



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

| | | |
|-------------------------------------|---|---------------------------------|
| IN THE MATTER OF | : | |
| | : | |
| JOHN YAKIM, | : | |
| Requester | : | |
| | : | |
| v. | : | Docket No.: AP 2016-1321 |
| | : | |
| MUNICIPALITY OF MONROEVILLE, | : | |
| Respondent | : | |

On August 1, 2016, John Yakim (“Requester”) submitted a request (“Request”) to the Municipality of Monroeville (“Municipality”), seeking “all audio and video recordings of Home Rule Charter meetings between July 1-31, 2016.” On August 8, 2016, the Municipality denied the Request, stating that no responsive records exist. On that date, the Requester filed an appeal with the Office of Open Records (“OOR”), challenging the denial and stating grounds for disclosure. The OOR invited both parties to supplement the record; however, neither party made a submission on appeal.

“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). In the present case, the Municipality did not provide any factual or legal support for denying access to the withheld records. Based on the Municipality’s failure to provide any evidentiary basis in support of an exemption under the RTKL or the nonexistence of records, the OOR finds that the Municipality did not meet its burden under the RTKL. *See* 65 P.S. § 67.305.

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.

For the foregoing reasons, the appeal is **granted**, 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>.

FINAL DETERMINATION ISSUED AND MAILED: September 7, 2016

/s/ Kyle Applegate

APPEALS OFFICER
KYLE APPLGATE, ESQ.

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

¹ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).