pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
DAMON DEVINE,	:	
Requester	:	
	:	
v.	:	**Docket No: AP 2020-1947**
	:	
PENNSYLVANIA DEPARTMENT OF STATE,	:	
Respondent	:	

On September 9, 2020, Damon Devine ("Requester"), an inmate at SCI-Forest, submitted a request ("Request") to the Pennsylvania Department of State ("Department") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq*., seeking a sentencing order, DC-300B and DC-301 Act 84 information transmittal form regarding an identified criminal matter. On September 16, 2020, the Department denied the Request, stating that it does not possess the requested records.

On September 24, 2020, the Requester filed an appeal with 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 Department to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On October 5, 2020, the Department submitted an affidavit, made under the penalty of perjury, from Rebecca Fuhrman, the Department's Open Records Officer, who attests that a search

was conducted and that no responsive records exist in the Department's possession, custody or control. Specifically, Ms. Fuhrman attests that she "made a thorough inquiry with the designated and/or reasonably likely records custodians for the Department regarding the requested records" and determined that "such records do not exist within our Department."

Under the RTKL, a 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 or that it possesses the requested records, "the averments in [the affidavit] should be accepted as true." *McGowan v. Pa. Dep't of Envtl. 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)). Based on the evidence provided, the Department has met its burden of proof that it does not possess the requested records.[1] *Hodges v. Pa. Dep't of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

For the foregoing reasons, the 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 or petition for review 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. 65 P.S. § 67.1303. However, as the quasi-judicial tribunal

[1] Even if the Department possessed these records, the OOR would be constrained to deny the appeal, as the records are judicial records. *Phila. Dist. Attorney's Office v. Stover*, 176 A.3d 1024 (Pa. Commw. Ct. 2017). However, the records may be available from the relevant judicial records custodian in the sentencing county. *See* http://www.pacourts.us/public-records.

adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.[2] This Final Determination shall be placed on the website at: http://openrecords.pa.gov.

FINAL DETERMINATION ISSUED AND MAILED: 16 October 2020

/s/ Joshua T. Young

JOSHUA T. YOUNG
APPEALS OFFICER

Sent to: Damon Devine, QC-3687 (via U.S. Mail only);
Jason McMurry, Esq. (via email only);
Rebecca Fuhrman, AORO (via email only)

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