

personal e[-]mail accounts or cell phones which discuss this official business. Please have ALL members of Council, Manager Little, Mayor Erosenko and members of the committee attest to the completeness of the request. Date range June 1-June 30, 2016.

On July 12, 2016, the Municipality invoked a thirty-day extension of time to respond to the Request. *See* 65 P.S. § 67.902. On August 11, 2016, the Municipality partially denied the Request, redacting personal identification information from certain records. *See* 65 P.S. § 67.708(b)(6). The Municipality also granted access to approximately 80 unredacted e-mails from a member of the HRC Committee, which had previously been provided to the Requester.¹

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

On September 25, 2016, the Municipality's Open Records Officer, Joseph Sedlak ("Mr. Sedlak"), submitted affidavits from Ronald Harvey ("Mr. Harvey") and Gregory Erosenko ("Mayor Erosenko"), as well as copies of e-mails from individuals who responded to Mr. Sedlak's inquiry for records responsive to the Request.

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

¹ These e-mails fall outside of the timeframe referenced in the Request and are not responsive to the Request.

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 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.* 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, the parties did not request a hearing; however, the OOR has the requisite information and evidence before it to properly adjudicate the matter.

The Municipality 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).

The Requester argues that the Municipality’s Open Records Officer did not conduct a good faith search of the Municipality’s files for responsive records, and did not disclose all of the responsive records possessed by the Municipality or the individuals referenced in the Request. In response to a request for records, “an agency shall make a good faith effort to determine if ...

the agency has possession, custody or control of the record[.]” 65 P.S. § 67.901. The RTKL does not define the term “good faith effort” as used in Section 901 of the RTKL. In *Rowles v. Rice Township*, however, the OOR stated:

[I]n order for an agency to meet its burden that a good faith search was conducted in response to a FOIA request an agency must show that it has conducted a search reasonably calculated to uncover all relevant documents as established by relatively detailed and non-conclusory affidavits submitted in good faith by responsible officials.

OOR Dkt. AP 2014-0729, 2014 PA O.O.R.D. LEXIS 602 (citing *Judicial Watch, Inc. v. United States Dep't of Homeland Sec.*, 857 F. Supp. 2d 129, 138-139 (D.D.C. 2012)) (citations omitted).

Additionally, the Commonwealth Court has held that an open-records officer’s inquiry of agency members may constitute a “good faith effort” to locate records, stating that open-records officers have:

a duty to inquire of [agency personnel] as to whether he or she was in the possession, custody, or control of any of the ... requested emails that could be deemed public and, if so, whether the emails were, in fact, public and subject to disclosure or exemption from access by Requestor.

Mollick v. Twp. of Worcester, 32 A.3d 859, 875 (Pa. Commw. Ct. 2011); *see also In Re Silberstein*, 11 A.3d 629, 634 (Pa. Commw. Ct. 2011) (holding that it is “the open-records officer’s duty and responsibility” to both send an inquiry to agency personnel concerning a request and to determine whether to deny access).

Here, the Municipality’s submission includes affidavits from Mr. Harvey and Mayor Erosenko attesting that they neither possess, nor did they send or receive, correspondence, notes, or agendas responsive to the Request. However, the Municipality has not submitted evidence demonstrating that Mr. Sedlak, the Open Records Officer, or any other Municipality personnel searched the Municipality’s files for records responsive to the Request. Additionally, a review of the documentation submitted by the Municipality on appeal shows that some of the individuals

referenced in the Request did not respond to Mr. Sedlak's inquiry for responsive records relating to the Request. The duty of an agency to conduct a good-faith search is not discharged when members of that agency fail to respond to an open-records officer's request for responsive records. *See Yakim v. Municipality of Monroeville*, OOR Dkt. AP 2016-0840, 2016 PA O.O.R.D. LEXIS 855, *appeal pending* SA 16-000537 (Allegheny Com. Pl.); *see also Mollick v. Twp. of Worcester*, 32 A.3d 859, 875 (Pa. Commw. Ct. 2011); *In Re Silberstein*, 11 A.3d 629, 634 (Pa. Commw. Ct. 2011). Based upon the evidence provided, therefore, the Municipality cannot be said to have conducted a good faith search reasonably calculated to identify the requested records.

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 641.2016 PA O.O.R.D. LEXIS 1062.

CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted**, and the Municipality is required to conduct a good faith search of the Municipality's records and to provide records responsive to the Request 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 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: September 12, 2016

/s/ Kelly C. Isenberg

APPEALS OFFICER
KELLY C. ISENBERG, ESQ.

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

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