



**FINAL DETERMINATION**

IN THE MATTER OF	:	
	:	
JOSE CHARRIEZ,	:	
Requester	:	
	:	
v.	:	Docket No: AP 2021-1236
	:	
MONTGOMERY COUNTY,	:	
Respondent	:	

On May 17, 2021, Jose Charriez (“Requester”), an inmate at F.P.C. – Schuylkill, submitted a request (“Request”) to Montgomery County (“County”), pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking:

[M]etro/CAD reports of a traffic[] stop that occurred on March 18, 2015 about the time of 4:30 p.m. -4:55 p.m. in the Pottstown Boro at the location of 665 Walnut St. Pottstown, PA 19464. The arresting officer is sergeant Michael Markovich.

On May 24, 2021, the County invoked a thirty-day extension to respond. *See* 65 P.S. § 67.902.

On June 14, 2021, the County denied the Request, arguing that responsive records do not exist.

On June 21, 2021, the Requester mailed an appeal to the Office of Open Records (“OOR”), challenging the denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the County to notify any third parties of their ability to participate in this appeal pursuant to 65 P.S. § 67.1101(c).

On July 6, 2021, the County submitted a position statement, along with the affidavit of its Solicitor and Open Records Officer, Joshua Stein, Esq. On July 16, 2021, the Requester submitted a position statement, arguing that responsive records must be archived somewhere. Because

Attorney Stein's affidavit reflected that the County invoked an extension on May 25, 2021, the OOR requested clarification. On July 16, 2021, the County noted that May 25, 2021 was a typographical error and that the extension had been timely invoked on May 24, 2021. In support, the County submitted the thirty-day extension notice that it had sent to the Requester, which was dated May 24, 2021.

In support of the County's argument that the requested records do not exist, Attorney Stein attests:

5. In my capacity as the Open Records Officer for [the] County, I am familiar with the records of the County.
6. In order to identify potentially responsive records, I conducted a thorough search and no responsive records were found.
7. My staff confirmed via e-mail with the County's Emergency Communications Division that our CAD records only exist from three (3) years to the present date; therefore, the County does not have the requested records from 2015.
8. On June 14, 2021, the County responded to [the Requester], explaining that the County CAD reports are only kept for three (3) years, and the County does not possess CAD records from 2015.
9. No responsive records for [the] Request exist in the County's possession, custody, or control

Under the RTKL, an affidavit may serve as sufficient evidentiary support for the nonexistence of records. *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 County has acted in bad faith or that the records do, in fact, exist, "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)).

The Requester argues that responsive records should be archived; however, the OOR does not assess whether an agency should have responsive records. *See, e.g., Voisine v. Cooperstown Borough*, OOR Dkt. AP 2018-1687, 2018 PA O.O.R.D. LEXIS 1302 (“While ... evidence may establish that a [record] *should* exist, the OOR lacks jurisdiction to rule on the propriety of the lack of such a [record] -- the OOR may only determine whether a responsive record does, in fact, exist.”) (internal citation omitted). Here, the County has produced evidence establishing that responsive records do not exist in its possession, custody, or control. Accordingly, the County has met its burden of proof, and the appeal is **denied**. *See Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

For the foregoing reasons, the County 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 Montgomery County Court of Common Pleas. 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>1</sup> This Final Determination shall be placed on the website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: July 22, 2021**

/s/ Blake Eilers  
Blake Eilers, Esq.  
Appeals Officer

Sent to: Jose Charriez, 75105-066 (via regular mail);  
Josh Stein, Esq. (via email);  
Lauren Raikowski (via email)

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