



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

IN THE MATTER OF

DARWIN LEUBA,  
Requester

v.

ALLEGHENY COUNTY,  
Respondent

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: Docket No: AP 2021-2326

### INTRODUCTION

Darwin Leuba (“Requester”) submitted a request (“Request”) to Allegheny County (“County”) pursuant to the Right-to-Know Law, 65 P.S. §§ 67.101 *et seq.*, seeking “Joseph Garcia’s Resume.” The County denied the Request, arguing that no responsive records exist. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted**, and the County is required to take additional action as directed.

### FACTUAL BACKGROUND

On September 3, 2021, the Request was filed, seeking “Joseph Garcia’s Resume.” On October 12, 2021, after extending its time to respond by thirty days, *see* 65 P.S. § 67.902(b)(2), the County denied the Request, arguing that the County does not have any responsive records.

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

On November 19, 2021, the County submitted a Statement of Information and Legal Argument, arguing that the County does not possess records responsive to the Request. In support of its argument, the County submits a sworn affidavit from Amelia J. Beadnell, the Executive Assistant to Warden Harper of the Allegheny County Jail (“ACJ”).

On the same day, the Requester submitted a Statement of Information and Legal Argument in response to the County’s submission, arguing that the County has failed to meet its burden proving that no responsive record exists. The Requester also asserts that the County has a history of bad faith denials and asks that the OOR hold the County accountable. In support of his argument, the Requester submits meeting minutes of the ACJ Oversight Board from a meeting held on September 20, 2021, at which Joseph Garcia’s resume was discussed. Additionally, the Requester provides an article explaining an instance where the Commonwealth Court ordered an agency to pay legal fees for frivolous conduct and acting in bad faith.

### **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 County is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in the possession of a local 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)). “The 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 County has not proven that no responsive records exist within its possession, custody or control**

The County asserts that no records responsive to the Request exist. 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 and 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, 575 (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).

In support of its assertions, the County submits the affidavit of Ms. Beadnell, which reads in pertinent part:

1. My name is Amelia J. Beadnell. I am the Executive Assistant to Warden Harper of the [ACJ]. I was hired on February 2, 2014. As the Executive Assistant to the Warden, I am responsible for assisting the Warden in all daily administrative duties.
2. One of the [R]equests was given the internal number 7538. That Request sought “Joseph Garcia’s resume.”
3. The ACJ does not have a copy of Joseph Garcia’s resume. Therefore, I informed the County [] that no record responsive to [R]equest #7538 exists.

Under the RTKL, a sworn affidavit 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). However, 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”). Here, Ms. Beadnell’s affidavit does not sufficiently describe the search performed to demonstrate that no records responsive to the Request exist. The affidavit does not explain what locations were searched and conversely, why others were not. Consequently, it is unclear if the records exist in another location, file or database.

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 because the affidavit does not describe the search performed with any detail, the County has not met its burden of proof. The County 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 County shall inform the Requester of such in writing.

**2. The record does not support a finding that the that the County has acted in bad faith**

The Requester provided argument that the County has historically acted in bad faith and asks that the OOR hold the County accountable. Section 1305(a) of the RTKL states that “[a]

court may impose a civil penalty of not more than \$1,500 if an agency denied access to a public record in bad faith.” 65 P.S. § 67.1305(a); *Office of the Dist. Atty. Of Phila. V. Bagwell*, 155 A.3d 1119, 1140-41 (Pa. Commw. Ct. 2017). “In the RTKL context, “bad faith” does not require a showing of fraud or corruption. The lack of good faith compliance with the RTKL and an abnegation of mandatory duties under its provisions rise to the level of bad faith.” *Uniontown Newspapers, Inc.*, 185 A.3d at 1170. A requester bears the burden of proving an agency committed bad faith.

Based on a review of the records and the evidence provided on appeal, both by the Requester and the County, there is no evidence that the County acted in bad faith. Therefore, the record does not support a finding that the County acted in bad faith.

### CONCLUSION

For the foregoing reasons, the appeal is **granted**, and the County is required to perform a good faith search and provide the Requester with a statement describing the search and that no responsive records exist or provide all responsive records discovered as part of that search 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 or petition for review to the Allegheny 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. 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.<sup>1</sup> This Final Determination shall be placed on the website at: <http://openrecords.pa.gov>.

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

**FINAL DETERMINATION ISSUED AND MAILED: November 23, 2021**

*/s/ Kerianne Baker*

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APPEALS OFFICER  
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