

dataset which is used to create the ‘Hate Crime Report’ search function on the Uniform Crime Reporting [(UCR)] website” as well as “[a]ny data dictionary, code tables, or other types of manuals that define, in plain English, the meaning of the column headers in the data, and any codes, acronyms, abbreviations or other shorthand terms for entries in the data.” RTKL Request Form, Reproduced Record (R.R.) at 1a-2a. Respondents noted that they were “seeking the dataset which is used to create the searchable database,” noting that “[s]ince this search function only shows the aggregate number matching a category, it disconnects the complete information for a single case.” *Id.*; R.R. at 1a.

By letter dated February 22, 2022, PSP denied the request pursuant to Section 705 of the RTKL, 65 P.S. §67.705, asserting that it would have to create a record in order to comply with Respondents’ technical request.² R.R. at 25a-32a. PSP explained that it did “not maintain the software administrative access to the ‘underlying dataset’ [Respondents] seek” and can only access the Hate Crime Report information as it is displayed on the UCR website. R.R. at 30a. PSP noted that it contracts with Optimum Technology, Inc. (OTECH) to provide a database processing and management system for the crime report data housed on PSP servers, that only OTECH can access the information requested, and that it would have to enter into an additional contract with OTECH, at a labor cost of approximately \$6,000, to retrieve the requested data. R.R. at 30a-31a.

Respondents thereafter filed an appeal with the Office of Open Records (OOR). R.R. at 46a. By Final Determination issued June 9, 2022, OOR granted

² Section 705 of the RTKL provides that an agency “shall not be required to create a record which does not currently exist or to compile, maintain, format or organize a record in a manner in which the agency does not currently compile, maintain, format or organize the record.” 65 P.S. §67.705.

Respondents' appeal and directed PSP to provide the requested data within 30 days. OOR Final Determination; Appendix A to PSP's Brief. OOR concluded that PSP had not proven that it would be required to create a record that does not currently exist, noting that PSP acknowledged that it constructively possessed the requested information through a third party, OTECH. OOR Final Determination at 3-5. OOR also concluded that PSP may not require Respondents to pay labor costs, regardless of whether the fees are for third-party labor. *Id.* at 9-10.

On July 11, 2022, PSP filed a Petition for Review with this Court, arguing that OOR erred as a matter of law in determining that it could not charge for costs necessarily incurred for complying with a request under Section 1307(g) of the RTKL, 65 P.S. §67.1307(g).³

On March 30, 2023, PSP filed an Application to Discontinue on the basis that it provided Respondents' counsel with a compact disc containing all of the requested information, in full compliance with OOR's Final Determination rendering its appeal moot as it had not charged Respondents any labor costs associated with their RTKL request. Respondents filed an Answer opposing any discontinuance and requesting that this Court issue a briefing schedule with respect to an award of attorney fees, costs, and sanctions for PSP's alleged bad faith beginning with their response to the initial request and continuing throughout the appeals to OOR and this Court.

On May 19, 2023, the Court granted PSP's Application to Discontinue, determining the single issue raised in PSP's Petition for Review was moot.

³ Section 1307(g) of the RTKL provides that other than postage and copying/duplication fees, "[n]o other fees may be imposed unless the agency necessarily incurs costs for complying with the request, and such fees must be reasonable." 65 P.S. §67.1307(g).

On June 2, 2023, Respondents filed the Application for Fees that is currently before the Court. The first two paragraphs indicate that the matter was discontinued on May 19, 2023, and that the discontinuance followed PSP’s production of the requested records. Appl. for Fees ¶¶ 1, 2. The third paragraph alleges that PSP provided the requested records almost 13 months after the initial request and failed to make a good faith search as required by Section 901 of the RTKL, 65 P.S. §67.901.⁴ *Id.* ¶ 3. The fourth paragraph cites *California University of Pennsylvania v. Gideon Bradshaw* (Pa. Cmwlth., No. 1491 C.D. 2018, filed October 13, 2021) and states specifically “[i]f an agency fails to take reasonable steps to secure records from a third-party contractor, that failure can lead to a determination of bad faith and fees.” *Id.* ¶ 4. In the fifth paragraph, Respondents go on to say that in *Bradshaw*, because of the lack of an initial good faith search and the resulting litigation, the Court explicitly made a finding of bad faith under Sections 1304(a)(1) and 1305(a) of the RTKL. *Id.* ¶ 5. The remaining five paragraphs are devoted to outlining the fees, in excess of \$40,000, desired by Respondents.

⁴ Section 901 provides that

[u]pon receipt of a written request for access to a record, an agency shall make a good faith effort to determine if the record requested is a public record, legislative record or financial record and whether the agency has possession, custody or control of the identified record, and to respond as promptly as possible under the circumstances existing at the time of the request. All applicable fees shall be paid in order to receive access to the record requested. The time for response shall not exceed five business days from the date the written request is received by the open-records officer for an agency. If the agency fails to send the response within five business days of receipt of the written request for access, the written request for access shall be deemed denied.

In PSP’s Answer to Respondents’ Application for Fees, PSP denies that it failed to make a good faith search. Answer to Appl. for Fees ¶ 3. PSP indicates that in stark contrast to *Bradshaw*, it did perform a search for the records upon request and did determine that responsive records existed before denying the request. *Id.* ¶ 4. PSP also asserts that attorneys’ fees may not be awarded in the case at bar because there is no determination of bad faith, citing *Uniontown Newspapers, Inc. v. Pennsylvania Department of Corrections*, 243 A.3d 19, 28 (Pa. 2020). *Id.* ¶ 6.

On June 16, 2023, PSP filed the Application to Quash before the Court. PSP alleges that Respondents’ Application for Fees was filed after the case was closed and fails to cite a rule of law permitting such a filing. Appl. to Quash ¶ 3. PSP also argues “notwithstanding that a case in controversy does not exist and [Respondents’] Application [for Fees] is a procedurally improper filing on a closed case, [Respondents’] Application [for Fees] fails to include evidentiary support demonstrating [PSP’s] alleged bad faith.” *Id.* ¶ 4. PSP cites *Uniontown Newspapers, Inc. v. Pennsylvania Department of Corrections*, 185 A.3d 1161, 1171 (Pa. Cmwlth. 2018), *aff’d*, 243 A.3d 19 (Pa. 2020), for the proposition that the requester bears the burden of proving an agency committed bad faith in denying access to requested records. *Id.*

Respondents argue, in their Answer to the Application to Quash, that attorneys’ fees and statutory damages remain a live controversy pursuant to *Ladley v. Pennsylvania State Education Association*, 269 A.3d 680 (Pa. Cmwlth. 2022), and that there is ample evidence of bad faith to include PSP’s effective concession “that it had no proper basis for withholding the records” implied by PSP’s “realization that it [misunderstood] the nature of the RTKL request.” Answer to Appl. to Quash ¶ 3. Respondents believe that “PSP’s conduct in denying the RTKL request,

contesting the OOR appeal, seeking appeal of the OOR decision, and waiting until after Respondents' brief was filed to turn over data that it indisputably had all along indicates, at minimum, that PSP did not seriously attempt a good faith search for the records until months into litigation." *Id.* ¶ 12.

Discussion

Section 1304(a) of the RTKL provides:

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

65 P.S. §67.1304 (emphasis added).

Also, Section 1305(a) of the RTKL 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.” 65 P.S. §67.1305(a).

To the extent that Respondents indirectly assert these statutory sections in paragraph five of their Application for Fees, they both fail. Section 1304(a) of the RTKL is not applicable here as no court has reversed the final decision of the appeals officer, nor has a court granted access to the records in question. This Court made no merit-based decision.

Section 1305 of the RTKL requires that an agency deny access to a public record in bad faith. The requester bears the burden of proving an agency committed bad faith. *Uniontown Newspapers, Inc.* Evidence of bad faith is required. *Barkeyville Borough v. Stearns*, 35 A.3d 91 (Pa. Cmwlth. 2012).

Additionally, Rule 123(a) of the Pennsylvania Rules of Appellate Procedure (Pa.R.A.P.) provides that an application “shall state with particularity the grounds on which it is based.” Pa.R.A.P 123(a). “The failure to state ‘with particularity’ the grounds on which it is based will result in the denial of the application.” 20 West’s Appellate Practice, §123:5 (2022-2023 ed.). *See also Lowery v. East Pikeland Twp.*, 599 A.2d 271 (Pa. Cmwlth. 1991) (motion to discontinue denied in light of appellant’s failure to state with particularity the grounds on which it is based).

Respondents, in their Application for Fees, put forth only five enumerated paragraphs regarding the underlying case, two of which provide procedural background. Respondents offer no authority, statutory or otherwise, for the Application for Fees. Respondents aver nothing further about PSP’s actions or inactions beyond the unverified allegations made in the third paragraph of the Application for Fees. Paragraphs four and five offer only legal citations to a case and the RTKL without connecting how or why these citations specifically pertain to facts of the matter at hand. This Application for Fees fails to state with particularity the grounds on which it is based. Providing sparse allegations and speculation of bad faith fails to provide the necessary evidentiary support to demonstrate PSP’s alleged bad faith.

Accordingly, the Court denies Respondents' Application for Fees. In light of this denial, PSP's Application to Quash is dismissed as moot.



MICHAEL H. WOJCIK, Judge

