



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
THOMAS BAILEYS,	:	
Requester	:	
	:	
v.	:	Docket No.: AP 2016-1042
	:	
CLINTON TOWNSHIP,	:	
Respondent	:	

INTRODUCTION

Thomas Baileys (“Requester”) submitted a request (“Request”) to Clinton Township (“Township”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking, among other items, records regarding sewer, storm water and street light assessments. The Township granted the Request and provided certain records. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **denied in part** and **dismissed as moot in part**, and the Township is not required to take any further action.

FACTUAL BACKGROUND

On May 20, 2016, the Request was filed, seeking, in pertinent part, “[a] copy of any document that identifies which properties were (are) to be assessed sewer assessments, storm water assessment and street light assessments.” On May 23, 2016, the Township granted the

Request, indicating that a total of 84 responsive pages existed and would be provided to the Requester at a total cost of \$21.00.

On June 14, 2016, the Requester appealed to the OOR, asserting that a portion of his Request was deemed denied and stating grounds for disclosure. Specifically, the Requester argued that the records provided did not fully respond to the Request. The OOR invited both parties to supplement the record and directed the Township to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On June 20, 2016 and June 24, 2016, the Township submitted position statements arguing that the only record responsive to the portion of the Request subject to this appeal is a map regarding storm water assessment, which was provided to the Requester. The Township also submitted the sworn affidavit of Jill Droppa, Secretary for the Township, who attests that she assisted in performing a search for responsive records and that no records regarding sewage assessments or street lighting assessments exist. On June 23, 2016 and June 28, 2016, the Requester submitted position statements arguing that the requested records must exist.

On July 6, 2016, the OOR reopened the record in this matter in order for the Township to submit evidence regarding the existence of records regarding storm water assessments. On July 8, 2016, the Township provided the Requester with two e-mails dated July 7, 2016 and July 8, 2016, between the Township and the Pennsylvania Department of Environmental Protection regarding storm water. On July 9, 2016, the Township submitted the sworn affidavit of Kenneth Coles, Chairman of the Board of Supervisors for the Township, who attests that other than what has already been provided, no responsive records regarding storm water assessments exist. On July 11, 2016, the Requester filed a supplemental position statement arguing that he still has not received the Township records that he seeks.

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.*; *Giurintano v. Pa. Dep’t of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, neither party requested a hearing in this matter; however, the OOR has the necessary, requisite information and evidence before it to properly adjudicate the matter.

The Township 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 clearly 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). 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).

1. To the extent responsive records have been provided, the appeal is dismissed as moot

On appeal, the Township provided two responsive e-mails between the Pennsylvania Department of Environmental Protection and the Township regarding storm water. To the extent that responsive records have been provided, the appeal is dismissed as moot.

2. The Township has demonstrated that no additional records exist within its possession, custody or control

The Township argues that, other than what has already been provided, no other responsive records exist. In support of its position, the Township submits the sworn affidavit of Jill Droppa, Secretary for the Township, who attests that she “assisted ... in searching the Township records extending back to the year 1986, and ... that [she] found no documents in any written format either referencing and/or generating information regarding sewage assessments or street lighting assessments.” Additionally, the Township submits the sworn affidavit of Kenneth

Coles, Chairman of the Board of Supervisors for the Township, who attests that he “conducted a full and complete search of all Township records extending back to the year 1986” and that “the only document found in the Township records referenced a stormwater assessment and was provided as party of an eight-four (84) page document response.” Mr. Coles further attests that he “did not find, nor [is he] aware of any written document or record related to or otherwise associated with the stormwater assessment which contributed to or otherwise was used to compile said taxing assessments by any third party agency, and this search extended back to the year 1986.”

Under the RTKL, a statement made under the penalty of perjury may serve as sufficient evidentiary support to sustain an agency’s burden of proof. *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). The Requester argues that the records sought must exist because the Township has to justify how it performs selective assessments. However, in the absence of any competent evidence that the Township acted in bad faith or that additional records exist, “the averments in [the affidavits] should be accepted as true.” *McGowan v. Pa. Dep’t of Env’tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)). Based on the evidence provided, the Township has demonstrated that other than what has been provided, no additional records exist within its possession, custody or control.

CONCLUSION

For the foregoing reasons, the Requester's appeal is **denied in part** and **dismissed as moot in part**, and the Township is not required to take any further action. 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 Wayne 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. 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.¹ This Final Determination shall be placed on the website at: <http://www.openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: July 19, 2016

/s/ Kathleen A. Higgins

APPEALS OFFICER
KATHLEEN A. HIGGINS, ESQ.

Sent to: Thomas Baileys (via e-mail only);
Ken Coles (via e-mail only)

¹ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).