



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

:

MARY HALLINAN,
Requester

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:

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v.

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Docket No.: AP 2016-1221

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DUNMORE BOROUGH,
Respondent

:

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INTRODUCTION

Mary Hallinan (“Requester”) submitted a request (“Request”) to Dunmore Borough (“Borough”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking records of her complaints that had been provided to alleged violators of various ordinances. The Borough denied the Request, claiming it was unable to locate responsive records. 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 Borough is not required to take any further action.

FACTUAL BACKGROUND

On June 27, 2016, the Request was filed, seeking:

Right to know requests from and documents provided to all property owners of the 1700 block of Madison Avenue regarding [the Requester’s] ordinance, zoning and structural code complaints of the homes within the 1700 block of Madison Avenue and the exact and complete documentation they were provided that [the Requester] had submitted.

As the Borough did not respond to the Request by July 5, 2016, the Request was deemed denied on that date. *See* 65 P.S. § 67.901.¹

On July 15, 2016, the Requester appealed to the OOR, stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the Borough to notify any third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

On July 20, 2016, the Requester submitted a partial transcript of the council meeting for the Borough from August 10, 2015, in which she stated that she “believe[s] that the detailed information that this tenant spoke of at the hearing could have only been provided by a Borough official as it consisted of details from documentation I submitted as part of my zoning complaint.” Thomas Cummings, Esq., the Solicitor for the Borough, replied:

We have received multiple open records requests incident to the properties and complaints, etc., and they are public documents. The only thing[s] that [are] not available are active police investigation reports or communications between attorneys. So if a landlord wants to come in and see the complaints lodged against him, the Borough has an obligation to turn them over to anybody that request[s] them.

On August 4, 2016, the Borough submitted the sworn and notarized statement of its Zoning and Code Officer, who avers that the office has received multiple right-to-know requests regarding the properties in question, but all of them were submitted by the Requester. Accompanying the submission is a letter dated November 19, 2015, from the Officer to the Requester, stating that the properties at issue were in compliance with the Borough’s Ordinances. On the same date, the Requester submitted a statement asserting that she had not filed any right-to-know requests prior to the instant one and stating that the documentation the Borough submitted is not responsive to her Request.

¹ While the Request was deemed denied by operation of law, 65 P.S. § 67.901, the Borough later responded to the Requester, stating that it could not locate any responsive records.

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, the Requester requested a hearing, but the request is denied because the OOR has the necessary, requisite information and evidence before it to properly adjudicate the matter.

The Borough 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. 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 *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

Here, the Requester states that she believes that the Borough provided information from her complaint to tenants based on the level of detail possessed by the tenant, and she claims that the Borough admitted to having disseminated her complaint information. However, in the transcript the Requester has submitted, the Solicitor does not actually state that the Borough disseminated information to the Requester’s neighbors, as she claims. The Solicitor does admit that the Borough had received “multiple open records requests incident to the properties and complaints” and that “they are public documents.” However, contrary to the Requester’s assertions, this is not inconsistent with the Borough’s subsequent statement that the only right-to-know requests regarding the properties at issue were initiated by the Requester, herself. The Requester counters that she has made no prior right-to-know requests, but she submits no actual evidence to support this contention. On the other hand, the Borough has submitted a sworn and notarized statement in support of its position.

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 Borough has acted in bad faith or that the records do, in fact, 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)). Accordingly, the Borough has sustained its burden of proof in demonstrating that no responsive records exist.

CONCLUSION

For the foregoing reasons, Requester’s appeal is **denied**, and the Borough 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 Lackawanna 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.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/ Blake Eilers
Blake Eilers, Esq.
Appeals Officer

Sent to: Kelly Hallinan (via e-mail only);
Thomas Cummings, Esq. (via e-mail only);
Joe Lorince (via e-mail only);
Michael McHale (via e-mail only);
Jacquelyn Nicolais (via e-mail only)

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