



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
DANIEL STONEROOK,	:	
Requester	:	
	:	
v.	:	Docket No.: AP 2016-1355
	:	
GREATER JOHNSTOWN SCHOOL	:	
DISTRICT,	:	
Respondent	:	

INTRODUCTION

Daniel Stonerook (“Requester”) submitted a request (“Request”) to the Greater Johnstown School District (“District”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking employment information for various entities. The District denied the Request, claiming that the requested records do not exist within the District’s possession. 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 District is not required to take any further action.

FACTUAL BACKGROUND

On August 1, 2016, the Request was filed, seeking “[a]ll the names of the employees ... with their titles, salaries, contractual obligations and job descriptions from 2009-present” for 124

separately listed entities. On August 8, 2016, the District denied the Request, asserting, in part, that the District does not possess the requested records.

On August 16, 2016, the Requester appealed to the OOR, challenging the denial and asserting grounds for disclosure. The OOR invited both parties to supplement the record and directed the District to notify any third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

On August 30, 2016, the District submitted a position statement, claiming that the requested records do not exist in the District's possession, custody or control. In support of its position, the District also submitted the attestation of Michael Vuckovich, the District's Open Records Officer. The Requester did not submit any evidence to challenge the District's position statement or attestation.

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.” 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). 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, neither of the parties requested a hearing; however, the OOR has the requisite information and evidence before it to properly adjudicate this matter.

The District 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 requested records do not exist within the District's possession, custody or control

The District claims that the requested records do not exist in the District's possession, custody or control. In support of its position, the District submitted the attestation of Michael Vuckovich, the District's Open Records Officer, who attests, in relevant part, as follows:

5. The District does not employ any of the employees of the 124 entities that are the subject of the ... [R]equest.
6. The District does not establish or pay salaries, assign titles, assign work duties, or prepare job descriptions for any of the employees of the 124 entities that are the subject of the ... [R]equest.
7. With respect to the ...[R]equest's reference to "contractual obligations" of every employee of the 124 separately enumerated entities, the District has no contracts with every, let alone any, of the employees of the 124 separately enumerated entities, and therefore the individual employees of the entities have no contractual obligations to the District....
9. The District has no records in its possession, custody, or under its control of the names, titles, salaries, contractual obligations, or job description of every, or any, employee of the 124 separately listed entities in the ... [R]equest, as the individuals who are the subject of the [R]equest are not employees of the District....

Under the RTKL, an attestation 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 competent evidence that the District acted in bad faith or that the records exist within the District's possession, "the averments in [the attestation] 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)). Here, the District has demonstrated that the requested records are not in the District's possession, custody or control.

2. The District is not required to obtain the requested records from the thirty-party vendors

While the District does not possess the requested records, the District acknowledges that it has service contracts with each of the 124 entities that are the subject of the Request. Under the RTKL, two groups of records are accessible: records in an agency's actual or constructive possession reached directly under Section 901 of the RTKL, and records that are only in the possession of third parties that are indirectly accessible through Section 506(d) of the RTKL. *See Pa. Dep't of Pub. Welfare v. Eiseman*, 86 A.3d 932, 938-39 (Pa. Commw. Ct. 2014).

Section 506(d)(1) of the RTKL states that:

A public record that is not in the possession of an agency but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the agency, and which directly relates to the governmental function and is not exempt under this action, shall be considered a public record of the agency for purposes of this act.

65 P.S. § 67.506(d)(1); *see also Allegheny County Dep't of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1039 (Pa. Commw. Ct. 2011) (holding that records "in the possession of a party with whom an agency has contracted to perform a governmental function on behalf of the agency" are presumptively public records subject to public access, "so long as the record (a) directly relates to the governmental function and (b) is not exempt under the RTKL"). The Pennsylvania Supreme Court has held that an agreement to perform a governmental function is an agreement where an agency contracts for "some substantial facet of the agency's role and responsibilities, as opposed to routine service agreements with independent contractors." *SWB Yankees v. Wintermantel*, 45 A.3d 1029, 1043 (Pa. 2012); *see also Giurintano*, 20 A.3d at 615; *Buehl v. Office of Open Records*, 6 A.3d 27 (Pa. Commw. Ct. 2010).

In the instant matter, the District states that it has entered into service contracts with each of the 124 separately listed entities, but argues that none of the entities perform a governmental function on behalf of the District. The District further argues that the requested records do not relate to the services the entities provide to the District. In support of its position, Open Records Officer Vuckovich attests as follows:

8. None of the information pertaining to the employees of the 124 separately enumerated entities sought by the ... [R]equest directly relates to what services the entities perform or how they are performed.
9. ... The employment and establishment of the terms of the employment of every employee of the 124 separately listed entities in the ... [R]equest, including names, titles, salaries, contractual obligations, and job descriptions, is not a function of the District, nor is in any way related to the services that each of the 124 separately listed entities are contracted to provide to the District.

The 124 enumerated entities are third-party vendors. Irrespective of whether these entities are providing a governmental function to the District, the information requested does not relate to the performance of a governmental function on behalf of the District. By way of example, Pennsylvania Highlands Community College, one of the entities subject to the Request, may provide services related to the District's governmental function of educating children. *See Chester Cmty. Charter Sch. v. Hardy*, 38 A.3d 1079, 1088 (Pa. Commw. Ct. 2012) (holding that the school's governmental function is to educate children). However, employment information of the employees of Pennsylvania Highlands Community College, or those of any other third-party vendor subject to the Request, does not relate to the performance of that or any other governmental function of the District. As a result, this information is not available under Section 506(d) of the RTKL. *See Allegheny County Dep't of Admin. Servs. v. Parsons*, 61 A.3d 336, 345 (Pa. Commw. Ct. 2013) (finding that "[t]he 'directly relates' test ... focuses on *what* services are performed and *how* they are performed, not *who* performs them").

CONCLUSION

For the foregoing reasons, the Requester's appeal is **denied**, and the District 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 Cambria 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 14, 2016

/s/ Magdalene C. Zeppos

APPEALS OFFICER
MAGDALENE C. ZEPPOS, ESQ.

Sent to: Daniel Stonerook (via e-mail only);
Jarad Handelman, Esq. (via e-mail only);
Michael Vuckovich (via e-mail only)

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