



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

IN THE MATTER OF

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**BLAKE MARLES,  
Requester**

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:

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v.

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**Docket No.: AP 2016-1303**

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**CITY OF BETHLEHEM,  
Respondent**

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### INTRODUCTION

Blake Marles, Esq. (“Requester”) submitted a request (“Request”) to the City of Bethlehem (“City”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking records related to an identified property within the City. The City provided responsive records, but redacted personal identification information. 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 City is not required to take any further action.

### FACTUAL BACKGROUND

On June 8, 2016, the Request was filed, seeking:

Any records ... in the possession of City ... or any party<sup>1</sup> per RTKL Section 506(d)(1) that refer to 1838 Center Street, City of Bethlehem, PA, from 1-1-2012 to the present, from, to or copied to the following:

1. Stewart Early;
2. Greg Zebrowski; or
3. William Moran[.]

The Request also clarified that it sought records from, among others, City Council members, staff, the City Solicitor and the City Engineer. On June 15, 2016, the City invoked a thirty-day extension of time to respond to the Request. *See* 65 P.S. § 67.902(b). On July 15, 2016, the City stated that:

City ... employees and City Council members were directed to provide all work-related documents that involved the topics you identified in your ... [R]equest. This office's response was dependent upon the full cooperation of these individuals for access to their work and personal electronic messaging records.

The City provided access to 39 pages of responsive records, and redacted personal identification information. 65 P.S. § 67.708(b)(6)(i)(A).<sup>1</sup>

On August 4, 2016, the Requester appealed to the OOR, challenging the redactions and the failure to provide access to records from the City Solicitor or City Engineer. The Requester sought mediation, *in camera* review and a hearing. The OOR invited both parties to supplement the record and directed the City to notify any third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

On August 16, 2016, the City submitted a position statement with attachments, including notarized affidavits from its Open Records Officer and the City Engineer. In her affidavit, the City's Open Records Officer affirms that only personal, non-government-issued e-mail addresses were redacted from responsive records. The Open Records Officer affirms that she conducted a search for responsive records from the Office of City Solicitor and did not locate any records responsive to the Request. Additionally, the Open Records Officer states that she asked the Office of City Engineer to locate any responsive records and was advised that no responsive

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<sup>1</sup> These records were attached to the Requester's appeal.

records exist. Following the filing of the appeal to the OOR, the Open Records Officer stated that additional records were located within a litigation file. The Open Records Officer attached the majority of these records to its submission and stated that access to a lengthy document would be provided upon the payment of copying fees.

The City Engineer affirms that he “conducted and/or supervised a good faith search ... in the Engineering Department physical and digital records for the documents requested in the agency’s files” and that no responsive records were located as a result of the search.

On August 25, 2016, the Requester submitted a position statement arguing, among other matters, that the City failed to search for records at either its current Solicitor’s or former Solicitor’s off-site, private practice offices.<sup>2</sup> The Requester also offered to allow the OOR additional time to issue a final determination in this matter. *See* 65 P.S. § 67.1101(b)(1). On August 29, 2016, the City sought the opportunity to respond to the Requester’s submission. On August 30, 2016, the OOR reopened the record for both parties to supplement the record. On September 2, 2016, the Requester and the City both submitted additional statements in support of their respective positions.

### **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).

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<sup>2</sup> On August 26, 2016, the Requester submitted a corrected version of one of the pages of its earlier submission.

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.* 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 requests for *in camera* review and a hearing are denied, as the OOR has the requisite information and evidence before it to properly adjudicate the matter.

The City 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 City has established that e-mail addresses may be redacted**

In its August 16, 2016 submission, the City’s Open Records Officer affirms<sup>3</sup> that no government-issued e-mail addresses were redacted. Additionally, in its unsworn September 2, 2016 submission, the City states that only one e-mail address was redacted, belonging to a resident identified as Mr. Early, pursuant to 65 P.S. § 67.708(b)(6)(i)(A). The Requester attached the 39 pages of records provided to him by the City to his appeal, and the OOR has reviewed these records. These records only reveal one redaction for an e-mail address in the “To:” line of an e-mail.

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 City has acted in bad faith, “the averments in [the affidavit] 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)). Based on the sworn affidavits offered by the City and the OOR’s review of the redacted record, the City has established that it properly redacted the personal e-mail address of Mr. Early.

**2. The appeal is moot as to the records provided on appeal**

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<sup>3</sup> Although the Requester argues that the City’s notarized affidavits should not be treated as competent evidence because they were not made under penalty of perjury, the OOR treats notarized submissions and submissions made under penalty of perjury the same for evidentiary purposes. *See Baxter v. Pa. Dep’t of Env’tl. Prot.*, OOR Dkt. AP 2010-0139, 2010 PA O.O.R.D. LEXIS 639.

On appeal, the City identified additional responsive records and provided the Requester with access to these records. Accordingly, the appeal is dismissed as moot as to the records provided on appeal.

### **3. The City has established that no other responsive records exist**

The City argues that it conducted a good faith search and provided all records responsive to the Request and has provided notarized affidavits from its Open Records Officer and City Engineer in support. The Requester argues that the City should have also searched the off-site, private practice offices of its current and former Solicitor, rather than just the Office of City Solicitor.

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).

The Request itself seeks records in the possession of, among others, the City Solicitor. Although “a solicitor who retains records of an agency after the conclusion of his representation may have duties to supply such information to the agency upon request,” *Breslin v. Dickinson Twp.*, 68 A.3d 49, 55 n.6 (Pa. Commw. Ct. 2013), the Request, as written, does not expressly

seek any records in the possession of the former City Solicitor. Accordingly, the City's Open Records Officer was not required to send an inquiry to the former City Solicitor.

With respect to the current Solicitor's private practice office, the Request expressly seeks records "of" the City Solicitor involving the subject matter referenced in the Request. Based on the content of the Request, the City's Open Records Officer searched for records within the Office of City Solicitor, a search that logically was undertaken with the knowledge of staff members of the Office of City Solicitor. As the Request sought records related to the City's activities with respect to an identified property, the City's Open Records Officer conducted a "good faith search" for responsive records within the meaning of 65 P.S. § 67.901 by searching for records with the Office of City Solicitor. Accordingly, the City's Open Records Officer was not required to review the records within the City Solicitor's off-site, private practice office.

### CONCLUSION

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

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

**FINAL DETERMINATION ISSUED AND MAILED: October 3, 2016**

/s/ Charles Rees Brown  
CHARLES REES BROWN  
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Sent to: Blake Marles, Esq. (via e-mail only);  
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