



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

**WHITNEY BRADY,
Requester**

v.

**BOROUGH OF WERNERSVILLE,
Respondent**

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Docket No: AP 2019-0453

INTRODUCTION

Whitney Brady (“Requester”) submitted two requests (“Requests”) to the Borough of Wernersville (“Borough”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking records related to sidewalk curbing. The Borough partially denied the Requests, arguing that other than the records already provided to the Requester, no additional responsive records exist. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted**, and the Borough is required to take additional action as directed.

FACTUAL BACKGROUND

On February 19, 2019, the first request was filed, seeking:

- (1) Copies of any notification and/or legal remedies enacted upon properties that have been in non-compliance with Ordinance #530/493 (Sidewalk & Curb) from 2012-present[;]

- (2) Copies of any expressed or written criteria from the Borough...for the issuance of “waivers” for curb & sidewalk installation from 2012 – present[;]
- (3) Copies of any policies or procedures for the consistent/uniform enactment of Ordinance #530/493 from 2012-present[;]
- (4) Copies of all sidewalk waivers granted from 2012-present[;]
- (5) Copies of all documentation provided to the Borough...for the “(economic) hardship” waiver considered at 469 Lincoln Avenue from the Borough Council meeting held on January 4, 2016[;]
- (6) Copies of the meeting minutes from the Borough Council meeting approving the full sidewalk waiver at 469 Lincoln Avenue OR (included in #1) copies of the legal remedies acted enacted upon 469 Lincoln Avenue[;]
- (7) Copies of all documentation provided to the Borough...for the “temporary sidewalk waiver at 304 East Penn Avenue” granted on October 5, 2011[;]
- (8) Copies of the meeting minutes providing the full sidewalk waiver for 304 East Penn Avenue[;]
- (9) Copies of any further documentation regarding the full sidewalk waiver at 304 East Penn Avenue (est[.] 2011/2012)[;]
- (10) Copy of the criteria utilized to discern the appropriateness of waiver at 304 East Penn Avenue, including identification of alternate routes for pedestrian access (est[.] 2011/2012) [;]
- (11) Copy of all sidewalk permits where the property is outside of the PennDOT ROW, which have required an alternate design, for both ADA & Ordinance #530/493 (Sidewalk & Curb) compliance from 2012-present[;]
- (12) Copy of all sidewalk permits where the abutting intersection is not ADA compliant from 2012-present.

On February 20, 2019, the Requester filed a second request, seeking:

- (1) [D]ate of installation of curbing @ 304 E[.] Penn Avenue[;]
- (2) [P]rior accepted “elevations” and “grades” prior to the change on 04-04-2012 and all relevant background documentation to support this change.

On February 20, 2019, the Borough invoked a thirty-day extension to respond to the Requests. 65 P.S. § 67.902(b). On March 20, 2019, the Borough partially denied the Requests, by providing certain records and arguing that no additional records exist within its possession, custody or control.

On March 25, 2019, 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 Borough to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On April 3, 2019, the Borough submitted an affidavit made under penalty of perjury from Debra Pierce, the Borough's Right to Know Officer, asserting that other than the records already provided to the Requester, no additional responsive records exist within its possession, custody or control.

Also on April 3, 2019, the Requester submitted a position statement asserting that the Borough has not explained the basis for its denial of records, that the records are incomplete, and providing reasons why she believes that the records should exist.

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

¹ In the appeal, the Requester granted the OOR an additional thirty days to issue a final determination. *See* 65 P.S. § 67.1101(b)(1).

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 law also states that an appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* The decision to hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Pa. Dep’t of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, the parties did not request a hearing; however, the OOR has the necessary information and evidence before it to properly adjudicate the matter.

The Borough is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in possession of a local agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.” 65 P.S. § 67.708(a)(1). Preponderance of the evidence has been defined as “such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa.

Commw. Ct. 2010)). “The 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).

The Borough asserts that, other than the records already provided to the Requester, the Borough has no additional records responsive to the Requests in its possession, custody or control. In support of the Borough’s position, Ms. Pierce attests that the responsive records were granted in the Borough’s final response and provided to the Requester. Ms. Pierce further attests that “all other requests for records contained in the Requests...are denied because, based on a thorough examination of the records in the possession, custody or control of the Borough and inquiries to relevant third-party contractors, the records requested do not exist within the possession, custody and control of the Borough....”

In response to a request for records, “an agency shall make a good faith effort to determine if ... the agency has possession, custody or control of the record[.]” 65 P.S. § 67.901. While the RTKL does not define the term “good faith effort,” in *Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr.*, the Commonwealth Court stated:

As part of a good faith search, the open records officer has a duty to advise all custodians of potentially responsive records about the request, and to obtain all potentially responsive records from those in possession... When records are not in an agency’s physical possession, an open records officer has a duty to contact agents within its control, including third-party contractors ... After obtaining potentially responsive records, an agency has the duty to review the records and assess their public nature under ... the RTKL.

185 A.3d 1161, 1171-72 (Pa. Commw. Ct. 2018) (citations omitted); *see also Rowles v. Rice Twp.*, OOR Dkt. AP 2014-0729, 2014 PA O.O.R.D. LEXIS 602 (citing *Judicial Watch, Inc. v. United States Dep’t of Homeland Sec.*, 857 F. Supp. 2d 129, 138-39 (D.D.C. 2012)) (citations omitted). Additionally, the Commonwealth Court has held that an open-records officer’s inquiry of agency

members may constitute a “good faith effort” to locate records, stating that open-records officers have:

a duty to inquire of [agency personnel] as to whether he or she was in the possession, custody, or control of any of the ... requested emails that could be deemed public and, if so, whether the emails were, in fact, public and subject to disclosure or exemption from access by Requestor.

Mollick v. Twp. of Worcester, 32 A.3d 859, 875 (Pa. Commw. Ct. 2011); *see also In re Silberstein*, 11 A.3d 629, 634 (Pa. Commw. Ct. 2011) (holding that it is “the open-records officer’s duty and responsibility” to both send an inquiry to agency personnel concerning a request and to determine whether to deny access).

Here, the Borough has not presented competent evidence detailing the steps of the search, the types of records searched and what Borough offices, Borough personnel or relevant third-party contractors were contacted to determine the existence of responsive records.² In addition, the subject matter of the Request involves Borough Code Enforcement and property inspection, but Ms. Pierce’s affidavit does not indicate whether a search of these types of records was conducted. Based upon the evidence provided, therefore, the Borough cannot be said to have conducted a good faith search reasonably calculated to identify the requested records. *See Stookey v. Unionville-Chadds Ford Sch. Dist.*, OOR Dkt. AP 2018-2025, 2018 PA O.O.R.D. LEXIS 1359; *Pa. Dep’t of Labor and Indust. v. Earley*, 126 A.3d 355 (Pa. Commw. Ct. 2015).

² Under the RTKL, an attestation made under the penalty of perjury may serve as sufficient evidentiary support. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). However, “a generic determination or conclusory statements are not sufficient to justify the exemption of public records.” *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013) (*en banc*); *see also Office of the District Attorney of Phila. v. Bagwell*, 155 A.3d 1119, 1130 (“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); *Pa. Dep’t of Educ. v. Bagwell*, 131 A.3d 638, 659 (Pa. Commw. Ct. 2016) (“Affidavits that are conclusory or merely parrot the exemption do not suffice”) (citing *Scolforo*); *Carey v. Pa. Dep’t of Corr.*, 61 A.3d 367, 375-79 (Pa. Commw. Ct. 2013)).

The OOR is mindful that an agency cannot produce records that do not exist within its “possession, custody or control” and, accordingly, is not ordering the creation of any records sought in the Request. Absent the Borough providing a sufficient evidentiary basis that no additional records exist, the OOR will order disclosure of responsive public records. *See generally Sindaco v. City of Pittston*, OOR Dkt. AP 2010-0778, 2010 PA O.O.R.D. LEXIS 755; *Schell v. Delaware County*, OOR Dkt. AP 2012-0598, 2012 PA O.O.R.D. LEXIS 641.

CONCLUSION

For the foregoing reasons, the appeal is **granted**, and the Borough is required to conduct a good faith search and provide all responsive records 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 Berks County Court of Common Pleas. 65 P.S. § 67.1302(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond as per Section 1303 of the RTKL. 65 P.S. § 67.1303. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.³ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: May 22, 2019

/s/ Kelly C. Isenberg

APPEALS OFFICER
KELLY C. ISENBERG, ESQ.

Sent to: Whitney Brady (via email only);
Michael Gombar, Esq. (via email only);
Debra Pierce, AORO (via email only)

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