pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
JOHN YAKIM,	:	
Requester	:	
	:	
v.	:	**Docket No.: AP 2016-1083**
	:	
MUNICIPALITY OF MONROEVILLE,	:	
Respondent	:	

INTRODUCTION

John Yakim ("Requester") submitted a request ("Request") to the Municipality of Monroeville ("Municipality") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq*., seeking various communications pertaining to the Municipality's Home Rule Charter Ad Hoc Review Board ("Committee"). The Municipality partially granted the Request, providing redacted communications and records. The Requester appealed to the Office of Open Records ("OOR"). For the reasons set forth in this Final Determination, the appeal is **granted in part** and **dismissed as moot in part**, and the Municipality is required to take further action as directed.

FACTUAL BACKGROUND

On May 13, 2016, the Request was filed, seeking:

> [C]orrespondence to or from Members of Council, Mayor Erosenko, Manager Little and members of the Home Rule Charter Committee which discuss the Home Rule Charter or the work of the HRC Committee. This should include[]

> but not [be] limited to any emails, notes, agendas, discussions of meetings or discussions of agendas. This should include any emails, received or sent from personal email accounts or cell phones which discuss this official business. Please have Members of Council, Manager Little, Mayor Erosenko and members of the committee attest to the completeness of this request. Date range April 1 – April 30, 2016.

On May 20, 2016, the Municipality invoked a thirty-day extension of time to respond to the Request. *See* 65 P.S. § 67.902. On June 20, 2016, the Municipality partially granted the Request, providing documents redacted of personal identification information. 65 P.S. § 67.708(b)(6)(i).

On June 21, 2016, the Requester appealed to the OOR, arguing that the response was insufficient because it did not contain all of the information requested. The OOR invited the parties to supplement the record, and directed the Municipality to notify third parties of their ability to participate in the appeal. 65 P.S. § 67.1101(c). The Requester also submitted copies of the e-mails which he had received from his Request.

On July 5, 2016, the Municipality submitted a position statement and the affidavit of Joe Sedlak, the Municipality's Open Records Officer ("ORO"). In these statements, the Municipality testified that:

> 4. On May 13, 2016, I contacted the Members of Council, Mayor Erosenko and Manager Little and inquired as to whether those parties had any records in their possession which were responsive to Mr. Yakim's request.
> 5. Members of Council, Mayor Erosenko and Manager Little advised me that they have no such responsive records.
> 6. On May 13, 2016, I notified all of the citizen members of the Home Rule Committee. The records provided are all the records provided to me by the Home Rule Committee members.

On July 6, 2016, the Requester replied to the Municipality's submission, submitting e-mails provided to him by a former member of the Committee, Jennifer Taylor, which were provided to Mr. Sedlak in response to the Request but never provided to the Requester. The Requester also

submitted e-mails between Ms. Taylor, Manager Little and Councilman Gresock, arguing that either Mr. Sedlak's affidavit was inaccurate or responsive records had not been provided to him. On July 7, 2016, the Municipality provided the Requester with the e-mails submitted by Jennifer Taylor, indicating that they had been "overlooked" and provided clarification to their earlier affidavit.

On July 8, 2016, the Requester submitted the sworn affidavit of Ms. Taylor, who attests that:

> 2. On Monday, May 19, 2016, I emailed Mr. Joe Sedlak, Right To Know Officer for the Municipality of Monroeville to verify the deadline for RTK submissions requested for the date range of April 1-30, 2016.
> 3. I received a response from Mr. Sedlak giving me a deadline of 6/20, 2016.
> 4. On June 2, 2016, I forwarded emails to Mr. Sedlak fulfilling the 4/1-4/30 RTK request. Those emails were sent and/or copied to: Timothy Little (Monroeville Municipal Manager), Sharon McIndoe (Municipal employee and Secretary for the HRC Committee), and Nick Gresock (Monroeville Councilman and Liason for the HRC Committee).
> 5. I emailed Mr. Sedlak June 2, 2016 advising him of approximately 40 emails received from fellow board member John Ritter and asking if I needed to provide those or if those would be provided by Mr. Ritter. I received no response from Mr. Sedlak.

On July 10, 2016, the Municipality responded, submitting two e-mail conversations between Mr. Sedlak, Manager Little and Councilman Gresock. In these e-mails, Mr. Sedlak informed the other two parties of the pending Request and asked if they had any responsive materials, to which they responded negatively and Manager Little instructed Mr. Sedlak to give the Requester a copy of the minutes.

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; however, 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 of the parties requested a hearing, and the OOR has the requisite information and evidence before it to properly adjudicate this matter.

The Municipality is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in the possession of a local agency are presumed to be 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 to respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemption(s). *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. **The appeal is moot in part**

On appeal, the Municipality provided additional responsive records to the Requester. As such, the appeal is dismissed as moot as to these records.

2. **The Municipality has not established that it does not possess other records responsive to the Request as it applies to all members of the Home Rule Committee**

In his affidavit, Mr. Sedlak attests that "On May 13, 2016, I notified all of the citizen members of the Home Rule Committee. The records provided are all the records provided to me by the Home Rule Committee members." Upon request for clarification, Mr. Sedlak stated that some members of the Committee had responded to him in writing or verbally, and informed him that they did not possess any responsive records, but other members of the Committee had not responded to his inquiry.

The duty of an agency to conduct a good-faith search is not discharged when members of that agency fail to respond to an open-records officer's request for responsive records. *See Yakim v. Municipality of Monroeville*, OOR Dkt. AP 2016-0840, 2016 PA O.O.R.D. LEXIS 855, *appeal pending* SA 16-000537 (Allegheny Com. Pl); *see also Mollick v. Twp. of Worcester*, 32 A.3d 859, 875 (Pa. Commw. Ct. 2011); *In Re Silberstein*, 11 A.3d 629, 634 (Pa. Commw. Ct. 2011). Here, since the Municipality has not provided evidence demonstrating which members of

the Committee responded, the OOR is constrained to grant access to all responsive documents in the possession of any Committee member.

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 sought in the Request. Absent an agency providing a sufficient evidentiary basis that no records exist, the OOR will order 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.

3. The Municipality has not established that it conducted a search reasonably calculated to locate all responsive records

In his affidavit, Mr. Sedlak attests that he contacted the Members of Council, Mayor Erosenko and Manager Little, notified them of the Request and inquired as to any responsive documents in their possession. Mr. Sedlak further attests that they informed him that they possessed no responsive documents, and the Municipality and Requester have separately submitted the e-mail chains in which parts of Mr. Sedlak's inquest occur.

To rebut Mr. Sedlak's affidavit, the Requester submitted e-mail chains and an affidavit from Jennifer Taylor, who was a member of the Committee until June 14, 2016. These submissions demonstrate that, during the pendency of the Request, Mr. Sedlak received responsive documents in the form of e-mail chains between Ms. Taylor and Manager Little and Councilman Gresock, which were neither provided nor explicitly denied to the Requester. The affidavit from Ms. Taylor also demonstrates that Mr. Sedlak was informed that there was a further series of e-mails between Ms. Taylor and another board member, and that Ms. Taylor had asked Mr. Sedlak if she should provide those, but Ms. Taylor did not receive a response.

Mr. Sedlak responded to these submissions by providing the Requester with the e-mails submitted to him by Ms. Taylor, indicating that he had overlooked them. Mr. Sedlak also submitted the e-mail chains between himself, Manager Little and Councilman Gresock, showing that he had asked them both if they possessed responsive records and that they had answered negatively.

The Requester argues that the inconsistency between the two affidavits, as well as the demonstrated inaccuracy of Mr. Sedlak's initial submission, is fatal to the Municipality's position. He further requests that the Municipality be made to provide affidavits from each of the individual record-holders.

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). Where there is no competent evidence that the Municipality acted in bad faith or that the record exists in the possession of the Municipality, "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)).

Taken as a whole, the evidence submitted in this case indicates the following:

1. Mr. Sedlak, upon receipt of the Request, contacted the named parties and asked if they had any responsive documents.
2. All of the members of Council, Mayor Erosenko, and Manager Little responded negatively.
3. An unknown number of Committee members responded in the negative; others, such as John Ritter and Ms. Taylor responded in the affirmative; and an unknown number of Committee members did not reply.
4. Ms. Taylor sent Mr. Sedlak responsive records and indicated the existence of other records also in the possession of Mr. Ritter.
5. Mr. Sedlak provided Requester with the submission of Mr. Ritter, but neither provided nor denied the submission of Ms. Taylor.

This sequence of events does not indicate bad faith on the part of Mr. Sedlak or any of the other actors involved in the fulfillment of the Request. It is apparent that Mr. Sedlak did, in fact, conduct a search in response to the Request. Mr. Sedlak provided the Requester the submission of Mr. Ritter, and he was told by several of the parties that they possessed no records. Those parties to whom Ms. Taylor had sent e-mails in the past may not have retained them until the date of the Request, and, at the time of the Request, may not have possessed any responsive records. It is true that Mr. Sedlak failed to inform the Requester of Ms. Taylor's submission, but a clerical oversight hardly indicates bad faith. *See generally Robinson v. City of Philadelphia*161 A.2d 1, 5 (Pa. 1960) ("Public officials are presumed to have acted lawfully and in good faith until facts showing the contrary are averred, or in a proper case averred and proved"). Therefore, since there is no evidence that Mr. Sedlak has acted in bad faith, his statements should be taken as true. *Office of the Governor v. Scolforo*, 65 A.3d at 1103.

However, an affidavit need not be made in bad faith to be unreliable. The essential duty of an open-records officer, upon receiving a request under the RTKL is to conduct a good-faith search. In response to a request for records, "an agency shall make a good faith effort to determine if ... the agency has possession, custody or control of the record[.]" 65 P.S. § 67.901. The RTKL does not define the term "good faith effort" as used in Section 901 of the RTKL. In *Rowles v. Rice Township*, however, the OOR stated:

> [I]n order for an agency to meet its burden that a good faith search was conducted in response to a FOIA request an agency must show that it has conducted a search reasonably calculated to uncover all relevant documents as established by relatively detailed and non-conclusory affidavits submitted in good faith by responsible officials.

OOR Dkt. AP 2014-0729, 2014 PA O.O.R.D. LEXIS 602 (citing *Judicial Watch, Inc. v. United States Dep't of Homeland Sec*., 857 F. Supp. 2d 129, 138-139 (D.D.C. 2012)) (citations omitted).

Additionally, the Commonwealth Court has held that an open-records officer's inquiry of agency members may constitute a "good faith effort" to locate records, stating that open-records officers have:

> a duty to inquire of [agency personnel] as to whether he or she was in the possession, custody, or control of any of the ... requested emails that could be deemed public and, if so, whether the emails were, in fact, public and subject to disclosure or exemption from access by Requestor.

Mollick v. Twp. of Worcester, 32 A.3d 859, 875 (Pa. Commw. Ct. 2011); *see also In Re Silberstein*, 11 A.3d 629, 634 (Pa. Commw. Ct. 2011) (holding that it is "the open-records officer's duty and responsibility" to both send an inquiry to agency personnel concerning a request and to determine whether to deny access).

The Municipality's submissions demonstrate that an inquiry was conducted. However, in this case, it cannot be said that the inquiry was reasonably calculated to uncover all relevant documents. First, the evidence demonstrates that the Municipality did not respond to Ms. Taylor's question regarding her e-mails to Mr. Ritter, even though there is nothing in the response it received from Mr. Ritter that demonstrates that the e-mails he submitted are all of those which Ms. Taylor would have possessed. Next, it appears that the Municipality, having been alerted that responsive e-mails were sent to Manager Little and Councilman Gresock, chose not to follow-up with either of those officials, but simply to accept earlier one-sentence responses indicating that they had no records. Finally, even when the Municipality received responsive records, it failed to accurately identify and catalogue them, and so ultimately failed to disclose their existence to the Requester.

Responding to requests under the RTKL is not always an easy process, and it is not possible to formulate a search which will never fail. An open-records officer, assuming good faith amongst his colleagues, is generally entitled to rely upon their representations. *See Mollick*,

32 A.3d 875 (Pa. Commw. Ct. 2011). The duty of the open-records officer, however, is ultimately to locate and evaluate responsive records; where the evidence makes it apparent that there is a high likelihood that other responsive records exist, such as when one of the named parties asks the open-records officer if certain records are responsive, the open-records officer must consider whether additional steps need to be taken to ensure that all responsive records have been identified.

Since, in this case, the Municipality knew or should have known that other responsive records existed at the time of their response and their affidavit, the OOR cannot conclude that the Municipality's search for records was reasonably calculated to uncover all relevant documents. Therefore, the Municipality's affidavit is not evidence of a good faith search, and the Municipality must undertake a good faith search that is reasonably calculated to uncover all relevant documents and provide any further responsive records to the Requester.

CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted in part** and **dismissed as moot in part**, and the Municipality 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 to the Allegheny 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 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] *See Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

FINAL DETERMINATION ISSUED AND MAILED: July 28, 2016

/s/Jordan Davis

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Jordan C. Davis, esq
Appeals Officer

Sent to: John Yakim (via e-mail only);
Joe Sedlak (via e-mail only)