



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

**PAUL LOBOS,
Requester**

v.

**CONYNGHAM TOWNSHIP,
Respondent**

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Docket No.: AP 2016-0503

INTRODUCTION

Paul Lobos (“Requester”) submitted a request (“Request”) to Conyngham Township (“Township”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking meeting minutes of the Township’s Board of Supervisors, as well as the Township’s noise and fireworks ordinance from January 1, 2012 through January 1, 2016. The Township denied the Request, asserting that the “noise ordinance was not changed within the time period” requested, and no other responsive records exist. 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 February 18, 2016, the Request was mailed to the Township, seeking:

[M]inutes of meetings for ... Board of Supervisors giving permission and permits for fireworks to Wilburton Hose Company #1 for last 5 years and also the name

of out of state fireworks company who was given permission. Names of supervisors who voted yes or no. Dates this meeting was posted or advertised to public. Copy of noise & firework ordinance from Jan. 1st 2012 to Jan. 1st 2016. Who voted to change noise ordinance.

On February 23, 2016, the Township denied the Request, asserting that the “noise ordinance was not changed within the time period” requested. The Township further claimed that no other responsive records exist.

On March 9, 2016, the Requester appealed to the OOR, challenging the denial and 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). The parties agreed to participate in the OOR’s mediation program. On July 13, 2016, the mediation was discontinued.

On July 29, 2016, the Requester submitted additional evidence, asserting that the requested advertising notices exist. In response to multiple requests for clarification from the OOR, the Township submitted additional evidence on August 2, 2016, claiming that the Township “has nothing to do with the fireworks and does not require [a] permit to set them off.” On August 3 and 4, 2016, the Township submitted two affidavits in support of its position from Linda Tarlecki, Chairperson of the Township’s Board of Supervisors. The Township further asserts that the Requester “would need to pay a fee before any Township meeting minutes would be provided.”

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. 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 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. 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). 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 Request cannot be modified on appeal

In response to a request for clarification from the OOR, the Requester asserts that he “would also like to know if this Cracker Jack, Inc. ... is licensed in Pa.” The Request, however, does not seek any records regarding whether Cracker Jack, Inc., is licensed in Pennsylvania. To the extent that the Requester seeks to modify the Request, a requester may not modify, explain, or expand upon a request on appeal.¹ *See Pa. State Police v. Office of Open Records*, 995 A.2d 515, 516 (Pa. Commw. Ct. 2010); *Staley v. Pittsburgh Water and Sewer Auth.*, OOR Dkt. AP 2010-0275, 2010 PA O.O.R.D. LEXIS 256 (“A requester may not modify the original request as the denial, if any, is premised upon the original request as written”). The OOR’s review on appeal is confined to the Request as written, and any modifications of the Request on appeal will not be considered. *See Hong v. Pa. Dep’t of Transp.*, OOR Dkt. AP 2013-0328, 2013 PA O.O.R.D. LEXIS 162.

2. The Township may request payment of copying fees prior to releasing the responsive meeting minutes

The Township acknowledges that it possesses meeting minutes that are responsive to the Request. Specifically, Chairperson Tarlecki attests that the minutes from the Township’s March 12, 2013, meeting are the only meeting minutes that are responsive to the Request. Chairperson

¹ The Requester is not precluded from submitting a new request clarifying the records sought. *See Hollinger v. Adams County*, OOR Dkt. AP 2013-0238, 2013 PA O.O.R.D. LEXIS 180.

Tarlecki further attests that the requested meeting minutes would be provided to the Requester upon payment of applicable fees.

Section 1307(b)(1) of the RTKL provides that the OOR has the authority to establish fees for duplication by photocopying for local agencies. *See* 65 P.S. § 67.1307(b)(1)(i). Pursuant to this authority, the OOR has approved fees of up to \$0.25 per photocopy. The RTKL favors a contemporaneous exchange of fees for records, but in no event is an agency required to send the records without receiving the fees at issue. *See Frame v. Menallen Twp.*, OOR Dkt. AP 2009-1072, 2010 PA O.O.R.D. LEXIS 155. Section 901 of the RTKL provides that “[a]ll applicable fees shall be paid in order to receive access to the records requested.” 65 P.S. § 67.901. Therefore, the Township may seek applicable photocopying fees up to \$0.25 per photocopy before providing the Requester with the responsive meeting minutes. *See Clinkscale v. City of Phila. Tax Review Bd.*, OOR Dkt. AP 2014-1337, 2014 PA O.O.R.D. LEXIS 1466.

3. The Township has met its burden of proving that no other responsive records exist in its possession, custody or control

The Township claims that other than the meeting minutes, no additional responsive records exist. Specifically, the Township asserts that the Township “has nothing to do with the fireworks and does not require [a] permit to set them off.” In support of its position, the Township presents that sworn affidavit of Linda Tarlecki, Chairperson of the Township’s Board of Supervisors, who attests, in part, as follows:

1. I am the Chairperson for the Board of Supervisors for Conyngham Township, and I am familiar with the ordinances of the Township, as well as whether permits are issued for fireworks....
4. The Township was not asked for permission and did not give any permission to Wilburton Hose Company #1 for setting off any fireworks.
5. The Township did not issue any permit to Wilburton Hose Company #1 to set off any fireworks.

6. The Township did not place any advertisement in any newspaper related to any fireworks being set off by the Wilburton Hose Company #1.
7. The Township did not have any communication or involvement with any “out of state fireworks company....”
8. The Township does not have any noise ordinance.
9. The Township does not have any firework ordinance....
11. The records requested by [the Requester], i.e., permits and ordinances, do not exist.

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 Township acted in bad faith or that additional 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. 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 other than the meeting minutes, no additional responsive records exist in the Township’s possession, custody or control.

CONCLUSION

For the foregoing reasons, the 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 Columbia 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.² This Final Determination shall be placed on the OOR website at:

<http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: August 12, 2016

/s/ Magdalene C. Zeppos

APPEALS OFFICER
MAGDALENE C. ZEPPOS, ESQ.

Sent to: Paul Lobos;
Megan Janolek (via e-mail only)

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