

2. All communications which gave rise to the Department's Notice of Determination Non-Fault Overpayment dated February 9, 2022 attached to this Request.

3. All complaints, challenges, and/or appeals submitted to the Department which initiated the Department's review or investigation of [the Requester's] unemployment compensation claim, including those originating from Carr & Duff.

The Department did not respond, and on February 25, 2022, the Request was deemed denied. 65 P.S. § 67.901. On March 17, 2022, the Requester appealed to the OOR, stating grounds for disclosure. The OOR invited the parties to supplement the record and directed the Department to notify third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

On March 28, 2022, the Requester submitted a position statement, arguing that the records are not subject to any exemption and are not exempt unemployment records because they are records of the Requester's unemployment determinations.

On April 13, 2022, in response to an inquiry by the OOR, the Department submitted a position statement arguing that the appeal is premature because it had not received the Request or, in the alternative, that the records are confidential pursuant to the Pennsylvania Unemployment Compensation Law, 34 Pa. Code § 61.25(a)(2)(i) ("UCL"), as well as the social services exemption of the RTKL. 65 P.S. § 67.708(b)(28). In support of this argument, the Department submitted the verifications of Wendy Willard ("Ms. Willard"), the Department's Open Records Officer, who attests that the Department has no record of having received the Request, and of David Fuhrman ("Mr. Fuhrman"), the Department's Disclosure Officer, who attests that all responsive records relate to unemployment matters and are exempt.

On April 15, 2022, the Requester submitted a reply, arguing that the Request had been sent to the proper account, that the Department's verifications otherwise were conclusory, and that the UCL did not apply because these are the Requester's own records.

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 Department 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 to be 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 to respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemption(s). *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). 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)).

1. The Department has failed to demonstrate that it did not receive the Request

On appeal, the Department argues that it did not receive the Request, and therefore the instant appeal is premature. In support of this argument, the Department submitted the verification of Ms. Willard, who attests that:

2. As the AORO, I am familiar with the operations and records of the Agency Open Records Office (Office) of the Department.

3. The Office follows established procedures when processing RTKL requests. The procedures followed by this Office are as follows:

a. The Office receives a RTKL request, typically by email to the RTKL resource account at RA-LI-RightToKnow@pa.gov or by fax, regular mail, or delivery in person to the Office in room 101 of the Department.

b. Upon receipt, the request is date stamped with the date it was received and assigned a tracking number. It is logged into the RTKL Request Log maintained by the Office. The request is also signed and dated by Office staff and the date [the] Department’s response to the Requester is due is noted on the request.

c. The request is then scanned into the computer and emailed to the Bureau(s) that will likely have the records requested. This email provides the Bureaus with the deadline for response.

d. Upon receipt of either the records or the Bureau’s determination that there are no [responsive] records or that the records are exempt from disclosure, this Office prepares a response.

e. The Response is sent to the requester via email or regular mail.

4. I have reviewed the records of the [RTKL] Office and determined that the Request at issue in this appeal was never received by this Office.

Under the RTKL, a statement made under the penalty of perjury is competent evidence to sustain an agency's burden of proof. *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 competent evidence that the Department acted in bad faith, “the averments in [the attestation] 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)). However, conclusory statements are not sufficient for an agency to meet its burden of proof. *See Office of the District Attorney of Phila. v. Bagwell*, 155 A.3d 1119, 1130 (“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).

Here, the Requester submitted a copy of the Request and the transmittal email, demonstrating that it was sent on February 17, 2022 at 1:30 PM to the ra-li-righttoknow@pa.gov address. This is sufficient to presume that the Department received the email, which the Department seeks to rebut with Ms. Willard’s verification. However, the verification only lists the usual chain of events which occur when a RTKL request is received, along with a one-sentence statement that the affiant “reviewed the records of the [RTKL Office] and determined that the Request at issue in this appeal was never received by this Office.” The Department does not provide a description of the search it undertook to locate the Request, nor does it address whether

the Request could have been received at the correct account and otherwise misplaced.¹ Therefore, the Department's evidence only demonstrates that the Department did not properly process the Request, which was addressed to the proper account and identified as a RTKL Request, and is insufficient for the OOR to find that the Department never actually received the Request. Because the Department has not submitted sufficient evidence to show that it never received the Request, the OOR will not dismiss the appeal as prematurely filed.

2. The responsive records are exempt under the Unemployment Compensation Law

The Department denied access to the records based upon the UCL, 43 P.S. § 766(b), and its implementing regulations. Section 766 of the UCL states that “[i]nformation ... shall not be made public or be open to public inspection, other than to the members of the board, the officers and employees of the [D]epartment and other public employees in the performance of their duties....” 43 P.S. § 766(b). Furthermore, the Department's regulations regarding the confidentiality and disclosure of unemployment compensation records provide that “[u]nemployment compensation information is confidential and may be disclosed only as permitted in this subsection.” 34 Pa. Code § 61.25.

In support of its argument, the Department provides the attestation of Mr. Fuhrman, who attests, in relevant part, as follows:

1. In my capacity as UC Disclosure Officer, I am familiar with the records maintained by the Department related to Unemployment Compensation matters.
2. In my capacity as UC Disclosure Officer, I am familiar with the subject matter of the present [R]equest.[]
3. These records requested by [the Requester] relate to unemployment compensation and are confidential under the [UCL] and its implementing regulations.

¹ Notably, the Department stated on April 8, 2022, that it had received the OOR's Notice of Appeal at that address and failed to forward it internally; likewise, the Department apparently did not notice the Requester's March 28, 2022 email, which was also sent to the RTKL account.

4. Section 766 of the UCL provides that unemployment information is confidential and “shall not be made public or be open to public inspection” 43 P.S. § 766(b). The Department’s regulations regarding the confidentiality and disclosure of unemployment compensation records also provide that unemployment compensation information is confidential. See, 34 Pa. Code § 61.25 and 20 CRF § 603.4(c).

5. In addition, Section 708(b)(28) of the RTKL exempts from disclosure the names and other information pertaining to UC claimants. It also makes confidential any information related to “an individual’s application to receive social services . . .” The RTKL defines “social services” to include UC benefits. 65 P.S. § 67.102.

6. Therefore, as discussed above, any records responsive to [the R]equest in the possession, custody or control of the Department would be confidential and not subject to disclosure under the RTKL.

As noted above, a statement made under the penalty of perjury is competent evidence to sustain an agency’s burden of proof under the RTKL. *See Sherry*, 20 A.3d at 520-21; *Moore*, 992 A.2d at 909.

Here, it is plain from the text of the Request that the Requester is seeking only communications which directly address an individual’s unemployment compensation.² *See Pa. Game Comm’n v. Fennell*, 149 A.3d 101 (Pa. Commw. Ct. 2016) (holding that the OOR must consider uncontradicted statements in the appeal filing when construing exemptions); *see also Office of the Governor v. Davis*, 122 A.3d 1185, 1192 (Pa. Commw. Ct. 2015) (*en banc*) (holding that an affidavit may be unnecessary when an exemption is clear from the face of the record). Unemployment compensation records are confidential under 43 P.S. § 766(b) and its implementing regulations. *See, e.g., Owusu Ansah v. Pa. Dep’t of Labor and Indus.*, OOR Dkt. AP 2021-1120, 2021 PA O.O.R.D. LEXIS 1158; *Booker and Leslie’s Personal Care Services, LLC v. Pa. Dep’t of Labor and Indus.*, OOR Dkt. AP 2021-0436, 2021 PA O.O.R.D. LEXIS 532. While Section

² Additionally, the Requester’s position statement and reply do not argue that the records are not unemployment compensation records, but instead, focus on the fact that the statute allows the Department to disclose such records to the actual applicant for unemployment benefits. This argument is addressed below.

61.25(5)(ii) permits disclosure to a claimant under paragraph (3)(ii), specifically, that information may be disclosed “to the extent necessary for the proper determination of the claimant’s application for benefits and claims for compensation[,]” 34 Pa. Code § 61.25(3)(ii), such a disclosure is within the discretion of the Department. Therefore, based upon the evidence provided, the Department has demonstrated that the requested records are confidential under Section 766(b) of the UCL and its implementing regulations, and the Department has not exercised its discretion to release the information to the Requester at this time. *See Moncada v. Pa. Dep’t of Labor and Indus.*, OOR Dkt. AP 2016-0739, 2016 PA O.O.R.D. LEXIS 892 (finding that unemployment compensation records were confidential under Section 766 of the UCL even where the requester claimed he was the victim of identity theft).

Notably, the identity of a requester is not relevant to the determination of the public status of a record, and the RTKL must be construed without regard to the identity of the requester. *Advancement Project v. Pa. Dep’t of Transp.*, 60 A.3d 891 (Pa. Commw. Ct. 2013); *see also DiMartino v. Pa. State Police*, No. 340 C.D. 2011, 2011 Pa. Commw. Unpub. LEXIS 787 at *18-19 (Pa. Commw. Ct. 2011). Therefore, because the Department has demonstrated that the responsive records are not accessible to all members of the public, the OOR is unable to order their release as public records. Notwithstanding the above, nothing in this Final Determination prohibits the Requester from obtaining the information in accordance with the applicable provisions of the UCL and its implementing regulations.

CONCLUSION

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 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 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: April 22, 2022

/s/ Jordan C. Davis

Jordan C. Davis, Esq.
Appeals Officer

Sent to: Raymond King (via email only);
Andrew Estepani, Esq. (via email only);
Jason Miller, Esq. (via email only)

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