



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

:

TRENT KOSTERMAN,
Requester

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:

:

v.

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Docket No.: AP 2016-1113

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CUSSEWAGO TOWNSHIP,
Respondent

:

:

:

INTRODUCTION

Trent Kosterman (“Requester”), submitted a request (“Request”) to Cussewago Township (“Township”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking Township minutes, a list of Township officials, documentation of an official appointment and the identity of the Township building code official. The Township did not respond, and the Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **dismissed as moot**, and the Township is not required to take further action as directed.

FACTUAL BACKGROUND

On June 15, 2016, the Request was filed, seeking:

1. Cussewago Township Planning Commission Meeting Minutes from 3/31/2016 and May 2016.
2. Cussewago Township Supervisors meeting minutes from [sic] May meeting and the meeting of 6/7/2016.
3. Official list of township officials, including salaries.

- 4[.] Documentation of the official appointment of Stephen White to position of supervisor.
5. A record indicating the township building code official for the township [sic].

As the Township did not respond to the Request by June 22, 2016, the Request was deemed denied on that date. *See* 65 P.S. § 67.901.

On June 27, 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 the appeal. *See* 65 P.S. § 67.1101(c).

On July 6, 2016, the Township made a submission that included records responsive to all five parts of the Request. The submission was accompanied by an affidavit of the Township's Open Records Officer, who avers, under penalty of perjury, that all responsive records have been provided. On July 13, 2016, the Requester made a submission to OOR, indicating that he found the Township's response unsatisfactory in part.

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. 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the request.” 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.* 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.* Here, neither party requested a hearing; 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. *See* 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. 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. 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 *Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

Here, the Township avers under penalty of perjury that it has provided all responsive records. The Requester suggests that there should be an election record for the election of Steve

White as supervisor, and that the supervisor meeting from June 7, 2016, should have been recorded. While the Requester believes that additional records should exist, the Requester has provided no evidence that additional records actually do exist. Under the RTKL, an affidavit 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). In the absence of any evidence that the Township has acted in bad faith or that any additional 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)). Therefore, the Township has sustained its burden of proof in showing that no other responsive records exist.

CONCLUSION

For the foregoing reason, Requester’s appeal is **dismissed as moot**, and the Township is not required to take further action as directed. 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 Crawford County Court of Common Pleas. *See* 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 OOR website at: <http://openrecords.pa.gov>.

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

FINAL DETERMINATION ISSUED AND MAILED: July 25, 2016

/s/ Blake Eilers
Blake Eilers, Esq.
APPEALS OFFICER

Sent to: Trent Kosterman (via e-mail only);
Jerry Galvin (via e-mail only)