only);

Andrew Filkosky (via email only)

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¹ Padgett v. Pa. State Police, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

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