



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

**LATOYA MONROE,
Requester**

v.

**BOROUGH OF YEADON,
Respondent**

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Docket No.: AP 2016-0726

INTRODUCTION

LaToya Monroe (“Requester”) submitted two requests (“Requests”) to the Borough of Yeadon (“Borough”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking payroll records and the Borough’s municipal charter. The Borough did not respond to the Requests, and the Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **denied in part** and **dismissed as moot in part**, and the Borough is not required to take any further action.

FACTUAL BACKGROUND

On March 17, 2016, the Requester filed the first request (“First Request”), seeking “a copy of the [Borough’s] Municipal Charter.” On March 24, 2016, the Borough invoked an extension of time to respond to the First Request, and stated that it would issue a final response no later than April 18, 2016. *See* 65 P.S. § 67.902(b). However, the Borough did not issue a timely final response thereafter, and the First Request was deemed denied on April 18, 2016. *Id.*

On April 11, 2016, the Requester filed the second request (“Second Request”), seeking “cop[ies] of payroll records for 2015.” The Borough did not respond within five business days, and the Second Request was also deemed denied on April 18, 2016. *See* 65 P.S. § 67.901.

On April 22, 2016, the Requester appealed the denial of the Requests to the OOR, stating grounds for disclosure.¹ The OOR invited the parties to supplement the record, and directed the Borough to notify third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

On August 10, 2016 and August 15, 2016,² respectively, the Borough submitted two separate position statements, arguing that the municipal charter requested in the First Request does not exist within the Borough’s possession, custody or control, and that the payroll records responsive to the Second Request were provided to the Requester on April 28, 2016. The Borough also provided an attestation of nonexistence executed by Majovie Bland, the Borough’s Open Records Officer, and copies of the records provided to the Requester in response to the Second Request. The Requester did not submit any additional information on appeal.³

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,

¹ These appeals were docketed separately at OOR Dkts. AP 2016-0726, AP 2016-0897, and AP 2016-0727. However, because the appeals involve the same parties and similar issues, the appeal docketed at AP 2016-0727 is hereby consolidated into the above-referenced docket number.

² The Borough’s August 15, 2016 submission was received after the record closed; however, to develop the record, the submission was considered during the disposition of this appeal. *See* 65 P.S. § 67.1102(b)(3) (stating that “the appeals officer shall rule on procedural matters on the basis of justice, fairness, and the expeditious resolution of the dispute”).

³ The parties agreed to enter into the OOR’s Mediation Program; however, because they could not settle the dispute, the files were assigned to the undersigned for disposition.

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; however, the OOR has the requisite information and evidence before it to properly adjudicate this 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 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).

During the course of the appeal, the Borough provided the Requester with a “Compensation Report,” which includes payroll information for Borough employees from January 1, 2015 to December 31, 2015. Because the Compensation Report contains the Borough’s 2015 payroll information, and the Requester has not objected to the sufficiency of the records provided by the Borough in response to the Second Request, the appeal of the Second Request is dismissed as moot.

With respect to the records requested in the First Request, the Borough states that the municipal charter does not exist within the Borough’s possession, custody or control. In support of its assertion, the Borough provides the statement made under the penalty of perjury of Mr. Bland, who attests that he “conducted a thorough examination of files in the possession, custody and control of the [Borough]” and “inquired with relevant [Borough] personnel[,]” and determined that the records responsive to the First Request do not exist within the Borough’s possession, custody or control. Under the RTKL, a statement made under the penalty of perjury is competent evidence 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). In the absence of any competent evidence that the Borough acted in bad faith or that the records exist, “the averments in [the attestation] 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)). Based upon the evidence provided, therefore, the Borough has met its burden of proving that the records responsive to the First Request do not exist within the Borough’s possession, custody or control. *See* 65 P.S. § 67.705; *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190 (Pa. Commw. Ct. 2011).

CONCLUSION

For the foregoing reasons, the Requester’s appeal is **denied in part** and **dismissed as moot in part**, 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 Delaware 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.⁴ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: 26 August 2016

/s/ Joshua T. Young

JOSHUA T. YOUNG, ESQ.
APPEALS OFFICER

Sent to: LaToya Monroe (via e-mail only);
Charles Gibbs, Esq. (via e-mail only);
Majovie Bland (via e-mail only)

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