



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
BOB KALINOWSKI AND <i>THE CITIZENS'</i>	:	
<i>VOICE,</i>	:	
Requester	:	
	:	
v.	:	Docket No.: AP 2016-1161
	:	
CITY OF WILKES-BARRE,	:	
Respondent	:	

On May 31, 2016, Bob Kalinowski, a reporter for *The Citizens' Voice* ("Requester"), submitted a request ("Request") to the City of Wilkes-Barre ("City") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq.*, seeking proposals received by the City for ambulance services. As the City did not respond within five business days, the Request was deemed denied.¹ *See* 65 P.S. § 67.901.

On July 7, 2016, the Requester appealed to the Office of Open Records ("OOR"), arguing that the records exist.² On July 14, 2016, the City submitted a sworn affidavit from Ted Wampole, the City's Administrator, attesting that the City does not possess the requested records.

Under the RTKL, an affidavit made under the penalty of perjury 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 City 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 Env'tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct.

¹ On June 9, 2016, the City sought a thirty-day extension pursuant to 65 P.S. § 67.902. However, the City's response was beyond five business days.

² By OOR Order issued July 7, 2016, the Requester was required to file a complete copy of the Request within seven days of the date of the Order. However, the City provided the OOR with a copy of the Request on July 14, 2016.

2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)). Based on the evidence provided, the City has met its burden of proving that no responsive records exist in the City's possession, custody or control.³ Accordingly, the appeal is **denied**.

For the foregoing reasons, the City 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 Luzerne 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.⁴ This Final Determination shall be placed on the website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: August 5, 2016

/s/ Magdalene C. Zeppos

APPEALS OFFICER
MAGDALENE C. ZEPPOS, ESQ.

Sent to: Bob Kalinowski (via e-mail only);
Timothy Henry, Esq. (via e-mail only)

³ The Requester asserts that the City "had a duty" to retain the requested records. The OOR makes no determination as to whether these records should exist, only that the City does not possess responsive records. *See, e.g., Troupe v. Borough of Punxsutawney*, OOR Dkt. AP 2010-0743, 2010 PA O.O.R.D. LEXIS 731 ("While ... evidence may establish that a [record] should exist, the OOR lacks jurisdiction to rule on the propriety of the lack of such [record] -- the OOR may only determine whether a responsive record does, in fact, exist").

⁴ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).