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IN THE SUPREME COURT OF PENNSYLVANIA

No. ____

DANIEL SCHWARTZ,
***Petitioner*,**

v.

PENNSYLVANIA STATE POLICE,
***Respondent*.**

PETITION FOR ALLOWANCE OF APPEAL

Petition for Allowance of Appeal from the August 24, 2022 Order, at No. 481 MD 2021, from the Commonwealth Court of Pennsylvania, denying the Petition to Enforce

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INTRODUCTION

This case involves a matter of statewide importance: the Commonwealth Court's holding effectively allows agencies to improperly evade disclosure of all text messages, voicemails or other communications that they store purportedly out of reach of the Right-to-Know Law ("RTKL") with telecommunications companies. By ruling that agencies contracting through the Commonwealth for telecommunications services are not required to obtain their own text messages and voicemails stored with telecommunications providers, the decision creates a technological loophole that threatens to undermine the letter and spirit of the RTKL.

This Court should grant Mr. Schwartz's Petition for Allowance to Appeal[1] for the following reasons. *First*, the Commonwealth Court erred in determining, as a matter of first impression, that Section 506(d) of the RTKL does not require an agency to obtain its records from a third-party contractor, where the third party's

[1] As a threshold question, the law is unsettled as to whether an RTKL enforcement action originally commenced in the Commonwealth Court is properly appealed as of right under 42 Pa. C.S. § 723(a) or via allowance of appeal under 42 Pa. C.S. § 724(a). *See Uniontown Newspapers, Inc. v. Pennsylvania Dep't of Corrections*, 243 A.3d 19, 24 (Pa. 2020) (noting petition for allowance of appeal granted); Pet. for Allowance to Appeal, 1-2, *Uniontown Newspapers, Inc. v. Pennsylvania Dep't of Corrections*, Nos. 561 & 779 MAL 2018 (Pa. 2018) (outlining in Jurisdictional Statement the conflicting precedent and this Court's initial grant of a simultaneously filed notice of appeal)*; Capinski v. Upper Pottsgrove Twp.*, 164 A.3d 601, 611-12 (Pa. Commw. Ct. 2017) (Brobson, J., concurring); 210 Pa. Code § 69.3761; Pa.R.A.P. 3761; 50 Pa.B. 5731 (official note states that petitions to enforce are "deemed to be addressed to the appellate jurisdiction of the Commonwealth Court, and thus appealable to the Supreme Court only by filing a petition for allowance of appeal"). Mr. Schwartz is thus filing this Petition in addition to a Notice of Appeal.

contract is with another agency acting on behalf of the Commonwealth and not with the individual agency. *Second*, the Commonwealth Court erred in holding—in a decision that conflicts with this Court's opinion in *Uniontown v. Newspapers, Inc. v. Pennsylvania Dep't of Corrections*—that an agency did not act in bad faith despite substantial evidence of the agency's repeated abnegation of mandatory duties and its lack of good faith compliance with the RTKL. *Third*, the Commonwealth Court erred in holding that no attorney's fees should be awarded, a decision that conflicts with prior Commonwealth Court holdings. The agency not only acted in bad faith but also relied on unreasonable interpretations of the law here.

Mr. Schwartz thus requests that the Court grant his petition for allowance to appeal.

REFERENCE TO THE OPINIONS IN THE MATTER

On August 24, 2022, the Commonwealth Court issued a memorandum Opinion and Order denying Mr. Schwartz's petition to enforce the final determination of the Office of Open Records ("OOR"). The opinion is attached as Appendix A. The OOR Final Determination was issued on June 22, 2021, and is attached as Appendix B.

ORDER IN QUESTION

On August 24, 2022, the Commonwealth Court issued an unreported opinion concluding with this paragraph and order:

> AND NOW, this 24th day of August[] 2022, Petitioner Daniel Schwartz's Petition for Enforcement of Final Determination is DENIED in its entirety.

QUESTIONS PRESENTED

I. **Did the Commonwealth Court err in a matter of first impression in determining that Section 506(d) of the RTKL does not require an agency to obtain its records from a third-party contractor, where the third party's contract is with another agency acting on behalf of the Commonwealth and not with the individual agency?**

II. **Did the Commonwealth Court err in holding—in a decision that conflicts with this Court's opinion in *Uniontown v. Newspapers, Inc. v. Pennsylvania Dep't of Corr.*—that an agency did not act in bad faith despite substantial evidence of the agency's repeated abnegation of mandatory duties and its lack of good faith compliance with the RTKL?**

III. **Did the Commonwealth Court err in holding that no attorney's fees should be awarded because an agency did not act in bad faith, where an agency also relied on unreasonable interpretations of the law?**

CONCISE STATEMENT OF THE CASE

A. PSP Claims Agency Text Messages and Voicemails Are Not In its Control Without Providing Evidence of Good Faith Search.

On March 24, 2021, independent journalist Daniel Schwartz made an RTKL request to PSP, seeking access to certain law enforcement officers' communications related to monitoring state residents protesting the construction of the Mariner East pipelines. R.145a-147a. The Mariner East pipelines carry highly explosive natural-gas liquids across Pennsylvania and have been the subject of government investigations into its approval process and media scrutiny. R.11a-14a, ¶¶ 6-11.

The first part of Mr. Schwartz's request sought the unredacted versions of certain correspondence of Lt. James Hennigan that had been previously produced in a "seemingly indiscriminately redacted" format. R.146a. The second part of the request sought, among other things, certain text messages and voice messages received by the work-issued cell phones of Lt. James Hennigan and Lt. Stephen J. U'Selis III pertaining to the "Mariner East pipeline or the activities of state residents as they may relate to the pipeline or its construction." *Id.*

On April 30, 2021, PSP partially denied the request. R.1055a-1061a. PSP relied on a prior response it had provided to Mr. Schwartz in rejecting the first part of the request. R.1057a. PSP then claimed with respect to the text messages and voicemails requested in the second part of the request that "it does not have any records in its possession, custody, or control that respond to your request." *Id.* PSP attached a verification that merely repeated this unsupported assertion that "it does not have any records in its possession, custody, or control that respond to this request." R.1060a.

B. Mr. Schwartz's Appeal Leads to OOR Final Determination Ordering PSP to Produce the Records or Provide a Good Faith Search Affidavit.

On May 7, 2021, Mr. Schwartz timely appealed to the OOR. R.141a. Three weeks later, PSP submitted a position statement seeking dismissal of the appeal as premature and reiterating its grounds for denial. R.725a-729a. The position statement erroneously indicated that it included an affidavit of the Agency Open

Records Officer. *Id.* The OOR followed up with PSP prior to issuing its Final Determination to request an affidavit providing evidentiary support for "statements of fact that are not supported by an individual with actual knowledge" as required. R.731a. But "[d]espite the OOR seeking an affidavit in support of PSP's submission," PSP submitted "no affidavit" in advance of the Final Determination with "sufficient evidence in support of its assertions." R.4a, 6a.

The OOR considered PSP's response, rejected the relevant alleged defenses to disclosure, and issued the OOR Final Determination on June 22, 2021, requiring Respondent to "provide unredacted emails responsive to Part 1 and text messages or voicemails responsive to Part 2 or provide the Requester with a statement describing the search and affirming that no responsive records exist within 30 days." R.9a. In ordering PSP to produce a good faith search affidavit, the OOR determined that PSP had not provided "sufficient support for any assertion[,]" as required, "by providing relatively detailed and non-conclusory affidavits submitted in good faith by officials or employees with knowledge of the records and the search for the records." R.7a. The OOR concluded that PSP had "not met its burden" of proof demonstrating that the text messages and voicemails do not exist or "as it relates to any other redactions or withheld records" aside from withheld personal identification information. R.9a.

C. PSP Failed to Comply with the Clear Terms of the Final Determination and Petitioner's RTKL Request.

PSP failed to appeal the Final Determination within thirty days as required by 65 P.S.§ 67.1301(a) and, therefore, the Final Determination became binding on both parties. PSP likewise failed to meet the 30-day compliance deadline set by the OOR to turn over the unredacted emails and either texts and voicemails or a good faith search affidavit. R.1416a-1418a. A day after the deadline, Mr. Schwartz asked whether PSP planned to comply with the order, and ultimately granted the agency a four-day extension. *See id.* PSP failed to meet the extended deadline as well and only turned over the unredacted emails after Mr. Schwartz followed up again. R.1413a-1415a. PSP continued to withhold text and voicemails or a good faith search affidavit. *Id.*

D. Mr. Schwartz's RTKL Lawsuit

On Dec. 20, 2021, Mr. Schwartz filed a Petition for Enforcement of the OOR's Final Determination, which sought an order requiring PSP to produce all withheld text messages and voicemails or a good faith search affidavit, awarding Mr. Schwartz reasonable attorneys' fees, and imposing an appropriate civil penalty. R.10a-21a. Nearly a month after Mr. Schwartz filed his enforcement action, the Agency Open Records Officer prepared a sworn verification in response to the enforcement action. R.61a-64a. On Jan. 23, 2022, PSP attached this verification to

an Answer and New Matter that it filed in response to the Petition along with a Motion to Dismiss for Mootness, which was then fully briefed. *Id.*

The Agency Open Records Officer's verification stated that the PSP RTKL Section contacted officer Hennigan regarding the request, who said he did not have any relevant text messages or voicemails and "was no longer in possession of the phone or the phone number" due to his promotion. R.63a, ¶ 11. The verification did not state that the other subject of the request, retired officer U'Selis, was contacted. R.63a-64a, ¶¶ 11-14. The verification further stated that a Telecommunication Services Supervisor in the Pennsylvania Office of Administration ("OA") said "he could not obtain voice or text messages" and "that a subpoena to Verizon Security Assistance Team would be necessary to search for any voice or text messages to begin an inquiry." *Id.* ¶ 13. The verification listed no further effort to either obtain a subpoena or reach out to Verizon to obtain the records. *Id.* The verification also stated that the "following databases were searched: Portal, PSP Records Management System (RMS), QIC (Query Initial Crime)" with "negative results." *Id.* ¶ 14.

The Commonwealth Court held an evidentiary hearing on Mar. 15, 2022, where PSP claimed that the agency had fulfilled its duty to reach out to third-party contractors by speaking to a Commonwealth Telecommunication Services Supervisor. PSP's affidavit concerning this conversation explicitly omitted the date

when PSP reached out to OA, and PSP stipulated at the hearing that no evidence had been submitted that would support the assertion that any outreach to OA was done prior to litigation commencing. *See* R.1865a-1867a, 70:6-72:10.

When questioned further about PSP's lack of diligence evidenced in its affidavit, counsel introduced new evidence not in the record at the hearing by testifying that she had contacted Verizon and was told that the requested records did not exist. R.1816a, 21:21-25; 1829a, 34:13-16. Neither of the two PSP witnesses' testimony or affidavits indicated that they had any interaction with Verizon. *See, e.g.*, R.61a-64a; 77a-78a; 1865a, 70:6-16. Nor did witness testimony demonstrate whether one of the subjects of Mr. Schwartz's request, officer U'Selis, was contacted and had any voicemails or text messages that were responsive. R.1869a, 74:6-15.

PSP also argued for the first time that it was unable to subpoena records from Verizon because the RTKL provided no mechanism for it to do so and claimed that it had no contract with Verizon that would facilitate access to its own records. R.1812a-1819a, 17:4-24:1. The relevant contract, it claimed, was with another state agency, the OA, which PSP viewed as its third-party contractor under the RTKL. R.1812a, 17:4-11; 1814a, 19:8-20. In response to PSP's claim that it had no access to its own phone records, the court observed at the hearing that PSP's argument, taken to its logical conclusion, meant "that nobody in Pennsylvania would be able to subpoena any of the cell phone carriers because its not under their division[.]"

R.1814a, 19:1-3. The court additionally observed during witness testimony that, contrary to PSP counsel's characterization of bad faith as "intentionally circumvent[ing] the OOR's Order," "actually bad faith doesn't necessarily require willful or wanton . . . it can be just mistakes." R.1873a, 78:13-19.

After the hearing, Mr. Schwartz located the relevant contract, which is publicly available on a Commonwealth website, and submitted it to the court as supplemental authority. R.1892a-1931a. The contract between the OA acting on behalf of the Commonwealth and Verizon contained an RTKL provision that expressly obligated Verizon to comply with public records requests. R.1916a, § 15.

In response to this Notice, PSP not only refused to enforce the provision but also argued that it may be *void ab initio*. R.1934a. Despite claiming at the hearing that it had no obligation or authority to reach out to Verizon, PSP apparently did reach out following the hearing and filed an unsworn letter from Verizon regarding access to the records with the court. R.1938a. The letter indicated that Verizon "cannot access any customer voicemail messages," that its "retention period for customer text message content is very brief and typically no longer than seven days" and that it had no access to "text message content from the period lasting from February 2017 through April 2021." *Id.*

In its post-hearing brief, PSP additionally made the sweeping proposition that "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." R.1952a. PSP solely relied on Sections 2702 and 2703(a) of the Stored Communications Act, which it claimed conclusively cuts off access to public records absent consent from the user of the device or a search warrant. *See id.* Mr. Schwartz in his post-hearing brief cited caselaw demonstrating that this narrow reading of the statute could not be squared with either the statute's exceptions to nondisclosure or caselaw. R.1981-1987a.

E. The Commonwealth Court Denies Mr. Schwartz's Petition for Enforcement.

On Aug. 24, 2022, the Commonwealth Court issued an opinion denying the Petition for Enforcement of the OOR Final Determination. R.2074a-2088a. The court found "that PSP has now complied with the OOR's Final Determination by conducting a good faith search for the responsive records[,] includ[ing] "searching multiple databases, attempting to track down the cell phones at issue, and contacting the potential custodians of those records, namely the two Lieutenants to whom the cell phones were assigned[.]" R.2084a-2085a. The court found that "[t]he detailed, sworn affidavit, along with the credible testimony of AORO Rozier and PSP's RTKL Counsel, establish that PSP conducted a good faith search" and "does not have any responsive records in its possession, custody or control." R.2085a. While the court acknowledged that PSP did not comply with the OOR's Final Determination in a timely fashion, it found that "it is clear from PSP's filings and

the frank testimony of its RTKL Counsel that this was the result of human error and not an attempt to withhold records or avoid the agency's responsibilities." R2086a-2087a. The court additionally considered the fact that the requester "did not notify PSP that its response was deficient, and PSP did not learn of the deficiency until the Enforcement Petition was filed." R.2087a. Because the court found that PSP's actions did not amount to bad faith, it denied Mr. Schwartz's request for attorney's fees, costs and penalties without considering an alternate statutory basis for fees that PSP had relied on an unreasonable interpretation of the law. R.2086a-2087a.

The court also concluded that Section 506(d)(1) of the RTKL did not require PSP to obtain records from Verizon as a third-party contractor because "the credible testimony of AORO Rozier and PSP's RTKL Counsel" establish that the relevant contract "is not between PSP and Verizon, but between OA and Verizon." R.2085a. The court explained that "[i]t is notable that PSP has continuously maintained – throughout the OOR's proceedings and before this Court – that it does not have a contract with Verizon," *id.*, despite the fact that this issue was never raised before the OOR. *See, e.g.*, R.1975a-1976a (arguing several issues PSP had not raised before OOR had been waived). The court characterized the OA, as "the third-party here[,]" without further explanation, and stated that PSP had reached out to the agency at "the outset of this matter to determine if responsive records exist." R.2085a-2086a. The court additionally noted that "even if Verizon was a third-party contractor, any

attempts to obtain the records from Verizon would be futile" because PSP's search and information from Verizon demonstrated the records "are no longer accessible." R.2086a.

Mr. Schwartz timely brings this Petition for Allowance to Appeal.

CONCISE STATEMENT OF THE REASONS RELIED ON FOR ALLOWANCE OF APPEAL

I. Review Is Warranted Under Pa.R.A.P. 1114(b)(3) Because This Case Presents An Issue Of First Impression Under The Right-to-Know Law: Does Section 506(d) of the RTKL Require an Agency to Obtain Its Records From a Third-Party Contractor, Where the Third Party's Contract is With Another Agency Acting on Behalf of the Commonwealth and Not With the Individual Agency?

Under the RTKL, "[a] public record that . . . 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 . . . , shall be considered a public record of the agency[.]" 65 P.S. § 67.506(d)(1). The Commonwealth Court interpreted Section 506(d)(1) of the RTKL narrowly to not require PSP to obtain its cellphone records from government contractor Verizon because the relevant contract "is not between PSP and Verizon, but between OA and Verizon." R.2085a. The court deemed the OA "the third-party here[,]" without further explanation, and credited PSP's purported outreach to the agency at "the outset of this matter to determine if responsive records exist." R.2085a-2086a. The court's holding should be reversed because its interpretation of

Section 506(d)(1) of the RTKL (i) improperly treats a Commonwealth agency serving as a contracting intermediary for all state agencies procuring telecommunication services as those agencies' third-party contractor; and (ii) narrowly construes the requirement that an agency have a contract with a third party to foreclose access in all instances where an agency contracts indirectly through the Commonwealth for services with outside vendors.

A. The Office of Administration is a government agency that acted on behalf of the Commonwealth and not a third-party contractor.

The Commonwealth Court held that the "PSP followed the applicable requirements of RTKL by reaching out to the OA, *the third party* here." R.2085a-2086a (emphasis added). But this interpretation ignores that the OA is another arm of the Commonwealth and not PSP's third-party contractor. *See* 65 P.S. § 67.102(1) (defining "Commonwealth agency" to include "[a]ny office, department, authority, board, multistate agency or commission of the executive branch, an independent agency and a State-affiliated entity," including the "Governor's Office"). As the Commonwealth Court aptly explained at the March 15, 2022 hearing in response to a question regarding whether PSP had a contract with the OA, "[i]t's the government . . . we don't contract with each other." R.1864a, 69:2-3. *See also* R.1813a,18:4-5 ("The Office of Administration is a separate state agency.").

The RTKL contemplates that an Agency Open Records Officer, when necessary, shall "direct requests . . . to appropriate persons in another agency." 65

P.S. § 67.502(b)(1). But this duty to reach out to other agencies is distinct from an agency's obligation under Section 506(d)(1) to obtain its public records from a third-party contractor. The Commonwealth Court therefore erred in finding that PSP's outreach to the OA satisfied any obligation it had under Section 506(d)(1).

B. Verizon is PSP's third-party contractor.

The Commonwealth Court narrowly construed Section 506(d)(1)'s requirement that an agency have a contract with a third party to foreclose access where an agency contracts indirectly through the Commonwealth for services with outside vendors. R.2085a-2086a. As support for its position that PSP does not contract with Verizon for purposes of Section 506(d)(1), the court relied on PSP "continuously maintain[ing] – throughout the OOR's proceedings and before this Court – that it does not have a contract with Verizon." R.2085a. But PSP in fact made no such claim (nor did it mention Verizon at all) in the proceedings before the OOR, R.4a-9a, and failed to credibly contradict the contractual evidence that Mr. Schwartz submitted after learning of the contract's existence at the March hearing.

The Commonwealth's contract with Verizon demonstrates that the OA contracted on behalf of "[a]ll using Agencies of the Commonwealth," R.1898a, with the Master Agreement specifically defining the governmental contracting agency as "the Commonwealth of Pennsylvania acting through its Governor's Office of Administration." R1902a, § 1; *see also* R.1903a, § 7 (OA "undertake[s] and make[s]

this type of contractual arrangement *on behalf of the Commonwealth*") (emphasis added). The contract further indicates that the OA's contracting authority was specifically "delegated to it by the Department of General Services to handle IT procurements for the Commonwealth." R.1903a, § 7.

The Master Agreement specifically authorizes all "Participating Entities," a term which as defined includes Commonwealth agencies such as PSP, to purchase products and services from Verizon "under the terms and conditions of the Master Agreement and this Participating Addendum[.]" R.1902a, § 2. One key provision of the Participating Addendum states that the RTKL "applies to this Contract" and provides that Verizon shall "[p]rovide the Commonwealth, within ten (10) calendar days after receipt of written notification, access to, and copies of, any document or information in the Contractor's possession arising out of this Contract that the Commonwealth reasonably believes is Requested Information and may be a public record under the RTKL[.]" R.1916a, § 15(c). The court below failed to analyze this key provision or the contract more generally in its decision and instead relied solely on PSP's representations with respect to the contract here. R.2085a-2086a.

Where, as here, the Commonwealth contracts with a third-party vendor on behalf of all participating agencies, including PSP, the Commonwealth Court erred

in narrowly construing Section 506(d)(1) to not apply to PSP's contractual relationship with Verizon.[2]

II. Review Is Warranted Under Pa.R.A.P. 1114(b)(1) & (2) Because The Commonwealth Court's Opinion Conflicts With This Court's Precedent Concerning Bad Faith In RTKL Cases.

The Commonwealth Court's decision should be reversed because its holding that PSP acted in good faith here directly conflicts with this Court's precedent concerning the standard for demonstrating an agency's bad faith in RTKL cases. Section 1304 of the RTKL provides for reasonable attorney's fees and costs if an agency "willfully or with wanton disregard deprived the requester of access to a public record . . . or otherwise acted in bad faith . . . ." 65 P.S. § 67.1304(a)(1). Demonstrating "bad faith does not require evidence of fraud or corruption. Rather, an *abnegation of mandatory duties* by an agency, including performance of a detailed search and review of records to ascertain if the requested material exists, or if any exclusions apply, prior to denial of access will support a finding of bad faith." *Uniontown*, 243 A.3d at 25 (internal citations omitted) (emphasis added). This detailed search necessarily includes "an initial inquiry" "to "determine whether potentially responsive records existed at . . . a third-party contractor prior to issuing [a] denial[.]" *See Calif. Univ.*

[2] The court noted that "even if Verizon was a third-party contractor, any attempts to obtain the records from Verizon would be futile" because the records "are no longer accessible." R.2086a. But this ignores the key role that record retention plays in the successful implementation of the RTKL and that the relevant Commonwealth policy treats text messages and voicemails concerning business of the agency as public records. *See* R.1987a.

of Pa. v. Bradshaw, 149 CD 2018, at 14 (Pa. Commw. Ct. 2021) (unpublished opinion) (Brobson, J.).[3] Indeed, if PSP had undertaken an inquiry here in March 2021 demonstrating that neither PSP nor Verizon possessed the requested records, the OOR may have found PSP's search sufficient, "thereby short-circuiting the ensuing litigation that occurred in this case." *Id.* at 14-15.

In determining that PSP did not act in bad faith, the Commonwealth Court incorrectly determined that "human error" does not amount to bad faith and ignored the substantial evidence that PSP abnegated its mandatory duties at every step of the OOR process and continued to flout the RTKL's requirement that the agency conduct a good faith search throughout the litigation before the Commonwealth Court. *See infra* at Point II.A-D.

A. PSP Abnegated Its Mandatory Duty to Conduct an Initial Good Faith Inquiry.

PSP abnegated its mandatory duty under the RTKL to sufficiently respond to Mr. Schwartz's RTKL request. It heavily and indiscriminately redacted certain emails and—despite the OOR requesting a good faith search affidavit during the appeals process—provided no evidence of any search conducted either within PSP, at the OA, or at Verizon demonstrating that the requested texts and voicemails did not

[3] A copy of this unpublished opinion is attached as Appendix C.

exist. *See, e.g.*, R.6a-9a. The OOR determined that PSP did not meet its burden relating to the redactions or to the withheld records, *id.*, evincing PSP's bad faith.

B. PSP Abnegated Its Mandatory Duty to Comply with the OOR's Final Determination.

PSP abnegated its mandatory duty under the RTKL to respond to the OOR's Final Determination within 30 days. Even after Mr. Schwartz granted PSP a four-day extension, PSP turned over unredacted emails only after Schwartz's persistent follow-up. *See* R. 1413a-1418a. But PSP still failed to provide the requested texts and voicemails or a good faith search affidavit as required. *Id.*

The Commonwealth Court improperly held that this failure did not amount to bad faith because it was purportedly "the result of human error and not an attempt to withhold records or avoid the agency's responsibilities." R. R2086a-2087a. This finding contradicted the court's own observation during the evidentiary hearing that "actually bad faith doesn't necessarily require willful or wanton . . . it can be just mistakes." R.1873a, 78:13-19. Worse, it ignored this Court's holding that "an abnegation of mandatory duties by an agency" "will support a finding of bad faith." *Uniontown*, 243 A.3d at 25 (internal citations omitted).

The Commonwealth Court also improperly faulted Mr. Schwartz for failing to remedy PSP's own bad faith failure to comply with the OOR's Final Determination. The Commonwealth Court took into account that Mr. Schwartz "did not notify PSP

that its response was deficient, and PSP did not learn of the deficiency until the Enforcement Petition was filed." R.2087a. But this is of no merit.

It is not the responsibility of the requester to remedy agencies' deficiencies. To the contrary, "[a]n agency's failure to locate responsive records until motivated by litigation evinces bad faith." *Uniontown Newspapers, Inc. v. Pennsylvania Department of Corrections*, 185 A.3d 1161, 1172 (Pa. Commw. Ct. 2018), *aff'd* 243 A.3d 19, 28 (Pa. 2020). PSP's failure to conduct a good faith search in advance of litigation is clear evidence of its bad faith.

C. PSP Abnegated Its Mandatory Duty to Search for Records Held by a Third Party.

PSP abnegated its mandatory duty under the RTKL to search for records held by a third party. *See Uniontown*, 243 A.3d at 28. Even if the OA were properly considered the third party here, an Open Records Officer cannot "fulfill[] his or her obligation simply by relying on the representation of others without inquiring as to what investigation was made and without reviewing the records upon which the individual responding to the request relied." *Uniontown*, 243 A.3d at 28. But that is exactly what happened here.

PSP only provided evidence of contacting an OA Telecommunication Services Supervisor after litigation commenced and relied on his representations without further inquiring into the investigations he made or the records upon which he relied. R. R.63a, ¶ 13. The Open Records Officer's affidavit indicated that the OA

supervisor "related that he could not obtain voice or text messages" and "that a subpoena to Verizon Security Assistance Team would be necessary to search for any voice or text messages to begin an inquiry." *Id.* The Open Records Officer erred in simply relying on this representation without inquiring into the investigation the supervisor made or reviewing the records upon which he relied. *See, e.g.*, *Staub v. City of Wilkes-Barre*, No, 2140 C.D.2012, 2013 WL 5520705, at *3 (Pa. Commw. Ct. Oct. 3, 2013) (unpublished opinion) (holding that agency "had a duty to independently ascertain the existence or nonexistence of the records" in the third-party contractor's possession rather than merely forwarding a request to the contractor and sharing the contractor's response with the requester).[4] Contrary to this Court's precedent, the court below here held that PSP's reliance on the OA's search was sufficient to demonstrate its own good faith search.

As noted above, PSP had additional mandatory duties under the RTKL: to inquire with the record holder Verizon directly, compel production of any presumptively public records, and ensure proper record retention. *See supra* at 16 n.2, 19-20. The Commonwealth Court's Opinion improperly elides this issue by incorrectly holding that the OA is PSP's third-party contractor. R.2086a.

[4] A copy of this unpublished opinion is attached as Appendix D.

D. PSP Abnegated Its Mandatory Duty to Provide an Affidavit Demonstrating a Good Faith Search for the Requested Records.

Finally, PSP abnegated its mandatory duty under the RTKL to provide Mr. Schwartz an affidavit demonstrating a good faith search for the requested records. After receiving a partial response with unredacted emails from PSP, Mr. Schwartz requested an order from the Commonwealth Court to enforce the Final Determination and obtain either the texts and voicemails or a good faith search affidavit. R.10a-21a. PSP only provided an affidavit regarding its search after litigation commenced—nearly six months after the initial 30-day deadline expired. R.61a-64a. That affidavit failed to show that PSP conducted a good faith search for these records. *See id*. In addition to no outreach made to third-party contractor Verizon, the affidavit also provides no specific dates when PSP contacted one subject of the request and the OA about the voicemails and text messages. *See id.* PSP's conspicuous omission of these dates and its subsequent testimony and stipulation at the hearing regarding this omission provides further evidence of PSP's apparent failure to conduct any proper search until after Mr. Schwartz filed the request for enforcement. *See* R.1865a-1867a, 70:6-72:10. An enforcement action should not be required to compel agencies to meet their obligations under the RTKL.

III. Review Is Warranted Under Pa.R.A.P. 1114(b)(1) Because The Commonwealth Court's Opinion Conflicts With The Commonwealth Court's Precedent Concerning Awarding Attorney's Fees Where an Agency Relied on Unreasonable Interpretations of the Law.

The Commonwealth Court's decision should be reversed because it conflicts with the Commonwealth Court's prior precedent on awarding attorney's fees where an agency relied on unreasonable interpretations of law. Courts may "award attorney fees if the court . . . grants access when either: (1) an agency acted with willful or wanton disregard of the right to access in bad faith; or, (2) an agency's denial was not based on a reasonable interpretation of law." *Uniontown Newspapers, Inc. v. Pennsylvania Dep't of Corrections*, 197 A.3d 825, 832 (Pa. Commw. Ct. 2018) (citing 65 P.S. § 67.1304); *see also Newspaper Holdings, Inc. v. New Castle Area Sch. Dist.*, 911 A.2d 644, 650 (Pa. Commw. Ct. 2006) (affirming an award of attorney's fees based on an unreasonable interpretation of law when the school district misinterpreted a District Court order as a basis for denying records to a newspaper). Here, even if the Commonwealth Court correctly found that the agency did not act in bad faith, it erred in failing to award attorney's fees based on the agency's unreasonable interpretations of law.

PSP relied on a number of unreasonable interpretations of the law that it failed to raise before the OOR in arguing that it had no duty to obtain its records stored with third-party contractor Verizon. *First*, PSP improperly relied on the federal Stored Communications Act as a basis for denying access. R.1952a.

The Commonwealth Court declined to reach the issue of whether the Stored Communications Act bars access to PSP's records held by Verizon. R.2082a. But no caselaw supports the agency's unreasonable interpretation of the statute as establishing a sweeping prohibition against access to public records stored with third-party telecommunications providers. Contrary to PSP's interpretation of the Stored Communications Act's scope, several exceptions that are applicable here allow a provider to disclose records, including prior authorization, that disclosure is necessarily incident to Verizon's performance under the RTKL provision of the contract, and consent of the subscriber or customer. R.1981-1987a. An analogously overbroad interpretation of the statute has been previously rejected in the leading case examining access to agency records stored with a telecommunications provider because a "sweeping prohibition against civil discovery of electronic communications" would "dramatically alter discovery practice . . . by permitting a party to defeat the production of electronically stored information . . . through the simple expedient of storing it with a third party." *Flagg v. City of Detroit*, 252 F.R.D. 346, 347 (E.D. Mich. 2008). So, too, here.

Second, PSP unreasonably argued that it had no ability or obligation to retrieve public records created on Commonwealth-issued mobile devices and maintained by Verizon because the RTKL does not specifically vest subpoena power with PSP. But PSP's own RTKL policy demonstrates—consistent with caselaw and with the

Commonwealth's contract with Verizon—that no subpoena to Verizon is required here. PSP's procedure for accessing its records stored with third-party contractors states that it should "direct" the contractor to provide access to PSP public records. R.1974a-1975a. *Third*, for the reasons described in Point I of the petition, PSP relied on an unreasonable interpretation of the law in arguing that Verizon does not qualify as a third-party contractor subject to the RTKL and that another state agency is PSP's third-party contractor here.

Because PSP relied on unreasonable interpretations of the law to deny access to the requested records, the Commonwealth Court erred in not awarding attorney's fees on that basis in addition to its finding of no bad faith here.

CONCLUSION

For the foregoing reasons, the Court should grant Mr. Schwartz's petition for allowance of appeal.

Dated: September 23, 2022

Respectfully submitted,

By: */s/Paula Knudsen Burke*

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[5] Cornell students Patrick George and Shayla Hinson drafted portions of this brief. The Cornell Clinic is housed within Cornell Law School and Cornell University. Nothing in this Petition should be construed to represent the views of these institutions, if any.

CERTIFICATES OF COMPLIANCE

I hereby certify that:

1. This filing complies with the word count limit set forth in Pennsylvania Rule of Appellate Procedure 1115. Based on the word-count function of Microsoft Word, the filing contains 6685 words.

2. I hereby certify that the foregoing Notice of Appeal and Jurisdictional Statement complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Dated: September 23, 2022

/s/ Paula Knudsen Burke

Paula Knudsen Burke
REPORTERS COMMITTEE FOR
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PA ID: 87607

APPENDIX A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Daniel Schwartz, Petitioner	:	
v.	:	No. 481 M.D. 2021
	:	Heard: March 15, 2022
Pennsylvania State Police, Respondent	:	

BEFORE: HONORABLE ELLEN CEISLER

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE CEISLER FILED: August 24, 2022

Before the Court is Daniel Schwartz's (Requester) Petition for Enforcement of Final Determination (Enforcement Petition) and the Pennsylvania State Police's (PSP) Answer in opposition thereto. Requester seeks an order from this Court directing PSP to comply with the June 22, 2021 Final Determination of the Office of Open Records (OOR), as well as attorney fees and costs and the imposition of a civil penalty due to PSP's purported violations of the Right-to-Know Law (RTKL).[1] PSP, for its part, argues that the Enforcement Petition is now moot because PSP has fully complied with the OOR's Final Determination, and that sanctions are not warranted because PSP did not act in bad faith.

Background

The pertinent facts are as follows. On March 24, 2021, Requester, a freelance investigative journalist based in Colorado, submitted a request to PSP pursuant to

[1] Act of February 14, 2008, P.L. 6, 65 P.S. §§ 67.101-67.3104.

the RTKL seeking correspondence, including text and voice messages, related to the Mariner East Pipeline (Request). While the Request contained two parts, only the second part is at issue herein and states:

> 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 was [sic] Lt. Stephen J. U'Selis III about the Mariner East pipeline or the activities of state residents as they may related [sic] to the pipeline or its construction. 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," "Mariner," "suspicious activity," "protesters," "pipeline," "construction." For text messages, please also include any and all
> attachments.
>
> Finally, I am requesting emails between Lt. U'Selis and Sunoco, Energy Transfer, and associates of those groups, such as Tiger Swan, Zorion, or Hillard Heintze, as well as emails that concern the Mariner East Pipeline. To this end, please conduct a keyword search of Mr. U'Selis['] email account for the words or phrases "Sunoco" and "Energy Transfer" and "Mariner" and within the timeframe of February 2017 to the date this request is completed. Please be sure to also provide any and all associated records, such as email attachments, as well as a Vaughn Index justify [sic] any redactions your office may deem necessary.

Enforcement Pet., Ex. B.

On April 30, 2021,[2] PSP issued a response to Requester granting in part and denying in part the Request. Enforcement Pet., Ex. C. Specifically as to Part Two, PSP provided Requester with a compact disc containing responsive emails sent between and among the identified individuals from February 2017 to the date of the

[2] By letter dated March 31, 2021, PSP notified Requester that it needed additional time to respond to the Request and that it was invoking the 30-day extension of time to do so pursuant to Section 902(b)(2) of the RTKL, 65 P.S. § 67.902(b)(2). *See* Enforcement Pet., Ex. B.

Request. The emails were heavily redacted, including redactions of personal identification information pursuant to Section 708(b)(6) of the RTKL, 65 P.S. § 67.708(b)(6).

PSP denied Part Two of the Request in part, claiming some of the responsive records were exempt from disclosure as criminal investigative records under Section 708(b)(16) of the RTKL, 67 P.S. § 67.708(b)(16), and because their disclosure would violate the Criminal History Record Information Act (CHRIA), 18 Pa.C.S. §§ 9101-9183. Of particular note herein, as to the text and voice messages received by the work-issued cell phones of the two identified PSP officers, the response stated that "PSP determined it does not have any records in its possession, custody, or control that respond to your request." Enforcement Pet., Ex. C. PSP also provided Requester with the unsworn verification of Kim Grant, PSP's Deputy Agency Open Records Officer, indicating that PSP did not have any records in its possession, custody, or control responsive to the request for text and voice messages.

Requester appealed to the OOR, which invited both parties to supplement the record and directed PSP to notify any third parties of their ability to participate in the appeal. Enforcement Pet., Ex. A, OOR Final Determination at 3. PSP submitted a position statement but failed to provide an affidavit as the OOR requested. Neither party requested a hearing and none was held before the OOR.

In its Final Determination issued on June 22, 2021, the OOR granted in part and denied in part Requester's appeal. *Id.* at 1. Notably, the OOR held that PSP failed to provide sufficient evidence in support of its assertions that records do not exist, are criminal investigative records, or are protected by CHRIA. *Id.* at 5. Regarding PSP's search for responsive records, the OOR noted that Section 901 of the RTKL provides that "an agency shall make a good faith effort to determine if . .

. the agency has possession, custody[,] or control of the record[.]" *Id.* at 6 (quoting 65 P.S. § 67.901). As this Court has noted

> Section 901 also includes the duty to perform a reasonable search for records in good faith. *Dep't of Labor & Indus. v. Earley*, 126 A.3d 355 (Pa. Cmwlth. 2015). 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. *Breslin*[*v. Dickinson Twp.*, 68 A.3d 49 (Pa. Cmwlth. 2013)].

Uniontown Newspapers, Inc. v. Pa. Dep't of Corr., 185 A.3d 1161, 1171-72 (Pa. Cmwlth. 2018) (*Uniontown II*), *aff'd*, 243 A.3d 19 (Pa. 2020). The OOR held that here, while PSP provided Requester with a verification along with its response, that verification failed to sufficiently describe the search for records such that the OOR could determine that no text or voice messages exist. Enforcement Pet., Ex. A, OOR Final Determination at 6-7. Therefore, the OOR concluded that PSP failed to meet its burden of proof with respect to Part Two of the Request. The Final Determination states:

> [] PSP is therefore directed to conduct a good faith search for records as set forth in [Section 901 of the RTKL,] 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, [] PSP shall inform the Requester of such in writing.

Id. The Final Determination gave PSP 30 days in which to comply. Neither party appealed the Final Determination.

Enforcement Petition

Requester filed the instant Enforcement Petition on December 20, 2021, approximately six months after the Final Determination was issued. Requester admits that PSP partially complied with the Final Determination by producing 350

pages of emails, which were largely unredacted aside from certain information that was properly withheld as personal identification information. Enforcement Pet. ¶ 25. Requester claims, however, that PSP failed to timely produce the text and voice messages responsive to Part Two of the Request, or provide an affidavit as required by the Final Determination. *Id.* ¶¶ 4, 26. Requester alleges that PSP acted in bad faith by failing to comply with the Final Determination and that this Court should award Requester attorney fees and costs of litigation and impose a civil penalty against PSP, citing Sections 1304(a)(1) and 1305(a) of the RTKL respectively, 65 P.S. §§ 67.1304(a)(1) & 67.1305(a).

PSP filed an answer with new matter to the Enforcement Petition, admitting that it failed to provide either the text and voice messages or the requisite affidavit within the prescribed time period, but denying that it acted in bad faith. Answer ¶ 4. Along with its answer, PSP submitted the sworn affidavit of William A. Rozier, PSP's Agency Open Records Officer (AORO Rozier), email correspondence between counsel for the parties, and the sworn affidavit of PSP's RTKL Counsel who prepared the agency's response to Requester following the OOR's Final Determination. In these filings, PSP explains that its failure to fully comply with the OOR's directive was due to an oversight by RTKL Counsel, which was unintentional and not done in bad faith or in wanton disregard of the Final Determination. Moreover, PSP avers that Requester did not raise an objection to PSP's initial response when it was received in July 2021, and that PSP did not become aware of the deficiency until Requester filed his Enforcement Petition in December 2021.

In his sworn affidavit, AORO Rozier detailed PSP's search for records responsive to Part Two of the Request, including the agency's attempts to track down

the two cell phones at issue and the Lieutenants who used them, and AORO Rozier's search of PSP and Commonwealth databases to which he had access. Answer, Ex. 1. AORO Rozier further explained that PSP's RTKL Section contacted now-Captain Hennigan who relayed that he did not have any text or voice messages relating to the Request and that he was no longer in possession of the phone or phone number used during the time period at issue, as he has since been promoted to the Bureau of Liquor Control Enforcement.

Notably, AORO Rozier also specifically stated that PSP contacted the Pennsylvania Office of Administration (OA), Public Safety Unified Telecommunications Section regarding the two work-issued cell phones. OA Telecommunication Services Supervisor Jason Bearden related to PSP that he could not obtain voice or text messages from the cell phones at issue and that a subpoena to Verizon, with whom OA contracted for services, "would be necessary to search for any voice or text messages to begin an inquiry." Answer, Ex. 1. Given all of these facts, AORO Rozier again "determined that [] PSP does not have any records such as Requester described in its possession, custody[,] or control." *Id.*

Simultaneously with its answer, PSP filed an application for relief in the form of a Motion to Dismiss, asserting that the Enforcement Petition is now moot. PSP explains that it has now provided Requester with all of the responsive records in its possession, custody, or control, as well as the sworn affidavit of AORO Rozier explaining that the agency does not have any responsive text or voice messages. PSP argues that the Enforcement Petition should be dismissed as moot, or in the alternative denied, because PSP has now fully complied with the OOR's Final Determination. In addition, attorney fees, costs, and civil penalties are inappropriate because PSP did not act in bad faith.

In his Answer in opposition to the Motion to Dismiss, Requester argues that AORO Rozier's sworn affidavit does not render the Enforcement Petition moot because it fails to demonstrate that PSP conducted a good faith search for responsive records. Requester cites to this Court's decision in *Uniontown II* for the proposition that PSP had a duty to reach out to all custodians or agents within its control, including third-party contractors such as Verizon, to obtain the responsive agency records. Requester maintains that because PSP's pleadings fail to show that it made any inquiry with Verizon directly to obtain the text and voice messages responsive to the Request, PSP failed to conduct a good faith search. Requester further claims that PSP's continuing failure to abide by its requirements under the RTKL means there is still a live controversy and the matter is not moot. In the alternative, Requester asserts that, at the very least, the issue of attorney fees, costs, and civil penalties is not moot because the Court has not yet resolved the allegation that PSP acted in bad faith.

A hearing on Requester's Enforcement Petition and argument on PSP's Motion to Dismiss were held on March 15, 2022, at which AORO Rozier and PSP's RTKL Counsel both testified. The Court finds both witnesses credible based on their demeanor and their candid responses, as well as the consistency of their testimony. AORO Rozier and RTKL Counsel testified in support of the averments made in PSP's Answer to the Enforcement Petition and its Motion to Dismiss regarding PSP's search for responsive documents and its determination that the agency did not have responsive text or voice messages in its possession, custody, or control. Specifically, AORO Rozier testified that PSP does not keep or store phone records, they go to the OA. Moreover, AORO Rozier and PSP's RTKL Counsel both stated that PSP does not have a contract with Verizon for communication

services; rather, the contract is between Verizon and the OA. Both AORO Rozier and PSP's RTKL Counsel confirmed that shortly after the Request was received, PSP reached out to OA, the third-party contractor here, in an attempt to search for responsive records. Based on all of the above, both AORO Rozier and PSP's RTKL Counsel determined that PSP did not have any responsive records in its possession, custody, or control.

By order dated that same day, the Court denied PSP's Motion to Dismiss and directed the parties to submit post-hearing briefs. On March 16, 2022, after the hearing on his Enforcement Petition but prior to the submission of post-hearing briefs, Requester filed what was captioned as a notice of supplemental authority. Requester claims that after the hearing he was able to obtain through the Office of the State Treasurer's website a contract purportedly between Verizon and the Commonwealth of Pennsylvania, acting through OA, covering the provision of wireless communications including voice messages and data. Requester asserts that the RTKL applies to this contract and the language therein proves Verizon is obligated to provide the Commonwealth, upon request, with records within its possession.

In its response in opposition to Requester's notice of supplemental authority, PSP notes that the contract Requester points to is between Verizon and OA. PSP is not a party to that contract, cannot attest to what it means, and is not bound thereby. PSP further states that it reached out to Verizon directly given the questions raised during the hearing, in particular whether an order could be issued to Verizon to produce any responsive text and voice messages. PSP attached to its response the letter it received from Verizon on March 18, 2022, in which Verizon explains that a subpoena or valid criminal search warrant may be necessary for it to release

customer text messages, and that Verizon must comply with the federal Stored Communications Act, 18 U.S.C. §§ 2701-12, and applicable regulations when responding to requests for customer telephone records. PSP's Response to Notice of Supplemental Authority, Attachment A. PSP notes that based on its communications with Verizon, the responsive text and voice messages Requester seeks "do not exist and cannot be produced" given the very short periods of time any such records might be retained by Verizon. PSP's Response to Notice of Suppl. Auth. at 3.

In its post-hearing brief, PSP maintains that it acted in good faith in conducting its search for responsive materials and provided an adequate, albeit slightly late response through AORO Rozier's affidavit. PSP argues that the record demonstrates that it did not have possession, custody, or control of the requested records, and neither did OA. PSP further asserts that OA is the third party here, not Verizon, and that PSP satisfied its obligations under the RTKL by reaching out to OA regarding the Request. There was no basis for AORO Rozier to believe that text or voice messages could be obtained from Verizon given what he was told by OA. Moreover, there is no mechanism in the RTKL for PSP to subpoena records from a another party, such as Verizon, especially when that party is not performing a governmental function on behalf of PSP.[3]

Conversely, Requester argues that PSP's repeated refusal to comply with the RTKL and the OOR's Final Determination constitutes bad faith. Requester argues

[3] PSP also argues that even if Verizon was performing a governmental function on behalf of PSP and the requested records directly related to that function, the record would be exempt from access under federal law, namely the Stored Communications Act. Requester maintains that because PSP failed to raise this exemption issue before the OOR and did not appeal the OOR's Final Determination, this issue has been waived. *See Levy v. Senate of Pennsylvania*, 94 A.3d 436, 442 (Pa. Cmwlth. 2014). Given the outcome of this matter, the Court need not reach these issues.

that PSP was required under the RTKL to contact Verizon because it qualifies as a third-party contractor with access to the requested records. Further, PSP improperly relied on the statement of an OA Telecommunication Services Supervisor who advised that a subpoena to Verizon would be necessary to search for text or voice messages. *See Uniontown Newspapers, Inc. v. Pa. Dep't of Corr.*, 243 A.3d 19, 28 (Pa. 2020) (*Uniontown III*) (open records officer cannot "fulfill[] his or her obligation simply by relying on the representations of others without inquiring as to what investigation was made and without reviewing the records upon which the individual responding to the request relied"). Requester also maintains that PSP's lack of diligence throughout the OOR and this Court's proceedings supports a finding of bad faith, pointing to, among other things, PSP's failure to meet the 30-day compliance deadline, and its alleged failure to conduct a good faith search for responsive records until motivated by this litigation.

Discussion

Given that this is an enforcement action and neither party appealed the Final Determination, we do not question the OOR's resolution of the merits. *Uniontown Newspapers, Inc. v. Pa. Dep't of Corr.*, 151 A.3d 1196, 1202 (Pa. Cmwlth. 2016) (*Uniontown I*). The first issue the Court must address is whether PSP has complied with the OOR's Final Determination ordering PSP to conduct a good faith search for records and to provide any records discovered as a result of that search, or a statement describing the search and that no responsive records exist, within 30 days. While Requester bears the burden to prove that PSP did not comply, *id.* at 1203, PSP as the responding agency "bears the burden of providing that no additional responsive records exist," *id.* at 1208.

As this Court explained in *Uniontown II*,

> [u]pon receipt of a request, an open records officer must make a good faith effort to determine whether: (1) the record is a public record; and, (2) the record is in the possession, custody, or control of the agency. Section 901 also includes the duty to perform a reasonable search for records in good faith. 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.

185 A.3d at 1171-72 (internal citations and quotations omitted).

Section 506(d)(1) of the RTKL specifically pertains to agency possession and third parties, and provides:

> [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 act, shall be considered a public record of the agency for purposes of this act.

65 P.S. § 67.506(d)(1). As we have explained, Section 506(d) of the RTKL "may reach records that are not in an agency's possession, custody[,] or control 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." *Allegheny Cnty. Dep't of Admin. Servs. v. Parsons*, 61 A.3d 336, 340 (Pa. Cmwlth. 2013) (emphasis in original).

With this legal framework in mind, and based upon the evidence of record, the Court finds that PSP has now complied with the OOR's Final Determination by conducting a good faith search for the responsive records. The parties agree that, at this point in time, the only potentially responsive records that have yet to be turned

over are the text and voice messages. AORO Rozier's sworn affidavit and testimony during the hearing demonstrate that PSP's efforts included searching multiple databases, attempting to track down the cell phones at issue, and contacting the potential custodians of those records, namely the two Lieutenants to whom the cell phones were assigned. PSP was unable to obtain responsive records from Lieutenant U'Selis because he is now retired and no longer in possession of the cell phone. Moreover, now-Captain Hennigan relayed to PSP that he did not have any text or voice messages relating to the Request and that he was no longer in possession of the phone or phone number used. The detailed, sworn affidavit, along with the credible testimony of AORO Rozier and PSP's RTKL Counsel, establish that PSP conducted a good faith search and that the agency does not have any responsive records in its possession, custody or control. *See Uniontown I*, 151 A.3d at 1208-09 (agency may satisfy its burden that it does not possess a requested record with sworn affidavit); *see also Campbell v. Pa. Interscholastic Athletic Ass'n*, 268 A.3d 502 (Pa. Cmwlth. 2021) (*en banc*).

Requester's attempt to invoke Section 506(d)(1) of the RTKL to require PSP to obtain records directly from Verizon as a third-party contractor falls short. Despite Requester's argument to the contrary, the contract it relies upon is not between PSP and Verizon, but between OA and Verizon. *See Parsons*, 61 A.3d at 340 (third party must have a contract with the agency to perform a governmental function for Section 506(d) to apply). The evidence presented in this matter, in particular the credible testimony of AORO Rozier and PSP's RTKL Counsel, establish this fact. It is notable that PSP has continuously maintained – throughout the OOR's proceedings and before this Court – that it does not have a contract with Verizon. Further, PSP followed the applicable requirements of RTKL by reaching

out to the OA, the third-party here, at the outset of this matter to determine if responsive records exist and how they might be obtained.[4]

This does not end our inquiry, however, since the Enforcement Petition also alleges that PSP acted in bad faith throughout the OOR and this Court's proceedings and that attorney fees, costs, and penalties should be imposed. Bad faith may constitute grounds for an award of attorney fees and costs or the imposition of civil penalties under Sections 1304(a) and 1305 of the RTKL respectively, 65 P.S. §§ 67.1304(a) & .1305. *See Uniontown I*. As is the case here, the RTKL permits recovery when the receiving agency determination is reversed, including when it is reversed by the OOR and no appeal was taken. *See Uniontown III*, 243 A.3d at 34. Requester bears the burden of proving that PSP acted in bad faith. *Uniontown I*. "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 II*, 185 A.3d at 1170.

Based upon the facts and circumstances of this case, the Court finds that PSP's actions do not amount to bad faith. PSP candidly admits that it did not fully comply with the OOR's Final Determination within the 30-day deadline. Specifically, PSP's response to Requester following the OOR's Final Determination failed to include either the responsive text and voice messages or a sworn affidavit regarding their non-existence. However, it is clear from PSP's filings and the frank testimony of its RTKL Counsel that this was the result of human error and not an attempt to withhold

[4] At this point in time, it is evident from PSP's search for the records and the information received from Verizon that any responsive text or voice messages are no longer accessible. Therefore, even if Verizon was a third-party contractor, any attempts to obtain the records from Verizon would be futile.

records or avoid the agency's responsibilities. Requester admittedly did not notify PSP that its responsive was deficient, and PSP did not learn of the deficiency until the Enforcement Petition was filed. PSP provided Requester with AORO Rozier's sworn affidavit within a reasonable amount of time after learning of the deficiency. Moreover, given our discussion above, we reject Requester's argument that PSP acted in bad faith by failing to conduct a good faith search.

Accordingly, the Enforcement Petition is denied, including Requester's request for attorney fees, costs, and civil penalties.

ELLEN CEISLER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Daniel Schwartz, Petitioner	:	
v.	:	No. 481 M.D. 2021
Pennsylvania State Police, Respondent	:	

O R D E R

AND NOW, this 24th day of August, 2022, Petitioner Daniel Schwartz's Petition for Enforcement of Final Determination is DENIED in its entirety.

Ellen Ceisler

ELLEN CEISLER, Judge

Order Exit
08/24/2022

APPENDIX B

pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
DAN SCHWARTZ AND TYPE INVESTIGATIONS,	:	
Requester	:	
	:	**Docket No: AP 2021-0916**
v.	:	
	:	
PENNSYLVANIA STATE POLICE,	:	
Respondent	:	

INTRODUCTION

Dan Schwartz and Type Investigations (collectively "Requester") submitted a request ("Request") to the Pennsylvania State Police ("PSP") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq*., seeking correspondence and text messages. The PSP partially denied the Request, redacting some records, arguing they are criminal investigative records and subject to the Criminal History Record Information Act ("CHRIA"), 18 Pa.C.S. §§ 9101-9183. The Requester appealed to the Office of Open Records ("OOR"). For the reasons set forth in this Final Determination, the appeal is **granted in part** and **denied in part**, and the PSP is required to take additional action as directed.

FACTUAL BACKGROUND

On March 24, 2021, the Request was filed, stating:

PART ONE:
In October, I submitted a request for correspondences, which met a certain criteria, that went to and came from Lt. James Hennigan of the state police. The records request number is 2020-1105. I was provided two batches of emails, one of which was seemingly indiscriminately redacted, and it is my opinion that the redactions are unlawful. This batch of PDFs was given the name "email N Redacted RELEASEABLE.pdf" and it is 263 pages long. Many of the records redacted are inherently public, such was waiver requests and non-exempt emails between public officials. Others have already been released to the public. I am now asking for these records to be release to me without redactions.

In my request, I had also asked for a Vaughn Index, which seems to have been ignored. Please provide me justification for the redactions in the documents "email N_Redacted RELEASEABLE.pdf." For your convenience, I have attached the document to this email.

I had also asked for any and all documents associated with the correspondences, namely email attachments, and this request seems to have been ignored. Please provide me any and all associated attachments.

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 was Lt. Stephen J. U'Selis Ill about the Mariner East pipeline or the activities of state residents as they may related to the pipeline or its construction. 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," "Mariner," "suspicious activity," "protesters," "pipeline," "construction." For text messages, please also include any and all attachments.

Finally, I am requesting emails between Lt. U'Selis and Sunoco, Energy Transfer, and associates of those groups, such as Tiger Swan, Zorion, or Hillard Heintze, as well as emails that concern the Mariner East Pipeline. To this end, please conduct a keyword search of Mr. U'Selis email account for the words or phrases "Sunoco" and "Energy Transfer" and "Mariner" and within the timeframe of February 2017 to the date this request is completed. Please be sure to also provide any and all associated records, such as email attachments, as well as a Vaughn Index justify any redactions your office may deem necessary.

On April 30, 2021, following a thirty-day extension to respond, 65 P.S. § 67.902(b), the PSP partially denied the Request, arguing that for Part 1, the PSP would rely on the final response sent to the prior request date October 1, 2020. In response to Part 2, the PSP argued that no text messages exist and that certain emails were redacted of personal identification information, 65 P.S. § 67.708(b)(6) and some records are criminal investigative records, 65 P.S. § 67.708(b)(16) and subject to CHRIA.

On May 7, 2021, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure.[1] The OOR invited both parties to supplement the record and directed the PSP to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On May 14, 2021, the Requester provided a second set of records, the final response of the PSP and the final response of the PSP to records request 2020-1073, which is unrelated to the Request at issue.

On May 28, 2021, the PSP submitted a position statement seeking dismissal of the appeal as premature and reiterating its grounds for denial. The PSP claims that Part 1 of the Request was identical to a prior request where the PSP provided redacted records and required no supplementation so the request as to Part 1 was denied. The PSP also asserted that no records exist as to Part 2 of the Request and noted that a verification to this assertion accompanied the final response. Despite the OOR seeking an affidavit in support of the PSP's submission, as of the date of this final determination, no affidavit has been provided.

[1] By OOR Order issued May 10, 2021, the Requester was required to file a complete copy of the agency's final response within seven days of the date of the Order. On May 14, 2021 the OOR received a copy of the final response from the Requester.

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 PSP 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 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).

1. The appeal is not premature

The PSP first asserts that the appeal is premature claiming that the Request was received on May 7, 2021 and a thirty-day extension was invoked on May 31, 2021. 65 P.S. § 67.902(b). The PSP then asserts that the final response was mailed on April 30, 2021. The PSP appears to have conflated the date of appeal with the Request date and further, acknowledges within its submission that the final response was mailed April 30, 2021. The appeal was filed on May 7, 2021 and is not premature.

2. The PSP has not met its burden of proof that records do not exist, are criminal investigative records or are protected by CHRIA

The PSP has not provided sufficient evidence in support of its assertions. Despite the OOR's attempts to develop the record, the PSP has not provided an affidavit. Courts interpreting the RTKL have held that testimonial affidavits may serve as sufficient evidentiary support of factual statements before the OOR. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. OOR*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). On the other hand, unsworn statements or statements of counsel, not supported by affidavit testimony, have

been held not to be competent evidence under the RTKL. *See Housing Auth. of the City of Pittsburgh v. Van Osdol*, No. 795 C.D. 2011, 2012 Pa. Commw. LEXIS 87 (Pa. Commw. Ct. 2012); *City of Philadelphia v. Juzang*, July Term 2010, No. 2048 (Phila. Com. Pl. June 28, 2011). As a result, the OOR is obligated to require that all factual statements be supported by a testimonial affidavit.

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 or 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, 875 (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). Here, the OOR does not have sufficient evidentiary support for any assertion. While the final response does include a verification, the

verification does not sufficiently describe the search for records such that the OOR can determine that no text messages or voicemails exist.

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 the PSP has not met its burden of proof with respect to Part 2 of the Request. The PSP 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 PSP shall inform the Requester of such in writing.

The verification also does not provide factual evidence regarding how the records for Part 1 are exempt and 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"); *see also Office of the District Attorney of Phila. v. Bagwell*, 155 A.3d 1119, 1130 (Pa. Commw. Ct. 2017) ("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).

In his appeal, the Requester provided records showing extensive redactions, "email N_Redacted RELEASABLE," and later supplemented the record by providing a second set of records, titled "email Y_Redacted RELEASABLE" showing redactions of email addresses. Section 708(b)(6)(i)(A) of the RTKL exempts personal identification information, including "personal financial information, home, cellular or personal telephone numbers, [and] personal e-

mail addresses...." 65 P.S. § 67.708(b)(6)(i)(A). As personal identification information is facially exempt from disclosure, the PSP has appropriately redacted the email addresses. *See, e.g., Vinovskis v. Allentown City*, OOR Dkt. AP 2020-1391, 2020 PA O.O.R.D. LEXIS 2790. The PSP has not met its burden as it relates to any other redactions or withheld records.

CONCLUSION

For the foregoing reasons, the appeal is **granted in part** and **denied in part**, and the PSP is required to provide unredacted emails responsive to Part 1 and text messages or voicemails responsive to Part 2 or provide the Requester with a statement describing the search and that no responsive records exist 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 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 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.[2] This Final Determination shall be placed on the OOR website at: http://openrecords.pa.gov.

FINAL DETERMINATION ISSUED AND MAILED: June 22, 2021

/s/ Erin Burlew

_____

ERIN BURLEW, ESQ.
APPEALS OFFICER

Sent to: Dan Schwartz (via email only);
Kathryn Daczka, Esq. (via email only);
William Rozier (via email only)

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

APPENDIX C

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

California University of Pennsylvania,	:	
Petitioner	:	
v.	:	No. 1491 C.D. 2018
Gideon Bradshaw,	:	
Respondent	:	

BEFORE: HONORABLE P. KEVIN BROBSON, President Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY PRESIDENT JUDGE BROBSON **FILED: October 13, 2021**

This matter returns to the Court following our prior decision and the Supreme Court of Pennsylvania's denial of allocatur in *California University of Pennsylvania v. Bradshaw*, 210 A.3d 1134 (Pa. Cmwlth.), *appeal denied*, 220 A.3d 532 (Pa. 2019). In that decision, this Court held that the California University of Pennsylvania (University) improperly denied Gideon Bradshaw's (Respondent) request for certain donation records made pursuant to the Right-to-Know Law (RTKL).[1] *See Cal. Univ. of Pa.*, 210 A.3d at 1139-40. Currently before the Court is an "Application for Attorney's Fees, Costs, and Statutory Damages for Bad Faith" (Application) filed by Respondent against the University stemming from that litigation. For the reasons that follow, the Application is granted.

[1] Act of February 14, 2008, P.L. 6, 65 P.S. §§ 67.101-.3104.

On August 22, 2018, Respondent submitted a RTKL request to the University seeking "all records related to donations from Manheim Corp[oration (Manheim)] to the Foundation for University of California [(Foundation)] between Jan[uary] 1, 2008, and Dec[ember] 31, 2013, and all records identifying the uses of those funds." (Reproduced Record (R.R.) at 001a.)[2] On August 27, 2018, the University denied the request on two grounds: (1) the University does not possess donation records of the Foundation, an independent nonprofit organization; and (2) had the request been properly directed to donation records maintained by the University, the request would be denied pursuant to Section 708(b)(13) of the RTKL, 65 P.S. § 67.708(b)(13), which provides:

> (b) Exceptions.--Except as provided in subsections (c) and (d) [relating to financial records and aggregated data], the following are exempt from access by a requester under [the RTKL]:
>
> . . . .
>
> (13) Records that would disclose the identity of an *individual* who lawfully makes a donation to an agency unless the donation is intended for or restricted to providing remuneration or personal tangible benefit to a named public official or employee of the agency, including lists of potential donors compiled by an agency to pursue donations, donor profile information or personal identifying information relating to a donor.

(Emphasis added.)

Respondent appealed the University's denial to OOR. Before OOR, Respondent supplemented the record with a copy of a Memorandum of Understanding (MOU) between the Foundation and the University, arguing that it showed that the Foundation receives and manages donations on behalf of the University, thus making the Foundation's records subject to RTKL requests directed

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[2] For convenience, the Court cites to the Reproduced Record filed by the University in connection with the merits of this appeal.

to the University. For its part, the University reiterated its position that the requested records were exempt from disclosure under Section 708(b)(13) of the RTKL, specifically claiming that Manheim, though a corporation, constituted an "individual" for purposes of that section. Notably, with respect to its position that it did not possess Foundation records as stated in its initial denial, the University submitted that "it does not matter whether the Foundation possesses the records or the University[;] access to donor records is protected from disclosure under [Section] 708(b)(13)." (R.R. at 025a-026a, University's Position Statement, 9/26/2018, at 3-4 n.2.)

On October 15, 2018, OOR issued its final determination (Final Determination), granting Respondent's appeal. Concluding that the University abandoned its argument that it did not possess the requested records, OOR turned its focus to the University's contention that corporations qualify as "individuals" for purposes of Section 708(b)(13) of the RTKL. OOR rejected the University's argument, relying primarily on its prior decision in *Roxbury News v. City of Harrisburg*, OOR Docket No. AP 2012-1748, slip op. at 6, which concluded that "only the identities of natural persons are exempt from disclosure under Section 708(b)(13) of the RTKL." OOR thus determined that, having failed to demonstrate that the requested records were exempt from disclosure, the University was required to provide Respondent with all records that were responsive to the request.

The University then appealed to this Court, which affirmed OOR's Final Determination. *Cal. Univ. of Pa.*, 210 A.3d at 1136. Before the Court, the University argued that OOR erred in determining that the requested records were not exempt under Section 708(b)(13) of the RTKL and in determining that the

University must disclose donation records of the Foundation. With respect to the University's first allegation of error, which presented an issue of first impression, the Court engaged in a statutory construction analysis to determine whether OOR's interpretation of the word "individual" was proper. We noted that, while the RTKL does not define "individual," Section 1991 of the Statutory Construction Act of 1972 (Statutory Construction Act), 1 Pa. C.S. § 1991, provided meanings for statutory terms to be used unless the particular statutory context clearly indicated that a different meaning should be given to the term at issue. *See Cal. Univ. of Pa.*, 210 A.3d at 1138. Most relevantly, we observed that the Statutory Construction Act defined the term "individual" as "[a] natural person" and that the context surrounding Section 708(b)(13) of the RTKL did not clearly indicate that the General Assembly intended to depart from the definition provided in the Statutory Construction Act. *Cal. Univ. of Pa.*, 210 A.3d at 1138-39 (relying upon 1 Pa. C.S. § 1991). We concluded, therefore, that the requested records were not exempt from access under Section 708(b)(13) because Manheim is not an "individual" for purposes of that section. *Id.* at 1139.

The Court then addressed the University's obligation to provide access to the requested donation records of the Foundation, reasoning:

> When a private foundation performs fundraising pursuant to an MOU with a university, the fundraising is a governmental function that the foundation is performing on behalf of the university. *E. Stroudsburg*[*Univ. Found. v. Off. of Open Recs.*], 995 A.2d [496,] 505-06[(Pa. Cmwlth. 2010) (en banc), *appeal denied*, 20 A.3d 490 (Pa. 2011)]. Pursuant to Section 506(d)(1) of the RTKL, 65 P.S. § 67.506(d)(1), records directly related to governmental functions are "public record[s] of the agency" which are accessible through the RTKL. The certified record in the instant matter reveals that the Foundation is engaged in performing a governmental function to the extent that it fundraises and manages donations on the University's behalf pursuant to the MOU, thereby rendering records directly related to those activities public

> records of the University. As such, the University must disclose them pursuant to Section 506(d) of the RTKL, as it would any responsive records in its own actual possession. We conclude, therefore, that the OOR did not err in granting Respondent's appeal.

Cal. Univ. of Pa., 210 A.3d at 1139-40 (footnotes omitted).[3]

Following this Court's decision, the University filed a petition for allowance of appeal with the Supreme Court of Pennsylvania, which denied the petition by order dated November 19, 2019. *Cal. Univ. of Pa. v. Bradshaw*, 220 A.3d 532 (Pa. 2019). On December 17, 2019, Respondent filed the Application. The University filed an answer in opposition to the Application, and, thereafter, this Court ordered briefing on the Application, which is now ripe for disposition.

In the Application, Respondent avers that, shortly after the Supreme Court denied the University's petition for allowance of appeal, Respondent submitted an inquiry to the University concerning production of the requested records. (Application ¶ 4.) On December 3, 2019, the University sent a written response and related documentation to Respondent indicating that it sought responsive records

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[3] While the University argued that "the Foundation may collect donations which are not connected to the fundraising activities the Foundation conducts pursuant to the MOU and that records of such unconnected donations are 'not automatically records of the University,'" the Court noted that it appeared from the certified record that the RTKL request did seek "records that *are* directly related to the governmental function the Foundation performs on the University's behalf, and the University [did] not contend otherwise." *Cal. Univ. of Pa.*, 210 A.3d at 1139 n.11 (emphasis in original) (quoting the University's Brief at 21). The Court further reasoned that, regardless:

> [T]he correct inquiry in any case addressing Section 506(d)(1) of the RTKL (concerning records of third[-]party contractors) is to ask whether the particular records requested are directly connected to a governmental function performed on an agency's behalf. This precise inquiry is necessary because the RTKL exposes to public access "only those records in a contractor's possession that relate to [the governmental] function, not other records that a contractor maintains during the normal scope of business."

Id. (quoting *E. Stroudsburg*, 995 A.2d at 504).

from the Foundation following the Supreme Court's denial of allocatur and that the Foundation notified the University that no such records existed at the Foundation. (*See* Application ¶¶ 5-8 and attached Exhibit B.) In this regard, the University attached to its response an attestation of Robert J. Thorn, the Open Records Officer (ORO) for the University. The attestation provides, in relevant part:

> 4. I am familiar with the instant request that was denied by the University and subsequently litigated through the Pennsylvania Commonwealth and Supreme Courts.
>
> 5. In my capacity as the [ORO], pursuant to the decision of the [Pennsylvania] Supreme Court a request was made to the Foundation . . . on November 21, 2019 . . . .
>
> 6. Upon receipt of the request, Foundation Executive Director, Denise Smith [(Smith)], conducted a thorough examination of files in the possession, custody and control of the Foundation for records responsive to the request underlying this appeal.
>
> 7. . . . Smith concluded no such records exist.
>
> 8. As such, the University is unable to produce any such donation records from Manheim . . . to the Foundation . . . .

(Application, attached Exhibit B, Attestation of Robert J. Thorn dated 11/26/2019.)[4] In its supporting brief, Respondent further explains that, after receiving the University's December 3, 2019 response, Respondent filed another RTKL request with the University, this time framing its request to encompass records of Manheim donations made directly to the University. (Respondent's Brief at 4.) In response,

[4] The University's response to Respondent's inquiry also included the email serving as the University's "official request for Foundation donation records" sent to Smith following the Supreme Court's denial of allocatur, as well as Smith's email stating that the Foundation had no records that were responsive to the request. (Application, Exhibit B, emails dated 11/21/2019.)

the University provided records of donations made by Manheim to the University. (*Id.*)[5]

Before the Court, Respondent argues that the University engaged in various instances of bad faith and frivolous conduct in this matter given the above events. Specifically, Respondent first claims that the University failed to make a determination regarding whether the University and the Foundation as a third-party contractor had possession, custody, or control of the requested records prior to responding to Respondent's first RTKL request in August 2018, in accordance with the University's duties under Sections 506(d)(1) and 901 of the RTKL, 65 P.S. §§ 67.506(d)(1), 67.901.[6] Instead, as evidenced by the University's December 2019

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[5] Respondent attached to his brief an email exchange between Respondent and the University concerning Respondent's second RTKL request. (*See* Respondent's Brief, attached Exhibit A.) Notwithstanding any issues regarding whether the email exchange is properly of record, in its brief, the University "does not dispute that a new request for the donation records of Manheim . . . to the University was received." (University's Brief at 3 n.7.) The University explains that this second request expanded on the original request to include "records–including both records in the possession, custody or control of the [U]niversity and those in the possession, custody or control of the Foundation . . . –of donations from Manheim . . . to any [U]niversity program or any donation to the [U]niversity for any purpose . . . ." (*Id.*) Claiming that Respondent's "new request expressly acknowledge[d] that his first request did not seek University records," the University confirms that it provided records relating to donations by Manheim to the University in response to Respondent's second request. (*Id.*)

[6] Section 506(d)(1) of the RTKL most relevantly provides:

> 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 act, shall be considered a public record of the agency for purposes of this act.

It is also worth noting that pursuant to Section 506(d)(3) of the RTKL, 65 P.S. § 67.506(d)(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." Further, Section 901 of the RTKL provides, in pertinent part:

> *Upon 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[] . . . and

response to Respondent's inquiry following the Supreme Court's denial of allocatur in the underlying litigation, the University waited until after the Supreme Court's denial to determine whether any such records existed with the Foundation. Respondent argues that the University's failure to ascertain prior to responding to the initial RTKL request whether the Manheim donation records existed at the Foundation in particular warrants a finding of bad faith on behalf of the University.

Respondent also argues that the University engaged in bad faith and frivolous conduct in asserting and litigating its bases for denying the initial RTKL request. Respondent argues that the University's first asserted basis for its denial (*i.e.*, that the University did not "possess" responsive records of the Foundation as an independent entity) was a legally untenable position given applicable precedent, as discussed in our prior decision involving the parties. Respondent further contends that, in light of the belated revelation that no records existed at the Foundation that were responsive to the request, the University's actions resulted in the litigation of a moot controversy, the unnecessary expenditure of party and judicial resources, and the issuance of improper advisory opinions from OOR and this Court.

Finally, Respondent argues that the University acted in bad faith following the Supreme Court's denial of allocatur in this matter. Respondent contends that, following the Supreme Court's denial of review, the University should have produced the records of Manheim donations it had in its own possession at that time.[7]

> *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.

(Emphasis added.)

[7] Indeed, Respondent accuses the University of knowing all along that the University (and not the Foundation) possessed Manheim donation records that were "germane to the request." (Respondent's Brief at 17.)

Instead, Respondent submits, the University "deceptively" produced an attestation asserting that no responsive records existed at the Foundation, causing him to submit another RTKL request specifically seeking records of the University in order to obtain those responsive records. (Respondent's Brief at 13, 18.) Respondent argues that the University's bad faith and frivolous conduct as outlined above entitles him to an award of attorney's fees, costs, and damages under the RTKL.

In response, the University argues that it acted reasonably and in good faith throughout this matter. In so doing, the University admits that it did not seek potentially responsive records from the Foundation when the RTKL request was initially made. (Answer ¶ 9.) According to the University, however, it had no legal obligation to do so for the two reasons it asserted in denying the request, *i.e.*, the request did not seek University records and the records would be nonetheless "facially exempt" under Section 708(b)(13) of the RTKL as records relating to an individual donor. (University's Brief at 10, 12.)

The University further argues that it acted reasonably in asserting its first basis for denying Respondent's initial RTKL request given that: (1) the request sought records of donations made by a corporation to the Foundation, an independent non-profit corporation that is not subject to the RTKL; (2) the University does not possess Foundation records; and (3) the request did not indicate on its face that Respondent sought donation records as they related to the MOU or the Foundation's performance of a "governmental function." As such, the University submits, it was reasonable to dispute whether the University was to infer that the request concerned a specific type of Foundation donation (*i.e.*, donations to the University being held by or directed to the Foundation) without any explicit mention thereof in the

request.[8] Regarding its second basis for denial, the University contends that its position on Section 708(b)(13) of the RTKL was based on a reasonable interpretation of the law at the time and that "[r]equiring an agency to search for a facially exempt record is illogical and wasteful of public resources." (University's Brief at 12.) The University adds that it did not mount a frivolous legal challenge in contesting the disclosure of the requested records reasonably believed to be protected by the RTKL.

The University also submits that, to the extent Respondent accuses it of acting improperly following the Supreme Court's denial of allocatur by issuing a response that the Foundation did not possess any responsive records, the University simply responded to the original request as submitted, which sought records possessed by the Foundation, not the University. The University further argues that, with respect to the applicability of Section 506(d) of the RTKL, that provision "makes it possible for Foundation records to be considered University records, but it does not turn University records into Foundation records." (University's Brief at 11.) In light of the above, the University claims that it acted reasonably and in good faith in this matter, rendering the award of attorney's fees, costs, and damages to Respondent improper.

Having set forth the parties' contentions, the Court now turns to an analysis of whether an award of attorney's fees, costs, and damages is appropriate in this matter. Regarding attorney's fees and costs, Section 1304 of the RTKL, 65 P.S. § 67.1304, provides, in relevant part:

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[8] The University takes the position that, "[h]ad the initial request specified that the Foundation records it sought were related to the MOU, then the University's obligation to search for the records would have been triggered." (University's Brief at 18 n.12.)

> (a) Reversal of agency determination.--If a court reverses the final determination of the appeals officer[9] 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 a requester if the court finds either of the following:
>
> > (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.
>
> (b) Sanctions for frivolous requests or appeals.--The court may award reasonable attorney fees and costs of litigation or an appropriate portion thereof to an agency or the requester if the court finds that the legal challenge under this chapter was frivolous.

As to an award of damages for an agency's bad faith conduct, Section 1305(a) of the RTKL, 65 P.S. § 67.1305(a), provides 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."

This Court has expounded upon the RTKL's treatment of an agency's bad faith conduct as follows:

> The core purpose of the RTKL is ensuring access to agency records. The RTKL "is remedial legislation 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. Off[.] of Open [Recs.]*, 990 A.2d 813, 824 (Pa. Cmwlth. 2010) (en banc), *aff'd*, . . . 75 A.3d 453 ([Pa.] 2013); *Off[.] of Dist. Att'y of Phila. v. Bagwell (Phila. DA)*, 155 A.3d 1119, 1130 (Pa. Cmwlth. 2017) ("the RTKL is remedial in nature[]").
>
> 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

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[9] To be clear, the above language refers to "when the receiving agency determination is reversed." *Uniontown Newspapers, Inc. v. Pa. Dep't of Corr.*, 243 A.3d 19, 34 (Pa. 2020).

level of bad faith. *Phila. DA* (affirming trial court's award of $500 civil penalty for bad faith); *Chambersburg Area Sch. Dist. v. Dorsey*, 97 A.3d 1281 (Pa. Cmwlth. 2014) (agency failure to review responsive records was grounds from which fact-finder could discern bad faith); *Staub v. City of Wilkes-Barre & LAG Towing, Inc.* (Pa. Cmwlth., No. 2140 C.D. 2012, filed October 3, 2013) . . . (unreported) (affirming attorney fee award for agency failure to confer with contractor before responding to request). The RTKL reserves bad faith determinations for disposition by Chapter 13 Courts. *Bowling v. Off[.] of Open [Recs.]*, . . . 75 A.3d 453 ([Pa.] 2013).

The RTKL requires an agency to make a good faith effort to find and obtain responsive records before denying access. *Dorsey*. "[A]n agency [may not] avoid disclosing existing public records by claiming, *in the absence of a detailed search*, that it does not know where the documents are." *Pa. State Police v. McGill*, 83 A.3d 476, 481 (Pa. Cmwlth. 2014) (emphasis added). Where an agency did not perform a search of its records under the RTKL until the matter was in litigation, the agency denied access in willful disregard of the public's right to public records. *Parsons v. Pa. Higher Educ. Assist. Agency (PHEAA)*, 910 A.2d 177 (Pa. Cmwlth.) (en banc), *appeal denied*, . . . 917 A.2d 316 ([Pa.] 2006) (agency failure to review records before a hearing on denial showed willful violation of former Right-to-Know Law).

A requester bears the burden of proving an agency committed bad faith. *Uniontown Newspapers[, Inc. v. Pa. Dep't of Corr.*, 151 A.3d 1196, 1209 (Pa. Cmwlth. 2016)]. Evidence of bad faith is required. *Barkeyville Borough v. Stearns*, 35 A.3d 91 (Pa. Cmwlth. 2012). After-discovered records are a type of evidence from which a court may discern bad faith. *Dorsey*. Evidence of an agency's failure to perform its mandatory duties, including a failure to search its records prior to a denial of access, may suffice. *Dorsey; accord PHEAA*.

Uniontown Newspapers, Inc. v. Pa. Dep't of Corr., 185 A.3d 1161, 1170-71 (Pa. Cmwlth. 2018) (single judge op.) (footnote omitted), *aff'd*, 243 A.3d 19 (Pa. 2020).[10]

[10] Pursuant to Section 414(b) of the Commonwealth Court Internal Operating Procedures (IOPs), 210 Pa. Code § 69.414(b), a single-judge opinion of the Commonwealth Court in a

With respect to frivolous legal challenges, our Court has observed that a "RTKL challenge is frivolous under Section 1304(b) [of the RTKL] if it is arbitrary, vexatious or the result of bad faith." *Pa. State Troopers Ass'n v. Scolforo*, 18 A.3d 435, 442 (Pa. Cmwlth. 2011). Further, albeit not in the context of a RTKL matter, this Court has held that "[a]n appeal that raises an issue that is well settled and presents no legal support is frivolous." *Venafro v. Dep't of Transp., Bureau of Driver Licensing*, 796 A.2d 384, 388 (Pa. Cmwlth. 2002); *see also Hewitt v. Commonwealth*, 541 A.2d 1183, 1185 (Pa. Cmwlth. 1988) (finding appeal frivolous where issue raised was well settled by prior decision of this Court and appellant presented no legal support for argument that prior decision did not control), *appeal denied*, 554 A.2d 511 (Pa. 1989).

Beginning with the University's actions in initially responding to Respondent's original RTKL request, the Court notes:

> Upon receipt of a request, an open records officer "must make a good faith effort to determine whether: (1) the record is a public record; and, (2) the record is in the possession, custody, or control of the agency." *Breslin v. Dickinson Twp.*, 68 A.3d 49, 54 (Pa. Cmwlth. 2013) (citing *Barkeyville Borough*, 35 A.3d at 96). Section 901 [of the RTKL] also includes the duty to perform a reasonable search for records in good faith. *Dep't of Labor & Indus. v. Earley*, 126 A.3d 355 (Pa. Cmwlth. 2015). 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. *Breslin.*
>
> 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. *Breslin*; *Staub.* Under Section 506(d) of the RTKL, 65 P.S. § 67.506(d), "the agency is

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non-election matter, "even if reported, shall be cited only for its persuasive value and not as a binding precedent." Further, to the extent unreported panel decisions of this Court are relied upon herein, Section 414(a) of the Court's IOPs, 210 Pa. Code § 69.414(a), provides that such decisions issued after January 15, 2008, may likewise be cited only for their persuasive value.

> required to take reasonable steps to secure the records from the [contractor] and then make a determination if those records are exempt from disclosure." *Staub*, slip op. at 6 . . . .
>
> After obtaining all potentially responsive records, an agency has the duty to review the records and assess their public nature under Sections 901 and 903 of the RTKL[, 65 P.S. § 67.903]. *Breslin*; *PHEAA*. It is axiomatic that an agency cannot discern whether a record is public or exempt without first obtaining and reviewing the record.

Uniontown Newspapers, 185 A.3d at 1171-72.[11]

Based on the foregoing, the Court agrees with Respondent that the University was required to determine whether potentially responsive records existed at the Foundation as a third-party contractor prior to issuing its denial of Respondent's original RTKL request. As noted, the University admittedly failed to make such an initial inquiry. Further, while the University argues that it had no initial obligation to make a determination in this regard given its asserted bases for denial of the request, the above pronouncements render the University's position untenable. Indeed, this case demonstrates precisely why it is axiomatic that an agency fulfill its initial duties under the RTKL in searching for potentially responsive records as outlined above: had the University made an inquiry to the Foundation regarding the Foundation's possession of Manheim donation records prior to issuing its denial of the original RTKL request, the University would have learned at that time that the Foundation did not possess any such records, thereby short-circuiting the ensuing

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[11] Indeed, our Supreme Court granted review of the *Uniontown Newspapers* litigation and, subsequent to the filing of the Application in this case, confirmed that "[a] good faith response--either to produce records or assert an exemption–cannot occur absent a good faith search, followed by collection and review of responsive records, so an agency has actual knowledge about the contents of the relevant documents." *Uniontown Newspapers*, 243 A.3d at 28-29 (concluding that Pennsylvania Department of Corrections acted in bad faith at request stage of RTKL litigation "in significant part because the open records officer failed to act with diligence in response to [the] request" by, *inter alia*, simply "relying on the representations of others" within agency).

litigation that occurred in this case. The University's admitted abnegation of its mandatory duties under the RTKL in failing to conduct a proper search for responsive records prior to issuing its denial to the RTKL request warrants a finding of bad faith on behalf of the University under Sections 1304(a)(1) and 1305(a) of the RTKL.

Turning to the University's grounds for denial, the Court observes that, in asserting its first basis for denying the request—that it did not possess Foundation records—the University took a position that was contrary to settled law. As explained in our prior decision involving the present parties, in *East Stroudsburg*, this Court made clear that a private foundation that conducts fundraising on behalf of a state university pursuant to an MOU performs a "governmental function," thereby rendering records directly related to that governmental function "public record[s] of the agency" accessible through Section 506(d)(1) of the RTKL. *Cal. Univ. of Pa.*, 210 A.3d at 1139; *see also E. Stroudsburg*, 995 A.2d at 505 (explaining that, pursuant to Section 506(d)(1), OOR properly ordered disclosure of fundraising records of university foundation because foundation, "under the MOU [in that case], carrie[d] out fundraising on behalf of the [u]niversity, making any records 'directly' related to performing fundraising activities on behalf of the [u]niversity"). Thus, notwithstanding that the University does not actually possess responsive records existing at the Foundation, pursuant to Section 506(d)(1) and *East Stroudsburg*, any such records would be considered "public records" of the University by virtue of the MOU existing between the University and Foundation. As such, the University's first grounds for denial was "not based on a reasonable interpretation of law" and its

subsequent pursuit of its legal challenge on appeal in this respect was frivolous.[12] Section 1304(a)(2) and (b) of the RTKL, 65 P.S. § 67.1304(a)(2)-(b). Although ultimately unsuccessful on its second ground for denial—*i.e.*, that Manheim was an "individual" for purposes of Section 708(b)(13) of the RTKL—that ground for denial at least provided an issue of first impression, making pursuit of the appeal on that ground more reasonable than on the first ground. Nevertheless, the University's unreasonable interpretation of the law on the first ground for denial, particularly when considered in conjunction with the University's failure to comply with Section 901 of the RTKL and the ramifications of such failure, provide further evidence of bad faith on the part of the University.

Next, the Court addresses Respondent's final claim of bad faith based on the University's failure to disclose records of Manheim donations made to the University that it possessed until those records were specifically requested in Respondent's second RTKL request. While Respondent essentially argues that the University nefariously viewed his original request with too narrow a lens and should have provided him with those records in response to his original request following the Supreme Court's denial of allocatur in this matter at the latest, the original RTKL

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[12] The University argues that it acted reasonably concerning its first basis for denial because, as alleged previously before this Court, the initial request did not specifically indicate that it was seeking Foundation records as it related to the MOU or the Foundation's performance of a "governmental function." The Court disagrees. Again, the initial request sought "all records related to donations from Manheim . . . to the Foundation . . . between Jan[uary] 1, 2008, and Dec[ember] 31, 2013, and all records identifying the uses of those funds." As noted in this Court's prior decision, the certified record indicated that the RTKL request sought "records that *are* directly related to the governmental function the Foundation performs on the University's behalf, and the University [did] not contend otherwise." *Cal. Univ. of Pa.*, 210 A.3d at 1139 n.11. Additionally, the relevant inquiry under Section 506(d)(1) of the RTKL is "whether the particular records requested are directly connected to a governmental function performed on an agency's behalf." *Id.* The University's position, therefore, is meritless.

request sought records related to donations made by Manheim to the Foundation; it did not specify that it sought records related to donations made by Manheim directly to the University. While the University's provision of such documents prior to their specific request would have perhaps been in the spirit of the RTKL's purpose of open access, the Court concludes that the University's interpretation of the original request does not in and of itself rise to the level of a bad faith interpretation. Stated another way, Respondent has failed to demonstrate bad faith conduct on behalf of the University in construing the original request under the circumstances and evidence presented.[13]

In sum, the Court concludes that the University engaged in bad faith and frivolous conduct in denying Respondent's RTKL request without first determining whether the Foundation had potentially responsive records in its possession, in asserting its first basis for denying the request, and in litigating both bases for its denial on appeal. The Court further concludes, however, that the University did not engage in bad faith conduct in failing to produce records of Manheim donations given directly to the University until those records were specifically requested.

With regard to the amount of attorney's fees, costs, and damages to be awarded, Respondent seeks a total of $15,298.32 in attorney's fees and costs under Section 1304 of the RTKL; however, he has presented the Court with documentation supporting an award of only $14,298.32.[14] Respondent also seeks the

[13] Notwithstanding, it is worth noting that, had the University properly fulfilled its obligations under the RTKL in initially responding to the original RTKL request regarding Manheim donations made to the Foundation, Respondent would have been able to submit his subsequent request in an effort to obtain responsive records of Manheim donations made to the University much sooner.

[14] It appears that the discrepancy between the amount Respondent claims is owed and the amount supported by the documentation is the result of a mathematical error. Respondent attached

maximum $1,500 allowed in statutory damages under Section 1305 of the RTKL. While the University disputes the grounds upon which the request for attorney's fees, costs, and statutory damages is based, the University does not appear to take any position with regard to the requested amounts as unreasonable or excessive. In the absence of such a challenge and in view of the University's bad faith and frivolous conduct as outlined above and the documentation supporting Respondent's requested amounts, the Court finds the supported amounts to constitute an appropriate award. Respondent's Application, therefore, is granted, and Respondent is awarded $14,298.32 in attorney's fees and costs under Section 1304 of the RTKL and $1,500 in statutory damages under Section 1305 of the RTKL.

P. KEVIN BROBSON, President Judge

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to the Application as Exhibit C a copy of the legal bills incurred for the work counsel provided in litigating the above-captioned matter and particularly the cost of preparing the Application, which Respondent claims amounts to a total of $8,278.32, as well as an attestation of their authenticity. The invoices are dated March 4, 2019; May 7, 2019; June 4, 2019; August 5, 2019; and December 3, 2019; respectively, they reflect amounts of $3,861.00, $838.50, $1,915.82, $468.00, and $195.00, for a total of $7,278.32. Further, Respondent attached to his brief in support of the Application an affidavit of counsel as to the hours spent in preparing the brief and an accompanying invoice totaling $7,020.00. In the attestation attached to Respondent's brief, counsel states that his rate is $195 per hour and that the services provided are reasonable, as he has "represented the newspaper for 30 years and ha[s] developed professional skill in First Amendment and publishing law." (Respondent's Brief, Exhibit B, Affidavit of Colin E. Fitch dated 1/3/2020.) The affidavit further provides:

> The issues involved in this litigation are important and involve the production of public records despite a government agency's denial of access to same. The issues involved are complicated given the nature of the case, *i.e.*, there was production of the records requested only one week ago. The results I have obtained have been successful and any award of attorney's fees will serve the statutory scheme and promote the RTKL statutory purpose.

Id.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

California University of Pennsylvania, Petitioner	:	
v.	:	No. 1491 C.D. 2018
Gideon Bradshaw, Respondent	:	

ORDER

AND NOW, this 13th day of October, 2021, upon consideration of the "Application for Attorney's Fees, Costs, and Statutory Damages for Bad Faith" (Application) filed by Respondent Gideon Bradshaw and the answer of Petitioner California University of Pennsylvania (University) filed in response thereto, and upon briefing of the matter, the Application is GRANTED. Accordingly, the University is ordered to pay $14,298.32 in reasonable attorney's fees and costs to Respondent pursuant to Section 1304(a) and (b) of the Right-to-Know Law (RTKL), Act of February 14, 2008, P.L. 6, 65 P.S. § 67.1304(a)-(b). Further, the maximum civil penalty in the amount of $1,500 is imposed against the University and in favor of Respondent under Section 1305 of the RTKL, 65 P.S. § 67.1305. Counsel shall file a verified statement of the payment within thirty (30) days.

P. KEVIN BROBSON, President Judge

Order Exit
10/13/2021

APPENDIX D

2013 WL 5520705
Only the Westlaw citation is currently available.

Commonwealth Court of Pennsylvania.

Andrew STAUB and The Citizens' Voice
v.
CITY OF WILKES–BARRE and LAG Towing, Inc.
Appeal of: City of Wilkes–Barre.

No. 2140 C.D.2012.
|
Argued Sept. 12, 2013.
|
Decided Oct. 3, 2013.

BEFORE: PELLEGRINI, President Judge, and COVEY, Judge, and FRIEDMAN, Senior Judge.

MEMORANDUM OPINION

PELLEGRINI, President Judge.

***1** The City of Wilkes–Barre (City) appeals the order of the Court of Common Pleas of Luzerne County (trial court) directing the City, pursuant to Section 1304(b) and (c) of the Right–to–Know Law (RTKL), [1] to pay ten percent (10%) of the costs incurred by The Citizens' Voice newspaper with respect to litigating its right-toknow request. We affirm.

The penultimate issue in this case is what an agency's obligation is to secure a record so that it may make the required determination under Section 506(d) of the RTKL to a request made for records in the possession of a third party. On July 22, 2011, Andrew Staub, a former reporter for The Citizens' Voice (collectively, Newspaper) filed a right-to-know request with the City seeking all records from April 1, 2005, to that date, including tow reports and receipts, pertaining to city-directed tows executed by LAG Towing, Inc. (LAG) pursuant to the contract between LAG and the City. On July 29, 2011, Jim Ryan (Ryan), the City's Open Records Officer, notified the Newspaper that it was extending the response period for 30 days to allow LAG to compile the requested records.

On August 29, 2011, the City notified the Newspaper that LAG had informed the City that it would not be turning over any records because it was LAG's belief that the records were not accessible under the RTKL, but that the City made no determination in that regard because LAG had not given it any records for review. Attached to that notification was an e-mail that Timothy Henry (Henry), the City Attorney, received from LAG's attorney, that stated, "[i]t does not appear that such documents are accessible under the [RTKL] and therefore, even if they existed, they would not be subject to production in response to this request." (Reproduced Record (R.R.) at 7.)

On September 9, 2011, the Newspaper appealed to the Office of Open Records (OOR) and LAG intervened. On January 27, 2012, after mediation failed, the OOR issued an order granting the appeal and issued an order requiring the City to provide all responsive records within 30 days. The OOR specifically provided that "[t]his Final Determination is binding on all parties...." (R.R. at 40.) None of the parties appealed the OOR's order.

On May 3, 2012, the Newspaper filed a petition to enforce the OOR's order in the trial court seeking the award of attorney fees and costs, citing Sections 1302 and 1304 of the RTKL. [2] At a hearing, Ryan testified that his normal practice after receiving a request for records is to have city administration search for the records, but because the records were not in the City's possession, he just forwarded the request to LAG and then forwarded to the Newspaper LAG's response that was sent to the Henry.

Henry testified that he spoke with Leo Glodzik (Glodzik), LAG's owner, on one or two occasions and believed that there may not be responsive records, but he never spoke with the owner again after Ford, LAG's attorney, became involved. He stated that he knew fairly early on, by August 29, 2011, at the latest, that LAG may not have responsive records, but that he was never completely sure whether LAG had responsive records or not until December 16, 2011, when LAG, by

correspondence, stated that it did not ordinarily maintain the requested records but had saved records from August 2011 after the request had been served on the City. He testified that he did not execute an affidavit [3] that the requested records did not exist because they were not in the City's possession and that he expected either Glodzik or Ford to execute such an affidavit.

***2** Glodzik, LAG's owner, testified that none of the requested records existed from April 2005, the beginning of the contract with the City, until July 22, the 2011, the time of the request. He stated that he contacted the City's Chief of Police each month and asked if he needed any information from the records, and that all of the records were destroyed at the end of the month. He testified that after the July 22, 2011 records request, he kept more accurate records and kept the receipts. Glodzik stated that he never told anyone from the City that no records existed before July 22, 2011.

The trial court found that LAG had engaged in willful and wanton misconduct by arguing that the information in the requested records was confidential when it knew that the records did not exist at that time. The trial court also found that while the City responded that it did not possess any responsive records, it did not indicate that LAG did not have any records when it knew early on that there was a possibility that no records existed. The trial court determined that LAG failed in its duty to disclose the nonexistence of the requested records and that the City failed in its duty to determine whether such records existed. [4] Accordingly, the trial court directed LAG to pay 90% of the Newspaper's costs in litigating this matter and directed the City to pay 10% of those costs and the City filed the instant appeal. [5]

In this appeal, the City argues that the trial court erred in imposing any of the costs against it because it discharged its duty under the RTKL by asking LAG to turn over any records that should have been released under the RTKL and because LAG had the ultimate burden of releasing the requested documents under the RTKL.

Section 506(d) of the RTKL states, in pertinent part:

> **(d) Agency possession.—**
>
> (1) **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 act, shall be considered a public record of the agency for purposes of this act.
>
> * * *
>
> (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, the open records officer shall assess the duplication fee established under section 1307(b) and shall remit the fee to the party in possession of the record if the party duplicated the record.

65 P.S. § 67.506(d)(1), (3) (emphasis added). Under this provision, the agency is required to take reasonable steps to secure the records from the agency and then make a determination if those records are exempt from disclosure. If the third party refuses to produce the records because they are not directly related to the governmental contract, the third party may refuse to turn those records over to the governmental agency on that basis. The agency shall then inform the requestor of the reason for the denial and the requestor can take an appeal to the OOR. [6]

***3** In this case, the City did not fully discharge its duty under the RTKL by merely forwarding the records' request to LAG and then forwarding LAG's response to the Newspaper regarding the records' existence or exemption status under the RTKL, or by forwarding whatever records LAG ultimately produced when it complied with the OOR's order. Instead, as the statutory possessor of the records under Section 506(d)(1), the City had a duty to independently ascertain the existence or nonexistence of the records in LAG's possession. The City's actions in this case, acting merely as a conduit between the Newspaper and LAG, were not sufficient to discharge its duty under the RTKL. As a result, the trial court did not err in imposing a further duty upon the City and in directing the City to pay a portion of the sanctions imposed under Section 1304. [7]

Accordingly, that portion of the trial court's order imposing ten percent (10%) of The Citizens' Voice's litigation costs upon the City is affirmed.

ORDER

AND NOW, this 3rd day of *October,* 2013, that portion of the order of the Court of Common Pleas of Luzerne County, dated October 16, 2012, at No. 8294 of 2012 imposing ten percent (10%) of The Citizens' Voice's litigation costs upon the City is affirmed.

All Citations

Not Reported in A.3d, 2013 WL 5520705

Footnotes

1 Act of February 14, 2008, P.L. 6, 65 P.S. § 67.1304(b), (c). Section 1304(b) and (c) states:

> **(b) Sanctions for frivolous requests or appeals.**—The court may award reasonable attorney fees and costs of litigation or an appropriate portion thereof to an agency or the requestor if the court finds that the legal challenge under this chapter was frivolous.
>
> **(c) Other sanctions.**——Nothing in this act shall prohibit a court from imposing penalties and costs in accordance with applicable rules of court.

2 65 P.S. §§ 67.1302, 67.1304. The petition alleged that the trial court had jurisdiction to enforce the OOR's order under Section 1302 which states, in pertinent part:

> **(a) General rule.**—Within 30 days of the mailing date of the final determination of the appeals officer relating to a decision of a local agency issued under section 1101(b) or of the date a request for access is deemed denied, a requester or local agency may file a petition for review or other document as required by rule of court with the court of common pleas for the county where the local agency is located....

65 P.S. § 67.1302(a). The petition also alleged that the trial court could impose attorney fees and costs under Section 1304(b) and (c). None of the parties have ever challenged the trial court's jurisdiction to entertain the petition under Section 1302 or its authority to impose the instant attorney fees and costs under Sections 1302 and 1304 of the RTKL.

3 Under Section 705 of the RTKL, an agency is not required to create a record that does not currently exist and under Section 708, an agency has the burden of proving that a record does not exist. 65 P.S. §§ 67.705, 67.708. This Court has held that an agency may satisfy its burden of proving the nonexistence of a requested record by an unsworn attestation by the person who searched for the record or a sworn affidavit of the nonexistence. *Moore v. Office of Open Records,* 992 A.2d 907, 908–09 (Pa Cmwlth.2010).

4 Specifically, the trial court stated:

> [T]o know for sure all Attorney Henry had to do was ask Leo Glodzik at that time whether he in fact had the responsive records. [The City] let LAG take the lead in the RTK litigation having a good idea that LAG

had no records and failed to ensure that either LAG provide an affidavit of no records or notify the Citizens Voice or OOR mediator that LAG did not have any records which the Citizens Voice was requesting. At best, this showed a lack of oversight by [the City] or its tower LAG with regard to its RTK responsibilities. At the very least, after OOR's final determination on January 27, 2012, the City, having been ordered to "provide" all responsive records within thirty (30) days, had an obligation to disclose the information it had pertinent to the existence or nonexistence of the records.

I find that both LAG and [the City] showed a willingness to engage in frivolous litigation.

(R.R. at 222–23.)

5 In a local agency appeal, the Court's standard of review is limited to determining whether the trial court's findings of fact are supported by competent evidence or whether the trial court committed an error of law or abused its discretion in reaching its decision. *Allegheny County Department of Administrative Services v. Parsons,* 61 A.3d 336, 342 (Pa.Cmwlth.2013). Our scope of review under the RTKL is plenary. *Id.*

6 When that occurs:

> The presumption of public nature shared by records in possession of a local agency does not apply to records that are in possession of a third party.... *[Allegheny County Department of Administrative Services v. A Second Chance, Inc.,* 13 A.3d 1025 (Pa .Cmwlth.2011) *(ASCII)].* Generally, the local agency bears the burden of proving a record is exempt from disclosure. *[Kaplan v. Lower Merion Township,* 19 A.3d 1209 (Pa. Cmw lt h.), *appeal denied,* 612 Pa. 693, 29 A.3d 798 (2011)]. Third-party contractors in possession of requested records are placed in the shoes of a local agency for purposes of the burden of proof when the contractor performs a governmental function on behalf of the agency, and those records directly relate to the contractor's performance of that function. *SWB Yankees, LLC v. Wintermantel[,* 615 Pa. 640], 45 A .3d 1029 (2012) (noting third-party contractor is recast as an agency for purpose of interpreting Section 506(d) and RTKL definitions); *ASCI I* (recognizing participating third party shares burden of proving exemptions).

Allegheny County Department of Administrative Services, 61 A .3d at 342. "[T]he burden [is] on third-party contractors whose records fall within Section 506(d)(1) to prove by a preponderance of the evidence that the records are exempt." *ASCI I,* 13 A.3d at 1042.

7 Moreover, it is clear that the trial court erred in imposing attorney fees and costs under Section 1304(b) because that section only authorizes the imposition of such sanctions for frivolous requests or appeals, and the City did not submit a request or file an appeal in this case. While Section 1304(c) provides that that section does not prohibit a court from imposing such sanctions "in accordance with applicable rules of court," the trial court does not cite any court rule authorizing the imposition of the instant attorney fees and costs.