



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

:

**TIM DOMAN,
Requester**

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:

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v.

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Docket No.: AP 2016-1117

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**BUFFALO TOWNSHIP,
Respondent**

:

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On June 2, 2016, Tim Doman (“Requester”) submitted a request (“Request”) to Buffalo Township (“Township”) pursuant to the Right-to-Know Law, 65 P.S. §§ 67.101 *et seq.*, (“RTKL”) seeking copies of correspondence between the Township and the Washington County Conservation District (“WCCD”) referencing the Requester and/or his property. On June 13, 2016, the Township provided the Requester with two responsive records.

On June 27, 2016, the Requester appealed to the Office of Open Records (“OOR”), arguing that additional records exist. 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 July 8, 2016, the Requester submitted an attestation in support of appeal from Gretchen Moore, Esq., who attests that there may be additional communications exchanged between the Township and the WCCD. On July 13, 2016, the Township submitted an unsworn position statement arguing that other than what has already been provided, no additional records exist in the Township’s possession, custody or control. Additionally, on July 12, 2016 and July 20, 2016, the Township Zoning/Code Enforcement Officer submitted unsworn position statements, arguing that the Requester has been provided all responsive records. Additionally, the Township Zoning/Code Enforcement Officer references correspondence responsive to the Request with the WCCD; however, no evidence has been submitted to demonstrate that such records have actually been provided to the Requester.

Section 708 of the RTKL clearly places the burden of proof on the public body to demonstrate that a record is exempt from disclosure. 65 P.S. § 67.708(a)(1). Under the RTKL, an affidavit 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). However, an unsworn statement is not competent evidence to meet an agency's burden of proof. See *Housing Authority of the City of Pittsburgh v. Van Osdol*, 40 A.3d 209, 216 (Pa. Commw. Ct. 2012) (holding that unsworn statements of counsel are not competent evidence); *City of Philadelphia v. Juzang*, July Term 2010, No. 2048 (Phila. Com. Pl. June 28, 2011) ("Because the letter written by City's counsel is a legal brief, it cannot be ... evidence at all"). In the present case, the Township did not provide any evidentiary basis to support its claim that no additional records exist in its possession, custody or control, nor has it cited any exemptions for denying access to responsive records.

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 listed in the Request. Absent an agency providing a sufficient evidentiary basis as to whether any responsive records exist in the first place, however, the OOR will order the 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.

For the foregoing reasons, Requester's appeal is **granted**, and the Township is required to 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 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 Section 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.¹ This Final Determination shall be placed on the website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: July 27, 2016

/s/ Kathleen A. Higgins

APPEALS OFFICER
KATHLEEN A. HIGGINS, ESQ.

Sent to: Tim Doman (via e-mail only);
Gretchen Moore, Esq. (via e-mail only);
John Hofrichter, Esq. (via e-mail only);
Open Records Officer

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