pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
ANDREW HAILSTONE,	:	
Requester	:	
	:	
v.	:	**Docket No: AP 2016-0931**
	:	
NORTH ABINGTON TOWNSHIP,	:	
Respondent	:	

INTRODUCTION

Andrew Hailstone, Esq. ("Requester") submitted a request ("Request") to North Abington Township ("Township") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq*., seeking building permits for nine properties. The Township did not timely respond to the Request, and the Requester appealed to the Office of Open Records ("OOR"). For the reasons set forth in this Final Determination, the appeal is **denied**, and the Township is not required to take any further action.

FACTUAL BACKGROUND

On May 3, 2016, the Request was filed seeking "Building Permits" for properties owned by the following:

Aikman, Timothy & Kathleen
Desai, smith [*sic*] & Niranjan
Gorczyk, John & Carolyn
Khademi, Jamshid & Shokoufeh

Rodes, Mary
Rogan, Michael & Mary Ann
Walsh, Jason & Christina
Walsh, John & Liana
Wolter, Melinda

The Township failed to respond within five business day of the Request, and the Request was, therefore, deemed denied on May 10, 2016. *See* 65 P.S. § 67.901.[1]

On May 26, 2016, the Requester appealed to the OOR, stating grounds for disclosure. 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 7, 2016, the Township submitted a position statement stating grounds for denial. The Township stated that the Uniform Construction Code did not require building permits until 2004 and that, after 2004, a third party contractor issued permits in the form of placards to be posted at construction sites. The Township argues that the records do not exist in the Township's possession, custody and control. In support of its position, the Township submitted the affidavit of Mary Roche Redel, Open Records Officer.

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

[1] On May 5, 2016, the Township's Solicitor e-mailed the Requester indicating that "we use a third party contractor … so the Township Secretary is inquiring with that company and will let me know what she learns." However, as this correspondence did not include the information required by 65 P.S. § 67.902, the OOR determines that this is not a thirty-day extension.

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 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 and 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)(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).

The Township indicates that the Aikman, Desai, Gorczyk, Rhodes, Rogan and John Walsh properties were constructed prior to the UCC's statutory mandate for building permits, and, therefore, no building permits exist for these properties. Ms. Redel attests that she contacted its third party contractor, Building Inspection Underwriters of PA, Inc. ("BIU"), who is responsible for the Township's building and permitting functions. She also contacted Thomas Mundrake, Township Supervisor, Roadmaster and Code Enforcement Officer, and Eugene Opsasnick, Former Zoning Officer, to inquire about the existence and location of the requested building permits. Ms. Redel attests that she was informed that the Township did not issue construction permits prior to 2004 amendments to the UCC. However, she was able to obtain zoning permits for the above properties that reference construction and expiration of the permit. Although zoning permits are not directly responsive to the Request, which sought *building* permits, Ms. Redel attests that she provided these zoning permits to the Requester.

With respect to the Jason and Christina Walsh and Montague Wolter properties, Ms. Redel attests that these properties were constructed after the 2004 UCC amendments and were required to have building permits; however, BIU issues the permits on a placard that contains the property owner's name, permit number, and date of expiration, which are posted at the property

during construction. She attests that there are no longer any permits/placards for these two properties. Lastly, the Khademi property is not located in the Township, and there are no responsive records that exist in the Township's possession.

Under the RTKL, an affidavit may serve as sufficient evidentiary support for the nonexistence of records. *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). In the absence of any competent evidence that the Township acted in bad faith or that the records exist, "the averments in [the affidavit] should be accepted as true." *McGowan v. Pa. Dep't of Envtl. 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 met its burden of proving that no responsive records exist in the Township's possession, custody or control.

The Township further argues that insofar as the Requester is seeking building permit applications, such records are exempt from disclosure under Section 403.85 of the UCC, which provides as follows:

> The Department [of Labor and Industry], a municipality and a third-party agency acting on behalf of a municipality may prohibit release of applications received, building plans and specifications, inspection reports and similar documents to the public under the act of June 21, 1957 (P. L. 390, No. 212) known as the Right-to-Know Law (65 P.S. §§ 66.1 -- 66.9). The Department, the municipality or third-party agency may release these documents to the building owner of record, the permit holder, the design professional of record or a third party authorized by the building owner in writing to receive the documents upon presentation of valid identification.

34 Pa. Code § 403.85(e). Such applications submitted for building permits are expressly confidential under the UCC and, therefore, may be withheld from disclosure. *See Murphy v. Lower Paxton Twp.*, OOR Dkt. AP 2015-2881, 2016 PA O.O.R.D. LEXIS 63.

CONCLUSION

For the foregoing reasons, Requester's appeal is **denied**, 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 to the Lackawanna 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.[2] This Final Determination shall be placed on the OOR website at: http://openrecords.pa.gov.

FINAL DETERMINATION ISSUED AND MAILED: July 20, 2016

/s/ Jill S. Wolfe

APPEALS OFFICER
JILL S. WOLFE, ESQ.

Sent to: Andrew Hailstone, Esq. (via e-mail only);
Jennifer Walsh, Esq. (via e-mail only)

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