



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

:

**DAN SCHWARTZ AND TYPE
INVESTIGATIONS,
Requester**

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Docket No: AP 2021-0916

v.

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**PENNSYLVANIA STATE POLICE,
Respondent**

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INTRODUCTION

Dan Schwartz and Type Investigations (collectively “Requester”) submitted a request (“Request”) to the Pennsylvania State Police (“PSP”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking correspondence and text messages. The PSP partially denied the Request, redacting some records, arguing they are criminal investigative records and subject to the Criminal History Record Information Act (“CHRIA”), 18 Pa.C.S. §§ 9101-9183. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted in part** and **denied in part**, and the PSP is required to take additional action as directed.

FACTUAL BACKGROUND

On March 24, 2021, the Request was filed, stating:

PART ONE:

In October, I submitted a request for correspondences, which met a certain criteria, that went to and came from Lt. James Hennigan of the state police. The records request number is 2020-1105. I was provided two batches of emails, one of which was seemingly indiscriminately redacted, and it is my opinion that the redactions are unlawful. This batch of PDFs was given the name "email N Redacted RELEASEABLE.pdf" and it is 263 pages long. Many of the records redacted are inherently public, such as waiver requests and non-exempt emails between public officials. Others have already been released to the public. I am now asking for these records to be release to me without redactions.

In my request, I had also asked for a Vaughn Index, which seems to have been ignored. Please provide me justification for the redactions in the documents "email N_Redacted RELEASEABLE.pdf." For your convenience, I have attached the document to this email.

I had also asked for any and all documents associated with the correspondences, namely email attachments, and this request seems to have been ignored. Please provide me any and all associated attachments.

PART TWO:

Please provide any and all text messages and voice messages received by the work-issued cell phones of Lt. James Hennigan as well as Lt. Stephen J. U'Selis III about the Mariner East pipeline or the activities of state residents as they may related to the pipeline or its construction. Please limit your search to the timeframe of February 2017 to the date this request is completed. These search terms may help: "Sunoco," "Energy Transfer," "Mariner," "suspicious activity," "protesters," "pipeline," "construction." For text messages, please also include any and all attachments.

Finally, I am requesting emails between Lt. U'Selis and Sunoco, Energy Transfer, and associates of those groups, such as Tiger Swan, Zorion, or Hillard Heintze, as well as emails that concern the Mariner East Pipeline. To this end, please conduct a keyword search of Mr. U'Selis email account for the words or phrases "Sunoco" and "Energy Transfer" and "Mariner" and within the timeframe of February 2017 to the date this request is completed. Please be sure to also provide any and all associated records, such as email attachments, as well as a Vaughn Index justify any redactions your office may deem necessary.

On April 30, 2021, following a thirty-day extension to respond, 65 P.S. § 67.902(b), the PSP partially denied the Request, arguing that for Part 1, the PSP would rely on the final response sent to the prior request date October 1, 2020. In response to Part 2, the PSP argued that no text messages exist and that certain emails were redacted of personal identification information, 65 P.S. § 67.708(b)(6) and some records are criminal investigative records, 65 P.S. § 67.708(b)(16) and subject to CHRIA.

On May 7, 2021, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure.¹ The OOR invited both parties to supplement the record and directed the PSP to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On May 14, 2021, the Requester provided a second set of records, the final response of the PSP and the final response of the PSP to records request 2020-1073, which is unrelated to the Request at issue.

On May 28, 2021, the PSP submitted a position statement seeking dismissal of the appeal as premature and reiterating its grounds for denial. The PSP claims that Part 1 of the Request was identical to a prior request where the PSP provided redacted records and required no supplementation so the request as to Part 1 was denied. The PSP also asserted that no records exist as to Part 2 of the Request and noted that a verification to this assertion accompanied the final response. Despite the OOR seeking an affidavit in support of the PSP's submission, as of the date of this final determination, no affidavit has been provided.

¹ By OOR Order issued May 10, 2021, the Requester was required to file a complete copy of the agency's final response within seven days of the date of the Order. On May 14, 2021 the OOR received a copy of the final response from the Requester.

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” and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 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.* Here, neither party requested a hearing.

The PSP is a Commonwealth agency 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. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

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)(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)). 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 appeal is not premature

The PSP first asserts that the appeal is premature claiming that the Request was received on May 7, 2021 and a thirty-day extension was invoked on May 31, 2021. 65 P.S. § 67.902(b). The PSP then asserts that the final response was mailed on April 30, 2021. The PSP appears to have conflated the date of appeal with the Request date and further, acknowledges within its submission that the final response was mailed April 30, 2021. The appeal was filed on May 7, 2021 and is not premature.

2. The PSP has not met its burden of proof that records do not exist, are criminal investigative records or are protected by CHRIA

The PSP has not provided sufficient evidence in support of its assertions. Despite the OOR’s attempts to develop the record, the PSP has not provided an affidavit. Courts interpreting the RTKL have held that testimonial affidavits may serve as sufficient evidentiary support of factual statements before the OOR. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. OOR*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). On the other hand, unsworn statements or statements of counsel, not supported by affidavit testimony, have

been held not to be competent evidence under the RTKL. *See Housing Auth. of the City of Pittsburgh v. Van Osdol*, No. 795 C.D. 2011, 2012 Pa. Commw. LEXIS 87 (Pa. Commw. Ct. 2012); *City of Philadelphia v. Juzang*, July Term 2010, No. 2048 (Phila. Com. Pl. June 28, 2011). As a result, the OOR is obligated to require that all factual statements be supported by a testimonial affidavit.

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, the Commonwealth Court outlined the elements of a good faith search in *Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr.*, 185 A.3d 1161 (Pa. Commw. Ct. 2018). The Court noted that an Agency Open Records Officer (AORO) has a duty to:

1. Advise all custodians of potentially responsive records about the request;
2. Obtain all potentially responsive records from those in possession of the potentially responsive records;
3. Contact agents within its control, including third party contractors; and
4. Review the records and assess their public nature.

Id. In sum, an agency must show that it has conducted a search reasonably calculated to uncover all relevant documents; an agency may do so by providing relatively detailed and non-conclusory affidavits submitted in good faith by officials or employees with knowledge of the records and the search for the records. *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 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). Here, the OOR does not have sufficient evidentiary support for any assertion. While the final response does include a verification, the

verification does not sufficiently describe the search for records such that the OOR can determine that no text messages or voicemails exist.

The OOR is mindful that an agency “shall not be required to create a record which does not currently exist...” 65 P.S. § 67.705. However, agencies have the burden of proving that a record does not exist, *Hodges*, 29 A.3d at 1192, and the PSP has not met its burden of proof with respect to Part 2 of the Request. The PSP is therefore directed to conduct a good faith search for records as set forth in 65 P.S. § 67.901 and provide any records discovered as a result of that search. If no records are located as a result of this search, the PSP shall inform the Requester of such in writing.

The verification also does not provide factual evidence regarding how the records for Part 1 are exempt and an agency cannot rely on conclusory statements to sustain its 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 justify the exemption of public records”); *see also Office of the District Attorney of Phila. v. Bagwell*, 155 A.3d 1119, 1130 (Pa. Commw. Ct. 2017) (“Relevant and credible testimonial affidavits may provide sufficient evidence in support of a claimed exemption; however, conclusory affidavits, standing alone, will not satisfy the burden of proof an agency must sustain to show that a requester may be denied access to records under the RTKL”) (citations omitted).

In his appeal, the Requester provided records showing extensive redactions, “email N_Redacted RELEASABLE,” and later supplemented the record by providing a second set of records, titled “email Y_Redacted RELEASABLE” showing redactions of email addresses. Section 708(b)(6)(i)(A) of the RTKL exempts personal identification information, including “personal financial information, home, cellular or personal telephone numbers, [and] personal e-

mail addresses....” 65 P.S. § 67.708(b)(6)(i)(A). As personal identification information is facially exempt from disclosure, the PSP has appropriately redacted the email addresses. *See, e.g., Vinovskis v. Allentown City*, OOR Dkt. AP 2020-1391, 2020 PA O.O.R.D. LEXIS 2790. The PSP has not met its burden as it relates to any other redactions or withheld records.

CONCLUSION

For the foregoing reasons, the appeal is **granted in part** and **denied in part**, and the PSP is required to provide unredacted emails responsive to Part 1 and text messages or voicemails responsive to Part 2 or provide the Requester with a statement describing the search and that no responsive records exist within thirty days. 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 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. 65 P.S. § 67.1303. 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.² This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: June 22, 2021

/s/ Erin Burlew

ERIN BURLEW, ESQ.
APPEALS OFFICER

Sent to: Dan Schwartz (via email only);
Kathryn Daczka, Esq. (via email only);
William Rozier (via email only)

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