

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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No. 481 M.D. 2021

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Daniel Schwartz,

Petitioner

v.

Commonwealth of Pennsylvania  
Pennsylvania State Police (Office of Open Records)

Respondent

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Post-Hearing Brief on the issue of whether Respondent conducted a good faith search and provided an adequate response to the Requester, and what prohibits Respondent and the Office of Administration from obtaining a subpoena compelling Verizon to turn over the responsive records.

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## **QUESTIONS PRESENTED**

- I. Did Respondent conduct a good faith search and provide an adequate response to Petitioner in the Affidavit of the Agency's Open Records Officer William Rozier ("Rozier Affidavit")?
  - a. Suggested Response – Yes.
  
- II. Is there a mechanism under the Right-to-Know Law ("RTKL") whereby a Responder can compel action by non-government entities?
  - a. Suggested Response – No.

## ARGUMENT

- 1. Respondent acted in good faith in conducting its search for responsive materials and provided an adequate, albeit not timely, response in the Affidavit of Open Records Officer William Rozier.<sup>1</sup>**

From the inception of Petitioner's Right-to-Know ("RTK") request on March 24, 2021, Respondent has acted in accordance with Pennsylvania's RTKL. In the instant case, Petitioner made the following request:

### PART TWO:

Please provide any and all text messages and voice messages received by the work-issued cell phones of Lt. James Hennigan as well as Lt. Stephen J. U'Selis III about the Mariner East pipeline or the activities of state residents as they may related to the pipeline or its construction.

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<sup>1</sup> Petitioner never alleged that any search conducted by Respondent was in bad faith, but simply that Respondent's failure to provide the requisite Affidavit was in bad faith. Petitioner received the Affidavit on January 18, 2022, once Respondent was put on notice the Affidavit had not been previously provided. (Respondent's Answer to Petition for Enforcement and New Matter, ¶4.) Respondent conceded in their Answer to Petitioner's Petition for Enforcement that the Affidavit was not provided as required by the OOR. As such, Respondent provided an affidavit from the attorney assigned to the RTK request, Kathryn Daczka, Esq., and made her available for examination by Petitioner at the hearing on March 15, 2022. (Answer and New Matter, ¶34; Respondent Attachment 4). Ms. Daczka admitted that she forgot to provide the requisite affidavit from Mr. Rozier and explained the mistake as an oversight due to her cross-state move and closing on a new home. For historical purposes, it is also relevant to note that everyone at that time was under the stress and restrictions of the Covid-19 global pandemic.

Petitioner failed to amend their petition to indicate the Affidavit itself was deficient and as such, Respondent was not on notice to litigate the sufficiency of the Affidavit itself. (*See* Petition for Enforcement). By way of further response, at the time Petitioner submitted their Petition for Enforcement, no Affidavit had been provided. Respondent provided the Affidavit on January 18, 2022. Respondent could not anticipate Petitioner would allege the Affidavit to be deficient and could not properly defend from the surprise claim. By requiring Respondent to litigate a matter not pleaded, they created a Catch-22, wherein Respondent's choices were either to not provide the Affidavit and instead litigate Ms. Daczka's oversight or, as happened in the present case, provide the Affidavit in good faith and endure an oral argument on a matter not pleaded. *See Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937 (2009) (holding factual allegations must be sufficient to plausibly suggest the basis for a claim).

Please limit your search to the timeframe of February 2017 to the date this request is completed. These search terms may help: “Sunoco,” “Energy Transfer,” “Marinier,” (sic) “suspicious activity,” “protesters,” “pipeline,” “construction.” For text (sic) messages, please also include any and all attachments.

Petition for Enforcement, Exhibit A (in relevant portion).

In seeking an initial request for a 30-day extension, participating in the appeal process through the Office of Open Records, communicating the delay in providing unredacted emails, and, ultimately, providing the Affidavit at issue in this Petition, Respondent has satisfied its obligation to search for and provide any non-exempt responsive records. Respondent has engaged with Petitioner throughout this process and made witnesses available for Petitioner at the hearing on March 15, 2022. Respondent continues to operate in good faith in effectuating the conclusion of Petitioner’s RTK inquiry and has been forthcoming and transparent in communicating with Petitioner and the Court.

**A. PSP conducted a good faith search for the information requested**

PSP’s obligations to receive and respond to public records requests are established and limited by the RTKL. Among these, Section 901 of the RTKL mandates, “[u]pon receipt of a written request for access to a record, an agency shall make a good faith effort to determine if the record requested is a public record, legislative record, or financial record and whether the agency has possession, custody or control of the identified record, and to respond as promptly as possible

under the circumstances existing at the time of the request.” 65 P.S. §67.901. The RTKL also establishes the time allotted for the agency receiving the request to respond. *Id.*<sup>2</sup>

Right to Know requests are agency specific. That is, a RTK request for Department of Corrections records would not be litigated by the Pennsylvania State Police, as each Commonwealth Agency designates an Open Records Officer to perform a good faith search for responsive materials within their custody and control. 65 P.S. § 67.502 (“An agency shall designate an official or employee to act as the open-records officer.”).

Here, PSP has complied with all of the RTKL’s requirements. As set forth above, the RTKL requires that “an agency shall make a good faith effort to determine if the record requested is a public record...and whether the agency has possession, custody or control of the identified record...” 65 P.S. § 67.901.

A good faith search can be conducted by “contacting the bureau most likely to possess responsive records, and ... explaining why that bureau is most likely to possess those records.” *Campbell v PIAA*, 268 A.3d 502, 518-1\519(Pa Cmwlth 2021)(citing *Hays v. Pa. State Police*, OOR Dkt. AP 2015-0193, 2015 PA O.O.R.D.

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<sup>2</sup> “The time for response shall not exceed five business days from the date the written request is received by the open-records officer for an agency. If the agency fails to send the response within five business days of receipt of the written request for access, the written request for access shall be deemed denied.” (*Emphasis added*).

search); *Yaldm v. Municipality of Monroeville*, OOR Dkt. AP 2017-1946, 2017 PA O.O.R.D. LEXIS 1685[, filed Nov. 22, 2017].

Here, the testimony from the Open Records Officer, Mr. William Rozier, (“Mr. Rozier”) establishes that PSP met its burden for conducting a good faith search for the records requested. He testified that PSP conducted a search for the individuals named in Petitioner’s RTK request: Lt. Hennigan and Lt. U’Selis. Specifically, Mr. Rozier ascertained the phone numbers associated with the two named individuals at the time of the request and attested that the phones were not in use at the time and did not contain any responsive information. Mr. Rozier also contacted the Office of Administration to determine if they could confirm if the materials currently existed within their possession, custody, or control. Rozier Affidavit ¶ 12. Mr. Rozier corresponded with Jason Bearden, a Supervisor in the Office of Administration’s Information Technology Department, who advised Mr. Rozier that the information did not exist, and, consistent with the Stored Communications Act, the cell phone carrier required a subpoena for any text message content and voicemails that may be retained outside of the agency’s possession. Rozier Affidavit ¶ 13, *see also* 18 U.S.C.A. Chapter 121.

Thus, the record establishes that PSP did not have possession, custody, or control of the requested records, nor did the Office of Administration, another

Commonwealth Agency. Having determined that it did not possess the records, nor did any other Commonwealth agency, PSP satisfied its burden.

**B. The RTKL does not require PSP to reach out to a non-government entity that does not perform a government function.**

In response, Petitioner asserts that PSP was required to search further and inquire with its telecommunications providers to determine if those providers also possessed responsive records. Such inquiry is not required by the RTKL. Under the current RTKL, to reach records outside an agency's possession the following two elements must be met: (1) the third party performs a governmental function on behalf of the agency; and (2) the information sought directly relates to that function. *Allegheny Cnty. Dep't of Admin. Servs./A Second Chance Inc. v. Parsons*, 61 A.3d 336 (Pa.Cmwlt.2013) (*ASCI II*); *Dental Benefit Providers, Inc. v. Eiseman*, 124 A.3d 1214 (Pa. 2015). Section 506(d)(1) establishes the only appropriate test for access to third-party records which are not in the possession, custody, or control of a Commonwealth agency. *Eiseman*, 124 A.3d at 1222.

Nevertheless, and despite no legal obligation to do so, PSP reached out to the third-party contract administrator with the phone carrier, the Office of Administration. *Id.* The Office of Administration indicated that they “could not obtain voice or text messages...[and] a subpoena to Verizon Security Assistance Team would be necessary to search for any voice or text messages to begin an inquiry.” *Id.* PSP “can only act or carry out its duties through real people – its agents,

servants, or employees.” *Moon Area School Dist. v. Garzony*, 522 Pa. 178, 560 A.2d 1361, 1366 (1989). PSP “act[ed] with diligence when directing requests to other appropriate persons within the agency.” *Uniontown Newspaper v. Pa. Dep’t of Corr.*, 243 A.3d 19, 28 (Pa. 2020)(citing 65 P.S. §502(b)(1)).

In light of the information provided by the Office of Administration, there was no basis for Mr. Rozier to believe that the information could be otherwise obtained from Verizon, as he had ascertained the information regarding the need for a subpoena and/or court order from the contract administrator. Rozier Affidavit, ¶¶ 11-13. Moreover, PSP was under no legal obligation under the RTKL to seek responsive documents that may be in the possession, custody or control of a third-party, non-governmental entity. Only in those limited circumstances may non-exempt records of a third-party entity be subject to disclosure, provided the third party in possession has a contract with the agency to perform a governmental function, and the information directly relates to the performance of that function. *Uniontown*. Here, there is no assertion that provision of telecommunication services is a “governmental function.” Rather, such services are provided by private entities to the public at large, including the Commonwealth and its agencies. No arm of Pennsylvania’s executive government is empowered to sell phone service.

Further, even if such limited circumstances existed here, records in the possession of telecommunications providers are not “public records” subject to disclosure under RTKL because they are exempt from access under federal law. In this regard, only records “of a Commonwealth or local agency that...(2) is not exempt from being disclosed under any other Federal or State law or regulation or judicial order or decree” are “public records.” *See*, 65 P.S. §67.102. Absent consent from the user of the device or a valid search warrant, “person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service,” including text message content and/or voicemails. 18 U.S.C.A. Chapter 121 §§ 2702, 2703(a). Thus, generally, text message content and voicemails in electronic storage of an electronic communication service provider, such as Verizon, are not “public records” because they are exempt from disclosure under the Stored Communication Act<sup>3</sup>. *Id.* Thus, even if the Verizon records were available, they could not be provided pursuant to Pennsylvania’s RTKL, without consent of the user of the device or a search warrant, as that is not one of the enumerated exceptions in the Stored Communications Act.

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<sup>3</sup> The Stored Communications Act prohibits “obtain[ing], alter[ing], or prevent[ing] authorized access to a wire or electronic communication while it is in electronic storage in such system” and “shall be punished...” by imprisonment, fines, or both. 18 U.S.C.A. Chapter 121 §2701.

Finally, given the retention policy applicable to transitory records and the short or non-existent retention periods for both with Verizon, any request to Verizon would have been futile. *See* Verizon letter to Pennsylvania State Police. Moreover, PSP is not required to demand consent, or otherwise perform a forensic search of the cell phones or employee any other method that would require specialized expertise, software, or tools. *Paint Township v. Clark*, 109 A.3d 796 (Pa. Cmwlth 2015) (“There is no requirement under RTKL to conduct “a forensic search of [a] cell phone device...to extract any existing data...all of which would require specialized expertise, software and/or tools.”).

In sum, the sole burden upon PSP was to establish that it did not possess any remaining records, which PSP met. *Smith Butz, LLC v. Pa. Dep’t of Env’tl Prot.*, 142 A.3d 941, 945 (Pa. Cmwlth. 2016)(quoting *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Cmwlth. 2011) (“[I]f the agency responding to the RTKL request determines that the record does not exist, it has the burden of proving that the record does not exist.”)( “An agency may satisfy its burden of proof that it does not possess a requested record with either an unsworn attestation by the person who searched for the record or a sworn affidavit of nonexistence of the record.”) *Id.* The Petitioner has not produced any evidence to the contrary, thus, this Court should find that PSP’s search was conducted in good faith and grant judgment for PSP. *McGowan v. Pa.*

*Dep't of Env'tl Prot.*, 103 A.3d 374, 382-83 (Pa. Cmwlth. 2014) (“Absent evidence of bad faith, the veracity of an agency’s submissions should be accepted as true.”)

**C. PSP’s failure to provide an Affidavit within the time period specified by the Office of Open Records does not establish Bad Faith.**

As explained above, Mr. Rozier’s search was conducted in good faith, as required by Section 901 of RTKL. 65 P.S. §67.901. There has never been an allegation, nor any facts put forth to suggest that Respondent attempted to subvert access to the materials requested by Petitioner. Further, Respondent did not act in bad faith when Mr. Rozier relied on the information provided by the contract administrator. Rozier Affidavit, ¶¶ 11-13.

Certainly, Respondent has admitted that they did not provide the Affidavit in a timely manner and has explained, through Ms. Daczka’s affidavit and testimony, the reason for that failure. Answer to Petition, ¶ 33. That said, untimeliness is not synonymous with bad faith. In fact, had the Requestor identified the deficiency when the emails were provided, PSP would have promptly corrected the deficiency. Answer to Petition. Petitioner has never alleged that the Affidavit of Mr. Rozier, itself, was deficient. A more apt question in this situation would be: If Respondent had provided Mr. Rozier’s Affidavit in July 2021, would that have satisfied Petitioners? Because the Petition does not address this issue, Respondent had no reason to believe it would not be satisfactory. Answer to Petition, Respondent

Attachment 3, Daczka Affidavit, ¶ 13. Respondent has explained the failure to provide the Affidavit and the failure was based on human error, not bad faith or wanton or willful disregard for the order of the OOR. *Id.*

The requested materials do not exist in the possession, custody, or control of PSP and Mr. Rozier acted in good faith in ascertaining that information and in providing the Affidavit when Respondent received notice that its provision had been previously overlooked. Answer to Petition for Enforcement and New Matter, Respondent Exhibit 2. It is also important to note the purpose of applying punitive fines in RTK matter, that is, Section 1305 of the RTKL is to deter the Agency from acting in bad faith in the future:

The purpose of Section 1305 of the RTKL is not to remedy harm to a party but to penalize conduct of a local agency and to provide a deterrent in the form of a monetary penalty in order to prevent acts taken in bad faith in the future. The purpose of Section 1305 of the RTKL is akin to the purpose of the penalty provision of the Sunshine Act...However, unlike the penalty provision in the Sunshine Act, the focus in Section 1305 of the RTKL is not on the mental state of the actor but the actions taken by the agency.

*Campbell*, 268 A.3d 502, 518-519(Pa Cmwth. 2021)(citing *Off. Of the Dist. Att’y of Phila. v. Bagwell*, 155 A.3d 1119, 1141 (Pa. Cmwth. 2017); *See also* 65 P.S. §67.1305.

Here, it must be noted that given Ms. Daczka’s demeanor at the hearing on March 15, 2022, her testimony at that hearing, and her affidavit, neither PSP, nor its attorneys, will fail to timely respond completely with the orders of the OOR in the future. Thus, any finding of bad faith would be inappropriate and would not provide

any additional deterrent effect. Additionally, such penalties are only warranted where “an agency denied access to a public record in bad faith.” 65 P.S. §67.1305. As indicated above, the records do not exist and Petitioner was not denied access in bad faith.

Attorney’s Fees are only appropriate where:

- (a) Reversal of agency determination.—If a court reverses the final determination of the appeals officer or grants access to a record after a request for access was deemed denied, the court may award reasonable attorney fees and costs of litigation or an appropriate portion thereof to requester if the courts find either of the following...”

65 P.S. §67.1304(a)

In the case at bar, the court has not reversed the final determination of the OOR, nor has Respondent objected to complying with the Order. Respondent has never challenged that an affidavit was ordered to be provided in this case and when Respondent became aware of that oversight, the Affidavit was provided.

Additionally, §67.1304(a) continues on:

- (1) The agency receiving the original request willfully or with wanton disregard deprived the requester of access to a public record subject to access or otherwise acted in bad faith under the provisions of this act; or
- (2) The exemptions, exclusions or defenses asserted by the agency in its final determination were not based on a reasonable interpretation of law.

Ms. Dackza's affidavit indicates that the failure to provide the Rozier Affidavit was a mistake and not done with "willful or with wanton disregard" to deprive the requester access. Answer to Petition, Respondent Attachment 3, Dackza Affidavit, ¶¶ 13-15. Lack of willful or wanton disregard is further evidenced in the Position Statement provided by Ms. Daczka to the OOR and correspondence from the OOR; specifically, that Ms. Daczka noted an "enclosure" of the Affidavit to her Position Statement and the OOR hearing examiner noted, "it appears that the affidavit was inadvertently not attached to the email transmitting the position statement." Joint Exhibits, Pgs. 594-600/1042. The requested materials do not exist and there was no attempt to deprive Petitioner of the non-existent materials. Accordingly, any request for attorney's fees should be denied, as PSP did not act in bad faith.

**2. RTKL does not provide any mechanism for Respondent to compel a non-governmental entity to comply with a RTK request.**

As this Court aptly noted in *Off. of Att'y Gen. v. Patel*, No. 116 M.D. 2019, 2019 WL 5561412, at \*5 (Pa. Commw. Ct. Oct. 29, 2019), "[i]n the absence of an express legislative grant of subpoena powers ... none exists. *Citing Com. ex rel. Margiotti v. Orsini*, 81 A.2d 891, 893-94 (Pa. 1951) (the only power of subpoena the Attorney General possesses is that given by an act of the legislature – subpoena power, and the extent thereof, is to be determined in each case by the express statutory grant); *City of Erie v. Cappabianca*, 879 A.2d 823, 825 (Pa. Cmwlth.

2005)(in the absence of a statute granting subpoena power to non-judicial bodies or officials, the power to issue subpoenas is limited to the judiciary).

Even under Section 506(d), there is no subpoena power afforded to the agency:

(d) Agency possession.—

(3) A request for a public record in possession of a party other than the agency shall be submitted to the open records officer of the agency. Upon a determination that the record is subject to access under this act...

65 P.S. §67.506(d)(3)(in relevant portion).

The appellate agency under Right to Know Law, the Office of Open Records, is administrative in nature and not a court of record that can issue such orders. The Pennsylvania Rules of Civil Procedure repeatedly address subpoenas, how they can be issued, how they can be used, how they can be enforced, and the penalties associated with failing to comply. *See* Pa. R. Civ. Pro. 234.1-234.9. By contrast, RTKL does not reference subpoenas, nor does it empower a court to issue such orders to effectuate a RTK request. There are numerous statutes that vest subpoena power, thus the decision to not include such power under the RTKL was intentional on the part of the General Assembly.

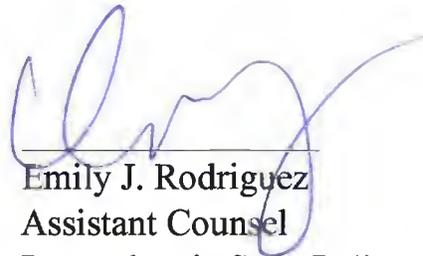
Furthermore, even if Verizon possessed responsive records, the requested records in this case are not subject to release under the RTKL and so even if a

mechanism existed to issue a subpoena compelling their release, it would not be appropriate in this case. Thus, because the RTKL does not contain any mechanism for PSP to compel a non-government entity to comply with a RTK request, PSP's failure to do so cannot be considered bad faith.

## CONCLUSION

Based on the foregoing arguments Respondent respectfully requests this Honorable Court find Respondent acted in good faith in conducting its search for responsive materials; not find bad faith in delay related to the Affidavit of Open Records Officer William Rozier; and deny Petitioner's request for relief, including attorney's fees.

Respectfully submitted,



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