

2. A document that states and or identifies the dates, times, and locations where seized vehicles are typically sold at auction and will be sold at auction between today and 12/31/2022;
3. A document that states and or identifies the dates, times, and locations where seized items are typically sold at auction and will be sold at auction between today and 12/31/2022;
4. A document that states, explains, and or identifies the rules, policy, procedure, terms & conditions that currently governs the sale of seized vehicles and seized items;
5. A document that lists and[/]or identifies each seized vehicle sold at auction between 01/01/2021 and 06/06/2021, to include the year, make, model, mileage, and final sale price of each seized vehicle sold;
6. A document that lists and[/]or identifies each seized item sold at auction between 01/01/2021 and 06/06/2021, to include the year, make, model, mileage, and final sale price of each seized vehicle sold[.]

On June 14, 2022, the Office denied the Request, arguing that the Office does not possess records responsive to the Request. The Office further explained that the Pennsylvania Controlled Substances Forfeiture Act (“Act”), 42 Pa.C.S. § 5801 *et seq.*, governs the procedure for the sale of seized assets and are the procedures the Office follows when selling forfeited property. In addition, the Office explained that the Act requires the Office to submit an annual audit to the Pennsylvania Office of Attorney General (“OAG”), which is confidential under the Act, and the OAG publicly releases non-confidential information on its website.¹

On June 28, 2022, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure.² The Requester argues that the Office has a duty to obtain the responsive records from the OAG’s website and provide them to the Requester. The Requester also argues

¹ The Office also provided a link that may be used to access the OAG’s annual asset forfeiture reports. *See* <https://www.attorneygeneral.gov/asset-forfeitures/> (last accessed July 18, 2022).

² The appeal was received by the OOR on June 30, 2022; however, it was postmarked June 28, 2022. Therefore, pursuant to the “prisoner mailbox rule,” the appeal is considered filed as of June 28, 2022. *See Commonwealth v. Jones*, 700 A.2d 423, 426 (Pa. 1997).

that, while the Act provides that the annual audit shall be submitted to the OAG, and that it shall not be made public, 42 Pa.C.S. § 5803(j), he did not request the audit report and the confidentiality does not apply to the information in the audit report. The Requester further argues that he does not seek records concerning forfeited property used in ongoing law enforcement activities; rather, he seeks records of vehicle and other property that have been sold at auction and the Act does not prohibit the Office from maintaining such records. The OOR invited both parties to supplement the record and directed the Office to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On July 11, 2022, the Office submitted a position statement reiterating its grounds for denial. In support of its position, the Office submitted the attestations made under penalty of perjury from Assistant District Attorney (“ADA”) Kevin McCarthy, the Office’s Open Records Officer and Angela Kelley, the Supervisor for the Office’s Forfeiture Unit.

The Requester did not submit any additional information on appeal.

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 Office 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)). 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).

ADA McCarthy attests that, upon receipt of the Request, Ms. Kelley was consulted regarding responsive records, as she is the Office's Supervisor for Forfeiture. ADA McCarthy states that he was informed that the Office does not maintain records that "match" the Request. ADA McCarthy further attests that the "Office follows the procedure for sale of seized assets as set forth in the Act, 42 Pa.C.S.A. § 5801, *et seq.*" Ms. Kelley's attestation corroborates that the Office follows the procedures set forth in the Act and that the Office "has no other written policies." Ms. Kelley further attests that the "Office submits an annual audit to the [OAG], as directed by statute, and that the [R]equester could access that information directly through the [OAG] website: <https://www.attorneygeneral.gov/asset-forfeitures>" and "[b]y statute, [the] Office's audit report is not public and remains confidential" ... pursuant to 42 Pa.C.S.A. § 5803(j). Under the RTKL, an affidavit or statement made under penalty of perjury may serve as sufficient evidentiary support. *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 Office has acted in bad faith, "the averments in the attestations 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 Office argues that it "does not maintain records that matched the [R]equest" and that the annual audit report it is mandated to provide to the OAG on an annual basis is not a publicly accessible document in accordance with the Act. The Act states, in relevant part:

(j) *Annual audit of forfeited property.* — Every county in this Commonwealth shall provide, through the controller, board of auditors or other appropriate auditor and the district attorney, an annual audit of all forfeited property and proceeds obtained under this chapter. The audit shall not be made public but shall be submitted to the Office of Attorney General. By September 30 of each year, the county shall report all forfeited property and proceeds obtained under this chapter

and the disposition of the property during the preceding year to the Attorney General. The Attorney General and each district attorney shall maintain and create appropriate records to account for the property forfeited in a fiscal year and the use made of the property forfeited. Each audit shall include:

- (1) Date property was seized.
- (2) The type of property seized.
- (3) Where property was seized.
- (4) The approximate value.
- (5) The alleged criminal behavior with which the property is associated.
- (6) The disposition or use of property forfeited.
- (7) Whether the forfeiture was related to a criminal case and the outcome of the criminal case.
- (8) Date of forfeiture decision.

(k) *Annual report and confidential information.* — The Attorney General shall annually submit a report to the Appropriations Committee and Judiciary Committee of the Senate and to the Appropriations Committee and Judiciary Committee of the House of Representatives specifying the forfeited property or proceeds of the forfeited property obtained under this chapter during the fiscal year beginning July 1 and the following shall apply:

- (1) The report shall include all information required under subsection (j) subject to the limitations provided under paragraph (2).
- (2) The Attorney General shall adopt procedures and guidelines, which shall be public, governing the release of information by the Attorney General or the district attorney to protect the confidentiality of forfeited property or proceeds used in ongoing law enforcement activities.

42 Pa.C.S. §§ 5803(j)-(k).

As a preliminary matter, the Act itself does not prohibit the release of the requested records. The audit, referenced in 42 Pa.C.S. § 5803(j), is conducted by a county controller/auditor and the district attorney's office collectively. The Act makes this audit confidential but is silent as to any other records in the possession of a district attorney's office, including "appropriate records to account for the property forfeited in a fiscal year and the use made of the property forfeited." Regarding this omission, the Cambria County Court of Common Pleas has held:

Section 5803(j) however does not contain any provision protecting records other than the annual audit from disclosure.... [Its] language limits the protection to only the audit and not any other financial records related to the forfeiture accounts. Had the Legislature intended to prevent the release of any records related to the forfeiture accounts they would have used language indicating such intent. As such the limited protection of this section does not extend to other financial records related to the forfeiture accounts....

DeBartola v. Cambria County District Attorney's Office, No. 2018-0095 (Cambria Cnty. C.C.P. Nov. 19, 2018). Because the Act only makes the audit confidential, not *all* of the requested records are confidential under the Act. *See also Walker v. Berks Cnty. Dist. Atty's Off.*, OOR Dkt. AP 2018-1993, 2018 PA O.O.R.D. LEXIS 1547; *Walker v. York Cnty. Dist. Atty's Off.*, OOR Dkt. AP 2018-1995, 2019 PA O.O.R.D. LEXIS 26; *Scott v. Berks Cnty. Dist. Atty's Off.*, OOR Dkt. AP 2019-0890, 2019 PA O.O.R.D. LEXIS 898.

Regarding potentially responsive records that are not the confidential audit report, the Office asserts that it does not maintain records that “match” the Request, except for the confidential audit report. With respect to Item 4 of the Request, ADA McCarthy and Ms. Kelley affirm that the Office follows the procedures set forth in the Act and no other written policies exist. Item 4 expressly seeks a record that sets forth and governs the Office’s sale of seized vehicle and other seized items. Ms. Kelley supervises the Forfeiture Unit for the Office and, therefore, is the most likely custodian of such records. Further, the Act delineates the specific procedure to be followed when a forfeiture proceeding is instituted. *See* 42 Pa. C.S. § 5805. Accordingly, based on the evidence, the Office has demonstrated that no records of policies or procedures related to the procedures followed for the sale of forfeited property, other than the statutory mandates of the Act, exist. *See Hays v. Pa. State Police*, OOR Dkt. AP 2015-0193, 2015 PA O.O.R.D. LEXIS 294 (finding that a good faith search has been conducted by an agency when it “contact[ed] the Bureau

most likely to possess responsive records,... explain[ing] why that Bureau is most likely to possess those records.”); *Hodges*, 29 A.3d at 1192.

However, regarding Items 1-3 and 5-6 of the Request, the Office’s evidence is conclusory and does not support the claim that the Office does not maintain any responsive records. *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”). 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), *aff’d*, 243 A.3d 19 (Pa. 2020). 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).

Here, the Office only states that there are no records that “match” the Request without describing a search for records or explaining why the Office would not maintain such records. For example, in *Scott*, a similar request sought records related to forfeitures under the Act from the York County District Attorney’s Office. 2019 PA O.O.R.D. LEXIS 898, *2-4. In that matter, sworn evidence was submitted to prove that certain “internal memoranda and documents” did not exist because the “records are destroyed in accordance with Office policy upon the OAG’s deliverance of the cumulative audit report to the General Assembly.” *Id.* at *11-13.

Based on a review of the evidence, the Office has not demonstrated that, other than a consultation with Ms. Kelley, an actual search for records was made. Further, the evidence consists of conclusory statements and does not prove that no records responsive records exist that would enable the Office to make the necessary annual audit report to the OAG and provide “appropriate records to account for the property forfeited in a fiscal year and the use made of the property forfeited” to comply with 42 Pa.C.S. § 5803(j). Therefore, the Office has not carried its burden of proving that no records exist that are responsive to Items 1-3 and 5-6, of the Request. *See Hodges*, 29 A.3d at 1192; 65 P.S. § 67.708(a).

Finally, to the extent that the Asset Forfeiture Report published by the OAG is responsive to the Request, “an agency may respond to a request by notifying the requester that the record is available through publicly accessible electronic means....” *See* 65 P.S. § 67.704(b)(1). However, in the appeal, the Requester states that “if the records are available on a website, [the Office] is “obligated to obtain them from that website and ... send them to me in the medium requested.” The Requester relies on Section 506(d) of the RTKL, but the authority is not applicable here, as Section 506(d) only applies in the event that records are possessed by party contracting with the

Office to perform a governmental function.³ If the Requester is asserting that he is unwilling or unable to access the record electronically and is requesting that the records be converted, then the Office would be required to print any responsive records from the OAG's website and provide them to the Requester for any applicable copying fees. *See* 65 P.S. § 67.704(b)(2).⁴

CONCLUSION

For the foregoing reasons, the appeal is **granted in part** and **denied in part**, and the Office is required to conduct a good faith search and provide all records responsive to Items 1-3 and 5-6 of the Request 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 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 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.⁵ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: July 27, 2022

/s/ Kelly C. Isenberg

SENIOR APPEALS OFFICER
KELLY C. ISENBERG, ESQ.

Sent to: Timothy Lawrence/ FX0145 (via US Mail only);
Kevin McCarthy, Esq. (via email only)

³ "A public record that is not in the possession of an agency but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the agency, and which directly relates to the governmental function and is not exempt under this action, shall be considered a public record of the agency for purposes of this act." 65 P.S. § 67.506(d)(1).

⁴ "If the requester is unwilling or unable to access the record electronically, the requester may, within 30 days following receipt of the agency notification, submit a written request to the agency to have the record converted to paper. The agency shall provide access to the record in printed form within five days of the receipt of the written request for conversion to paper." 65 P.S. § 67.704(b)(2).

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