



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

**LISA SCHERER,
Requester**

v.

**MARIANNA BOROUGH,
Respondent**

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Docket No: AP 2024-0725

On February 5, 2024, Lisa Scherer (“Requester”) submitted a request (“Request”) to Marianna Borough (“Borough”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking “all public meeting minutes from February 2023 to December 2023, as well as expense reports from this same time period.”¹ On March 13, 2024, after extending its time to respond by thirty days, *see* 65 P.S. § 67.902(b), the Borough partially denied the Request, stating that the meeting minutes sought in the Request, with the exception of those from the Borough’s August 2023 meeting, would be available on the Borough’s website by March 18, 2024. The Borough noted that the August 2023 meeting minutes had not been approved as of the date of the

¹ While the Borough’s final response states that the Request was submitted on February 2, 2024, because the Borough’s offices are closed on Fridays, the Request is deemed to have been received on the next business day, Monday, February 5, 2024. *See Scherer v. Marianna Borough*, OOR Dkt. AP 2024-0693, 2024 PA O.O.R.D. LEXIS 659.

Borough's final response. Finally, the Borough states that the expense reports sought in the Request do not exist.

On March 14, 2024, the Requester filed an appeal with the Office of Open Records ("OOR"), challenging the denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the Borough to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On March 28, 2024, the Borough submitted two attestations, made subject to the penalties set forth in 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities), from Nicole Boyer ("Boyer Attestations"), the Borough's Open Records Officer. The Boyer Attestations affirms that, following a search for records, Open Records Officer Boyer determined that "all Monthly Meeting Minutes that were requested are available on [the Borough's] website ..., except for August 2023 because they have not been approved by Council" and that "[a]ny bill lists are compiled for review by Council Members at the monthly meeting and are not retained after each meeting." *Boyer Attestations*, ¶ 5.²

On April 11, 2024, the Requester made a submission, acknowledging that most of the responsive meeting minutes have been uploaded to the Borough's website; however, she alleges, among other things, that the minutes from the Borough's August 2023 meeting are missing from the website. Additionally, regarding the portion of the Request seeking expense reports, the Requester argues that a Borough Councilman provided a "typed expense report to a person in the audience as council was going into executive session." The Requester also provided several examples of the expense reports/bill lists she seeks from April and October 2022.

² Under the RTKL, a statement made under the penalty of perjury may serve as sufficient evidentiary support. See *Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010).

On appeal, Open Records Officer Boyer attests that all of the responsive meeting minutes, with the exception of those from August 2023, would be made available to the Requester on the Borough's website by March 18, 2024. *See* 65 P.S. § 67.704(a). In her submission, the Requester acknowledges that the majority of the responsive meeting minutes are accessible on the Borough's website, with the exception of the minutes from the Borough's August 2023 meeting.³ Therefore, insofar as the meeting minutes were made available to the Requester during the appeal, albeit through the use of the Borough's publicly accessible website, the appeal as to the minutes provided is moot. *See Kutztown Univ. of Pa. v. Bollinger*, 217 A.3d 931 (Pa. Commw. Ct. 2019) (unreported opinion).

However, the Borough's only explanation for not producing the August 2023 meeting minutes is that "they have not been approved by Council yet." *Boyer Attestations*, ¶ 5. The Borough does not cite to any specific RTKL exemption or raise any other grounds for withholding these meeting minutes, nor does the Borough suggest that the August 2023 meeting minutes do not exist.⁴ Therefore, the Borough has failed to meet its burden of proving that the August 2023 meeting minutes are exempt from disclosure and the records must be provided. *See* 65 P.S. § 67.305; 65 P.S. § 67.708(a).

With respect to the expense report sought in the Request, the Borough argues that the bill lists compiled for review at the Borough Council's monthly meeting are not retained after each meeting and thus, by implication, do not exist. In response to a request for records, "an agency

³ A review of the Borough's website confirms that all but one month (August 2023) of the Borough's meeting minutes from 2023 are available to the public. *See* <https://www.mariannapa.org/2023-meeting-minutes> (last accessed April 24, 2024).

⁴ To the extent the Borough suggests that the meeting minutes were not disclosed because they have not received final approval and are, instead, in draft form, Section 708(b)(21) of the RTKL states that "[d]raft meeting minutes of any meeting of an agency" are exempt from disclosure "until the next regularly scheduled meeting of the agency." 65 P.S. § 67.708(b)(21)(i). Based upon the OOR's review of the meeting minutes uploaded to the Borough's website, the Borough's Council had numerous regularly scheduled meetings following its August 2023 meeting.

shall make a good faith effort to determine if ... the agency has possession, custody or control of the identified 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 all 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), *aff’d*, 243 A.3d 19 (Pa. 2020). An agency must show, through detailed evidence submitted in good faith from individuals with knowledge of the agency’s records, that it has conducted a search reasonably calculated to uncover all relevant documents. *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).

Although the Boyer Attestations were executed by the Borough’s Open Records Officer, who affirms that she is familiar with the records of the Borough and conducted a search of its files, the Boyer Attestations lack any detail regarding the files searched by Open Records Officer Boyer. Additionally, the Borough acknowledges that copies of bill lists are provided to Borough Councilpersons during their monthly meetings; however, there is no evidence that Open Records Officer Boyer asked the Councilmembers if they possess copies of the expense reports/bill lists sought in the Request. Accordingly, based on the evidence provided, the Borough has failed to meet its burden of proving that the requested expense reports do not exist for the timeframe referenced in the Request. *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011); *see also Campbell v. Pa. Interscholastic Athletic Ass’n*, 268 A.3d 502 (Pa. Commw. Ct.

2021) (noting that an agency must prove the nonexistence of records by a preponderance of the evidence).

For the foregoing reasons, the appeal is **granted in part** and **dismissed as moot in part**, and the Borough is required to provide copies of the August 2023 meeting minutes and responsive expense reports/bill lists to the Requester within thirty days, or, in the alternative, to provide her with a sworn affidavit or a statement made under the penalty of perjury demonstrating that the records do not exist. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal or petition for review to the Washington 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 according to court rules as per 65 P.S. § 67.1303, but 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.⁵ All documents or communications following the issuance of this Final Determination shall be sent to oor-postfd@pa.gov. This Final Determination shall be placed on the website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: 26 April 2024

/s/ Joshua T. Young

JOSHUA T. YOUNG
SENIOR DEPUTY CHIEF COUNSEL

Sent via e-file portal to: Lisa Scherer (via email only);
Nicole Boyer, AORO (via email only)

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