



FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
SHARIFF BUTLER,	:	
Requester	:	
	:	
v.	:	Docket No.: AP 2021-2089
	:	
PENNSYLVANIA DEPARTMENT OF	:	
CORRECTIONS,	:	
Respondent	:	

The Office of Open Records (“OOR”) received the above-captioned appeal under the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.* For the following reasons, the appeal is **denied in part** and **dismissed as moot in part**.

On September 15, 2021, Shariff Butler (“Requester”), an inmate at SCI-Huntingdon, submitted a request (“Request”) to the Pennsylvania Department of Corrections (“Department”) pursuant to the RTKL, seeking documents regarding the “job responsibilities and duties” for various Department positions.

On September 16, 2021, the Department purportedly granted the Request, notifying the Requester that the Department identified eighty-nine pages of responsive documents, that no other documents exist within the Department’s possession, custody or control, and that the fee to fulfill the Request is \$30.20. The Department also instructed the Requester that, alternatively, he may

inspect the records or designate someone to inspect the records on his behalf at the Department's Central Office location free of charge.

On September 29, 2021, the Requester filed an appeal with the OOR, stating grounds for disclosure.¹

On October 5, 2021, the Department submitted a position statement arguing that all responsive records were provided to the Requester on October 4, 2021, and that no other responsive records exist within its possession, custody or control.² In support of its position, the Department submits the attestation, made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities, of its Open Records Officer, Andrew Filkosky.

Mr. Filkosky attests that “on October 4, 2021, [the Department] received the \$30.20 duplication/mailing prepayment fee from [the Requester] to receive copies of the granted records [and] the eighty-nine...pages of responsive records were mailed to [the Requester] that same day.”

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, “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)). Here, the Requester did not submit evidence challenging the attestation submitted by the Department. Therefore, because the Department proved that it

¹ The appeal was received by the OOR on October 4, 2021; however, it was postmarked September 29, 2021. Therefore, pursuant to the “prisoner mailbox rule,” the appeal is considered filed as of September 29, 2021. *See Commonwealth v. Jones*, 700 A.2d 423, 426 (Pa. 1997).

² The Department confirmed it received the \$30.20 prepayment fee from the Requester on October 4, 2021.

provided the responsive records to the Requester on October 4, 2021, the appeal, insofar as it seeks those records, is **dismissed as moot**.

The Department also argues that no other responsive records exist within its possession, custody or control. 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. 2018) (internal citations omitted), *aff’d* 243 A.3d 19 (Pa. 2020); *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, in pertinent part, Mr. Filkosky attests:

9. ...[U]pon receipt of [the] Request I conducted a search on the following website run by the [the Pennsylvania Office of Administration]: <http://www.jobclass.state.pa.us/>. I provided the responsive job specifications I could locate on this website [to the Requester].
10. The good faith search I conducted as described above yielded eighty-nine... pages of responsive records; the job specifications I could not locate on this website were denied because there is no job title and[,] thus[,] [job] specifications do not exist.
11. Thus, I can state that after conducting a good faith search of the Department's records, the job specifications that were provided to [the Requester] represent all records responsive to...[the] [R]equest in the Department's possession, and no other responsive records exist within the Department's possession.

As previously stated, a sworn affidavit or statement made under penalty of perjury may serve as sufficient evidentiary support. *See Sherry*, 20 A.3d at 520-21; *Moore*, 992 A.2d at 909. In the absence of any competent evidence that the Borough acted in bad faith or that additional responsive records do, in fact, exist, “the averments in [the statement] should be accepted as true.” *McGowan*, 103 A.3d at 382-83. Accordingly, the Department proved that no additional records exist in its possession, custody or control, and this portion of the appeal is **denied**. *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

For the foregoing reasons, the appeal is **denied in part** and **dismissed as moot in part**, and the Department is not required to take any further action. This Final Determination is binding on the parties. Within thirty days of the mailing date of this Final Determination, either party may appeal to the Commonwealth Court. *See* 65 P.S. § 67.1301. 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.³ This Final Determination shall be placed on the OOR website at:
<http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: October 26, 2021

/s/ Erika Similo

APPEALS OFFICER
ERIKA SIMILO, ESQ.

Sent to: Shariff Butler, FM4733 (via regular mail only);
Tara J. Wikhian, Esq. (via email only)
Andrew Filkosky (via email only)

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